Submission to Parliamentary Joint Committee on Human Rights, Inquiry into the *Religious Discrimination Bill* 2021 and related bills

About Freedom for Faith

Freedom for Faith is a Christian legal think tank that exists to see religious freedom protected and promoted in Australia and beyond. It is led by people drawn from a range of denominational churches including the Anglican Church Diocese of Sydney, the Australian Christian Churches, Australian Baptist Churches, the Presbyterian Church of Australia and the Seventh-day Adventist Church in Australia. It has strong links with, and works co-operatively with, a range of other Churches and Christian organisations in Australia.

This is the submission of Freedom for Faith to the *Inquiry into the Religious Discrimination Bill 2021 and related bills* being conducted by the Parliamentary Joint Committee on Human Rights. It has been prepared by Associate Professor Neil Foster with input from other Board members.

Background to this Inquiry

As the Committee of course knows, this inquiry is being undertaken in response to a request from the Attorney-General, Senator the Hon Michaelia Cash, made on 26 November 2021, pursuant to s 7(c) of the *Human Rights (Parliamentary Scrutiny) Act* 2011. Accordingly, the central focus of the submissions will be on the "human rights" issues of the package, and in particular the relevance of the package to fulfilment of Australia's international obligations under the treaties and instruments included in the definition of that term in s 3(1) of the *Human Rights (Parliamentary Scrutiny) Act* 2011. While various of these treaties and instruments may be relevant, the main instrument to be considered will be the *International Covenant on Civil and Political Rights* done at New York on 16 December 1966 ([1980] ATS 23; "ICCPR").

In our submission we will aim to not repeat unduly material already canvassed in the comprehensive analysis provided in the "Statement of Compatibility with Human Rights" at pp 8-28 of the "Explanatory Memorandum" ("EM") to the main Bill (the *Religious Discrimination Bill* 2021, "RDB") tabled in Parliament with the Prime Minister's Second Reading Speech.

Things the Bill gets right

Human rights background

We start by saying that from a general human rights perspective, the Bill is a significant and indeed over-due reform which will play an important part in furthering protection of the fundamental right of freedom of religion and belief spelled out clearly in art 18 of the ICCPR (to which, of course, Australia has committed itself in the international arena). It is perhaps helpful to spell this out at the outset; art 18 provides that:

> 1. 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.
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> 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
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> 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
>
> 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Of course, a religious discrimination law alone does not fully meet the need to provide legal protection for "freedom of thought, conscience and religion". But discrimination laws around Australia, and in particular "balancing clauses" in those laws which recognise the need to balance non-discrimination rights with religious freedom rights, have long provided one of the main ways that religious freedom is protected in this country.

The Committee no doubt needs no reminder of this, but it seems that many in the Australian community do not realise the strong protection provided in international law to religious freedom. Religious belief is not some narrow "exception" to a broader principle of non-discrimination which must be carefully confined and can be gradually chipped away. It is a basic human right in its own terms and must be protected as other human rights are protected, taking into account its own distinctive characteristics.

The addition of the assurance at the outset of the Bill, concerning "the indivisibility and universality of human rights, and their equal status in international law", is welcomed, as is the inclusion of that statement in other Commonwealth discrimination laws through the associated *Human Rights Legislation Amendment Bill* 2021.

One key feature of the protection of religious freedom under art 18 is that it makes specific reference to such rights being exercised "either individually or in community with others". The communal aspect of religious belief has traditionally been a defining mark of the area. For most religious people around the globe, religion is exercised not solely in private or individually, but in public and in fellowship with other believers. Any protection of religious freedom must take into account the need to protect religious groups as well as individual believers, and it is encouraging to see that this is what the Bill does.

Article 18(4) is also an important part of the protections mandated by the ICCPR- the freedom for parents to see to the religious and moral education of their children in conformity with their own convictions. This freedom in Australia has seen the significant growth of faith-based educational institutions, for which many parents have been prepared to pay significant amounts over and above the general costs of public education. Protecting the rights of parents to see their children educated in accordance with their religious and moral convictions must be an important part of any protection of religious freedom in Australia, and this principle is reflected in several parts of the Bill.

Of course, like all rights, the right to religious freedom may need to be balanced against other important rights. The principles set out in art 18(3) recognise this, but also that limits must themselves be carefully constrained, to those imposed by **law** (as opposed to bureaucratic discretion), and which are "**necessary** to protect public safety, order, health, or morals or the fundamental rights and freedoms of others". The word "necessary" can be contrasted with limits which may seem merely "reasonable" or "popular". There is a strong onus on those who would impose limits on religious freedom to identify which of the listed goals is being threatened, and why any proposed restriction on religious freedom is proportionate to the desired outcome, and could not be achieved in some less restrictive way.

These matters are spelled out in what has become known as the "Siracusa Principles", which have been accepted by UN bodies as guidelines for determining when exceptions to human rights are "necessary".[1] Principle 10 is as follows:

> Whenever a limitation is required in the terms of the Covenant to be "necessary," this term implies that the limitation:
> (a) is based on one of the grounds justifying limitations recognized by the relevant article of the Covenant,
> (b) responds to a pressing public or social need,
> (c) pursues a legitimate aim, and
> (d) is proportionate to that aim.

[1] United Nations, Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, U.N. Doc. E/CN.4/1985/4, Annex (1985).

In this context, the Bill does recognise the need for exceptions to protection of religious freedom to be justified, but as will be noted below could be improved to reflect the UN guidelines more accurately in some areas.

The RD Bill and its associated Bills, then, as a whole deal with a core matter of "human rights", the prohibition of unjust detriment being imposed on persons on the basis of their religion or belief. The Bill also delineates those areas where decision-making on the basis of religion or belief is *not* unjust because it is relevant to the decisions. One of the laudable features of the RD Bill is that it clearly recognises that not all "differential treatment" amounts to unjust discrimination. This implements the view of the UN Human Rights Committee in its general comment on discrimination, where the committee comments that:

> not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.[2]

The various parts of the Bill providing differential treatment for religious bodies or persons meet these requirements, having the aim of furthering the purpose of protecting religious freedom set out in clearly in art 18 of the ICCPR.

Implementation of those principles in the Bills

The committee will be familiar with the legislative package, but we set out here how those principles are implemented. The art 18 right of religious freedom is impaired where religious persons are allowed to be subject to detrimental treatment by others on the very basis of their religious belief or activity. Such discriminatory treatment is also contrary to the rights given under art 26 of the ICCPR, which not only entitles all persons to equality before the law as well as equal protection of the law, but also prohibits any discrimination under the law and guarantees to all persons equal and effective protection against discrimination on the ground of religion (as well as on other grounds).

The Bills fill a serious gap in current legal protections in Australia against unjust discrimination. Of the 9 jurisdictions around the country (the States, the Territories, and the Commonwealth), 6 of them already prohibit religious discrimination. But NSW, SA (except in relation to "religious dress") and the Commonwealth (apart from some provisions relating to employment in the *Fair Work Act* 2009) do not have such laws at the moment. In NSW today, someone may run a café and put up a sign outside saying, "We do not serve Buddhists" or "Muslims" or "Christians".[3]

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[2] CCPR *General Comment No. 18: Non-discrimination*, Adopted at the Thirty-seventh Session of the Human Rights Committee, on 10 November 1989, para [13].

[3] Jewish and Sikh people are protected in some respects under the "ethno-religious" category of the *Anti-Discrimination Act* 1975 (NSW) but those of other religions are not.

Australia needs a clear law that applies across the country to prevent this behaviour. In adopting such a law, it would be merely following the example of other major democracies who have had such laws for many years.[4]

The RDB provides for this as follows. The core of the Bill is **Part 3**, where different types of prohibited conduct are defined: direct discrimination (s 13), indirect discrimination (s 14), discrimination by "qualifying bodies" in imposing restrictions on statements of belief (s 15), and discrimination on the basis of "association" with someone who has a religious belief (s 16).

Part 4 then spells out the various areas of public life where such discrimination is unlawful. ***Division 2*** covers the world of paid work: employment decisions (s 19), commercial partnerships (s 20), qualifying bodies (s 21), registered organisations (ie trade unions, s 22), and employment agencies (s 23). ***Division 3*** deals with other areas: education of students (s 24), access to premises (s 25), goods, services, and facilities (s 26), accommodation (s 27), dealings in land (s 28), sport (s 29), and clubs (s 30). There are other prohibitions on seeking information to allow discrimination (s 31), on discrimination in Commonwealth laws and programs (s 32), and on "victimisation" (s 33), which involves treating someone badly because they have made a complaint about religious discrimination. These provisions are broadly the same type of model as found in other discrimination laws around Australia.

However, where there is some difference from the standard model is in the early part of the Bill, Part 2, which starts out by describing what is not unlawful discrimination. This is one part of the Bill implementing the principle noted above, that not all "differential treatment" is unlawful discrimination.

To be clear, this fundamental concept recognised by the UN is not new to Australian law. All the current Australian laws on religious discrimination **already** have clear provisions which "balance" the right to freedom from discrimination with the rights of religious groups to operate in accordance with their beliefs. We should not force a Catholic youth group to employ a Hindu leader. These are the sort of protections provided by this law. The Bill provides these protections in two ways. It sets out, in Part 2, some general situations where using religion as a criterion for decision-making is not discrimination.

Then, in Division 4 of Part 4, it spells out a number of "exemptions" to the specific prohibitions in that Part, based on particular situations that arise in relation to religious bodies. (The heading to Division 4 refers to "exceptions and exemptions".

[4] In the US, for example, "Title VII of the Civil Rights Act of 1964 prohibits discrimination based on religion and requires employers to reasonably accommodate an applicant's or employee's sincerely held religious beliefs unless it would pose an undue hardship"- see comment on a recent successful case under this federal law in a settlement negotiated by the U.S. Equal Employment Opportunity Commission, "Greyhound Will Pay $45,000 to Settle EEOC Religious Discrimination Suit" (23 Nov 2021) https://www.eeoc.gov/newsroom/greyhound-will-pay-45000-settle-eeoc-religious-discrimination-suit.

Formally the difference between this Division and the provisions in Part 2 is that the activity described in Part 2 is "not discrimination", whereas the activities covered by Div 4 of Part 4 are said to be "discrimination" which is however not unlawful. The practical effect seems to be same, that the relevant behaviour will not be prohibited by the law, but there is a clear and important symbolic benefit in recognising the activities set out in Part 2 do not even amount to *prima facie* discrimination.)

In broad terms, Part 2 allows religious bodies to operate in accordance with their beliefs (s 7), though there are some additional rules for religious hospitals, aged care facilities, accommodation providers and disability service providers (sections 8 & 9). Sub-section 7(1) provides a very clear explanation of the general policy.

The condition under which s 7 operates is that the body engages in good faith in conduct which a "person of the same religion as the religious body could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of that religion"- s 7(2), or engages "in good faith, in conduct to avoid injury to the religious susceptibilities of adherents of the same religion as the religious body"- s 7(4).[5] In either case s 7 makes it clear that this will include "giving preference to persons of the same religion as the religious body".

Just as a political party can "prefer" to employ members of that party in head office, or an environmental lobby group can "prefer" to employ those who share its commitments, so religious bodies should generally be able to "prefer" to employ staff of the same faith, or support causes which match its faith commitments. Inclusion of "preference" is an important principle which recognises that occasionally a religious body may need specialist skills which are not easily available in its faith community, and so in some circumstances may choose to employ someone not in that community. Doing so should not undermine its general policy of preference.

However, under s 7(6), if faith-based *schools* are making employment decisions on this basis, they must do so in accordance with a "publicly available policy". This means that those approaching schools for employment will be able to determine beforehand whether the school has a policy of preference for fellow believers, and so avoid the embarrassment of being turned down on that basis if they don't meet the requirement.

There are also some additional requirements to be met if the religious body is providing general "social welfare" services to the public. Under ss 8 and 9, religious hospitals, aged care facilities, accommodation providers and disability service providers may "prefer" people of their own faith in employment decisions but may not generally "prefer" such people in other activities.

[5] Below we suggest that the "reasonable believer" standard is not appropriate and should be amended. But the general principle of recognition of sincerely held religious belief is supported.

This makes clear what is generally the practice in any case, that a religious social service provider will usually provide its services to everyone in need, but may seek to maintain its ethos by only engaging staff who share that ethos. Such bodies, however, must also meet the requirement in employment decisions that they comply with a "publicly available policy".

Under both s 7(7) and s 9(7) the relevant Minister administering the legislation may set down "requirements" to be met by publicly available policies. While the term "requirements" is quite broad, the context suggests that such requirements will deal with formal matters such as the way that the policy is to be made "public" rather than mandating the substantive content of the policy. On this issue we note that para [129] of the EM says that: "Beyond providing general guidance on the kinds of matters that a policy could address, guidance would be limited to the form, presentation and availability of policies."

The Government suggests at para [101] of the EM that the policy "may be issued publicly through a variety of means, such as being provided online at the point of application or by a copy being provided upon request or as part of the recruitment package". (See also para [128] concerning s 9.) These seem to be sensible suggestions and should be implemented in the Ministerial requirements.

Under s 10 persons may offer services which are "intended to meet a need arising out of a religious belief or activity of a person or group of persons" only to people in a specific group. The example given in a note is that a Jewish or Greek Orthodox residential aged care facility or hospital may "provid[e] services to meet the needs (including dietary, cultural and religious needs) of a minority religious group". This provision seems designed to operate like similar provisions in other discrimination laws allowing differential treatment or "special measures" to redress problems created by minority status, such as s 8 of the *Racial Discrimination Act* 1975 (Cth). It seems to be a sensible provision.[6]

Section 11 provides (supporting the rights already given by s 7) that religious schools may prefer to employ staff who support their religious beliefs, despite any State or Territory laws which undermine that principle. This provision is necessary because some States and Territories have imposed very restrictive rules which interfere with the religious freedom of faith-based schools (which as noted above are a key mechanism to implement parental rights under art 18(4) of the ICCPR.)

[6] For an example of the application of a similar provision in the UK, s 158 of the *Equality Act* 2010 (UK), see *R (on the application of Z and another) v Hackney London Borough Council* [2020] UKSC 40 (16 Oct 2020), upholding a policy which provided assisted housing to meet the special needs of the Orthodox Jewish community in a London borough.

The *Religious Discrimination (Consequential Amendments) Bill* 2021 ("RDCA Bill") currently contains a slightly unusual "contingent amendments" schedule (Sched 2) referring to some amending Victorian legislation, the *Equal Opportunity (Religious Exceptions) Amendment Act* 2021 (Vic) ("Vic EOREA Act").

This legislation passed both Houses of the Victorian Parliament on 3 Dec 2021, and when Division 2 of Part 2 of that Act commences operation (likely to be 12 months from when that Act receives the Royal Assent, see s 2(3)) then the effect of the RDCA Bill s 2(1) item 3 is that the main RDB s 11(2) will explicitly "prescribe" the Victorian *Equal Opportunity Act* 2010 ("Vic EOA 2010") as being subject to the s 11 over-ride.[7]

This "over-ride" provision will only operate in a very limited area. It will only apply to "educational institutions", and then only in the area of employment decisions, where preference is given to staff on the basis of religious belief or activity, in accordance with a publicly available policy. It will only need to over-ride State or Territory law where that law would prevent a faith-based school from giving such preference. An example of that would be the operation of the Victorian EOA 2010 (once it has been amended by the Vic EOREA Act), which will provide only very limited recognition of the right of such schools to select staff based on their religious belief or activity. The school will need to show that this is an "inherent requirement" of the position (s 83A(1)(a)), and that the application of this requirement is "reasonable and proportionate in the circumstances" (s 83A(1)(c)). An inherent requirement test is a very stringent one.

The view that is often put by advocates for these changes is that while they accept the legitimacy of requiring a school principal of a Christian school to be a Christian, they see no reason why the maths teacher should be. This assumes that maths teachers do no more than teach maths; but in fact teachers transmit principles, attitudes to life, worldviews and beliefs to students in all kinds of ways outside of the classroom, for example in leading pastoral care groups or extra-curricular activities. Many Christian schools are faith communities of staff seeking to provide a holistic witness to students.

The effect of these rules will not only be to limit the school's capacity to maintain its religious identity and ethos. They will also require the school's own processes to be subject to the decision of an external reviewer (a public servant, a tribunal, or a court) as to these matters, which are inherently a matter of religious judgement based on the ethos of the school.

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[7] It should be noted that this convoluted set of provisions leads to an unusual result. Most of the provisions of the Vic EOREA Act are contained in Division 1 of Part 2 and will commence **6 months** after Royal Assent- see that Act, s 2(2). The provisions that most concern faith-based schools, such as new s 83A, are contained in Division It is not at all clear why the commencement of the federal "over-ride" is delayed for a further 6 months until Division 2 of Part 2 commences. Division 2 introduces new rules for a specific group of religious bodies providing "government funded goods and services". Faith-based schools do not provide goods and services in this way and will mostly not be governed by the new provisions introduced by Division 2. With respect, it seems that there has been a drafting error in the RDCA Bill, and that s 2(1) item 3 should read: "immediately after the commencement of **Division 1** of Part 2 of the *Equal Opportunity (Religious Exceptions) Amendment Act 2021* (Vic.)".

The federal over-ride here is therefore necessary to ensure Australia's compliance with art 18(4) of the ICCPR., but it is an important affirmation of the principle that the religious freedom of faith-based schools should be supported.

Our view is that this would best be achieved by amendments to the Fair Work Act, which already deals with employment by faith-based institutions, to establish a nationally consistent principle, consistent with that contained in clause 7 of this Bill, to the effect that religious faith-based organisations may prefer to select staff who adhere to its faith and mission, and may require adherence to codes of conduct consistent with that faith. However, the Government has chosen the s.11 mechanism instead.

We support s.11 as a step forward in protecting the religious rights of schools even if it is not as satisfactory a mechanism as clarifying the position in the Fair Work Act. Under s.11, the Minister will be able to apply the over-ride by regulation to other State and Territory legislation which seeks to restrict the religious freedom of faith-based schools in the employment of staff.

Section 12 of the RDB then provides that moderate statements of religious belief do not amount to discrimination under the laws governing that topic around the country. The need to protect religious free speech is very important, but it is not entirely clear that this provision changes very much.

Despite some quite extraordinary claims of advocacy groups that are hostile to religious faith, this provision will not allow speech which is currently prohibited. This is because it is really very rare that mere speech alone would amount to "discrimination" under most laws.[8] There is a separate type of unlawful behaviour involving speech which is prohibited in some, but not all, Australian discrimination laws, often under the label of "vilification". But the two concepts are different, and s 12 does *not* explicitly over-ride "vilification" provisions, except in one significant case.

That case is the extreme prohibition on speech that causes "offence" under s 17(1) of the *Anti-Discrimination Act* 4 *1998* (Tas.) That law amounts to a severe limit on free speech which goes well beyond most other Australian laws on the topic and was the basis of an action against a Roman Catholic archbishop for a document circulated to Roman Catholic schools describing the Roman Catholic view of marriage. Under s 12(1)(b) it will be explicitly over-ridden by the Bill.[9]

[8] However, there are one or two isolated *dicta* that might support such a view, for example *Qantas Airways v Gama* (2008) 157 FCR 537, at [78]. So, providing protection in case this view is applied by the courts in the future seems wise.

[9] See Neil J Foster, "Religious Free Speech After Ruddock: Implications for Blasphemy and Religious Vilification Laws" (2019) at: http://works.bepress.com/neil_foster/131/ on "religious free speech" issues and noting the problems with the Tasmanian law.

This is only necessary because the Tasmanian Parliament has chosen not to fix the problem in its own legislation, or rather, in the interpretation of its own legislation by anti-discrimination commissioners who have, for whatever reasons, allowed the processes of the Commission to be misused for the purposes of political activism. A narrower interpretation of the Tasmanian legislation could have been adopted which took at least some account of the right to moderate and non-vilifying speech.

It is important to note, however, the limits on the type of protected "statement of religious belief" under the definition in s 12(2):

> (2) Subsection (1) does not apply to a statement of belief: (a) that is malicious; or (b) that a reasonable person would consider would threaten, intimidate, harass or vilify a person or group; or (c) that is covered by paragraph 35(1)(b).

These are important qualifications to the protection of religiously related free speech. As the note to the section points out: "A moderately expressed religious view that does not incite hatred or violence would not constitute vilification." The reference to s 35 RDB means that a statement that encourages commission of a serious criminal offence is not protected.

A "statement of belief" in s 5(1) is defined to include the expression of "a belief that the person genuinely considers to be in accordance with the doctrines, tenets, beliefs or teachings of [their] religion". (Statements by atheists are also protected, so long as they relate in some way to religion.)

One area which people of faith are well aware of, is that some views they hold are now not popular in the general community. This is especially so where religious views on matters relating to sexual morality are concerned. Should someone be fired because for religious reasons they don't support same sex marriage? Should they be disciplined because they say this outside working hours? These are the sort of issues which motivated the so-called "Folau clause" in previous drafts, which was of course based on the well-known circumstances of the termination of employment of footballer Israel Folau. There is now no such clause in the RDB, as despite its merits on other grounds, it had become too politically controversial to support. It should be noted that many people of religious faith view this example (being sacked for your faith-based views expressed on social media) with concern, as a serious incursion on the right to free speech for people of faith.

A case of this sort might still be able to be dealt with as "indirect discrimination" under s 14, when it would be open to the employer to show that a restriction on religious speech outside work was "reasonable". However, there is another provision which deals with a similar issue relating to "qualifying bodies", in s 15. A "qualifying body" is defined in s 5(1) to mean a body or authority whose permission is needed to practice a profession or occupation. This would include, for example, authorities that register doctors and other health professionals, or lawyers, or engineers.

If such a body tries to impose on someone, as a condition of their authorisation, a rule about their conduct that "has, or is likely to have, the effect of restricting or preventing the person from making a statement of belief other than in the course of the person practising in the relevant profession, carrying on the relevant trade or engaging in the relevant occupation", that will be unlawful discrimination under s 15, unless the rule is an "essential requirement".

An example of a situation where this has arisen in the past can be seen in the UK case involving social work student Felix Ngole, who was removed from his social work course based on comments he made opposing same-sex marriage on a social media site which was not in any way connected with his social work studies.[10] Of course there will still be room for debate about what is an "essential requirement" for a profession, but at least this provision may provide some food for thought when professional bodies purport to lay down conduct requirements penalising members of their profession speaking on controversial issues outside their professional context.

Again, s 15 provides (as s 12 does) that it does not protect "statements of belief" which are malicious, threatening, intimidating, harassing or vilifying, or urging commission of serious offences.

Section 16 of the Bill correctly forbids discrimination against someone who is an "associate" of an individual who holds a religious belief. This will cover, for example, discrimination against a person because of a religious belief held by their spouse. It will also allow a corporate body to make a claim for religious discrimination where it has been treated detrimentally due to religious views held by an individual closely associated with the corporate body.

Division 4 of Part 4 provides a number of "exceptions" balancing the specific prohibitions in other divisions of that Part, with competing values. Section 35, already noted as an exception to protection of religious free speech, makes it clear that it does not amount to unlawful discrimination to dismiss someone on the basis of their religious statements if those statements encourage the commission of a serious criminal offence. A "serious offence" is an offence involving harm (within the meaning of the Commonwealth Criminal Code), or financial detriment, that is punishable by imprisonment for 2 years or more under a law of the Commonwealth, a State or a Territory.

Other provisions allow continued operation of religious charitable trusts (s 36), and acting in what would otherwise be discriminatory ways if this is required by Commonwealth law, for national security purposes, or to comply with State or Territory law (unless that law is prescribed by the regulations) (s 37).

[10] See *The Queen (on the application of Ngole) -v- The University of Sheffield* [2019] EWCA Civ 1127 (3 July 2019).

Other exemptions in Div 4 include:

- allowing workplace discrimination if religious belief is an "inherent requirement" for a position (s 39);
- allowing "accommodation discrimination" in religious camps and conference sites if such is done in good faith for religious reasons in accordance with a publicly available policy (s 40)- this would seem to allow, for example, a Christian campsite which had announced such a policy to decline a booking from a Muslim group planning to use the site to further the teaching of Islam;
- allowing clubs and voluntary bodies to operate if their membership is restricted to persons of a particular religion (ss 42, 43).

Exemptions from the operation of the Bill can be granted under Subdivision D of Division 4, by the Human Rights Commission, for temporary periods under conditions they may impose.

Unjustified criticisms of the Bill

The Bill has been subject to a number of what we consider unjustified criticisms based on misreading of its provisions. A summary of some of these, and a clear rebuttal of the criticisms, can be found in a helpful document released by the Institute for Civil Society, which we commend to the Committee.[11] We provide our own comments below on two of the criticisms.

Does the Bill **undermine LGBTQI+ rights**? Does it privilege religious people above LBGTQI+ persons? No. There are important questions to be considered about "sexual orientation" discrimination and when a religious group should be able to act on its moral beliefs in that area. But those issues are **not** directly raised by this Bill. So, for example, the question as to whether a religious school can continue to choose not to employ an openly gay teacher on the basis of their sexual orientation, as allowed at the moment under s 38 of the *Sex Discrimination Act* 1984 (Cth), is not resolved by this Bill. Nor should any simplistic amendment to the SDA be adopted without careful consideration of the possible ramifications. These will be addressed as part of a reference of the issues to the Australian Law Reform Commission, which is due to report one year after the RDB is enacted.

Does the Bill **authorise hateful speech by doctors and nurses**? Some of the examples given in the press are outlandish and not based on reality. So, would this Bill make it lawful for a nurse to say to a patient that the patient's illness was caused by the devil and they need to repent?[12]

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[11] ICS, "Religious Discrimination Bill: Five Biggest Objections Answered" (2 Dec 2021) http://www.i4cs.com.au/religious-discrimination-bill-5-biggest-objections-answered/ .

[12] See this claim as to what the Bill would allow as alleged by Equality Australia CEO Anna Brown https://junkee.com/religious-discrimination-bill-explained/315993 .

The first thing to say is that this is a completely fanciful example. There are no examples of this happening. Second, while it is a stupid and harmful thing to say, the law does not *currently* make it unlawful. Not everything that is heartless and ridiculous is unlawful. The Bill will not change the situation; it will not "legitimise" such speech because such speech is not legally banned at the moment.

Perhaps the example might be changed: would the nurse's employer be able to sack her for saying this sort of thing? Yes, probably. If the nurse made a claim for "religious discrimination" after being sacked, it would most likely be a claim for "indirect discrimination", and such claims won't succeed where the action of the employer is "reasonable". It would be perfectly reasonable to tell religious employees not to upset patients by sharing their religious views when they have not been asked about them.

The Bill, in short, does not attack the rights of LGBT persons, and does not change the law to authorise horrible things being said to vulnerable persons. The sort of speech noted above would in any event probably fall under one of the exceptions set out in s 12(2).

Another Bill released as part of this "package" of amendments is the *Human Rights Legislation Amendment Bill* 2021 ("HRLA Bill"). Apart from adding some general statements of principle to human rights laws, noted above and supported, this Bill makes two significant amendments.

It amends the *Charities Act* 2013 (Cth) to provide in a new s 19 that an organisation which "engages in or promotes activities advancing, expressing or supporting a view of marriage as a union of a man and woman to the exclusion of all others, voluntarily entered into for life", is deemed to be of public benefit and not liable to have its charitable status revoked now that same-sex marriage has been introduced under Australian law. Challenges to public benefit and similar issues have been made to faith-based organisations in New Zealand, and while those challenges have been so far unsuccessful[13] it seems a very good idea for Parliament to recognise that this traditional belief is one that can be held by sincere believers who also engage in active charitable activity.

The HRLA Bill also adds a new s 47C to the *Marriage Act* 1961 (Cth) to provide that a religious school is not obliged to make its premises available for the solemnisation of a same-sex marriage. This is an initiative which was proposed when the same-sex marriage legislation was being debated but not implemented at the time. It seems a good recognition of the religious freedom rights of schools where many other venues for solemnisation of marriages will be available.

[13] See the decision in *Family First New Zealand v Attorney-General* [2020] NZCA 366 (27 August 2020) overturning a previous decision cancelling the charitable status of a group with traditional views on marriage. An appeal to the Supreme Court of New Zealand is under way.

Areas where the Bill could be improved

There are some areas where we recommend that the Bill could be improved.

There are two differing approaches adopted in the Bill to the question as to whether the actions of an organisation are genuinely based on religious beliefs. In the definition of "***statement of belief***" in s 5(1), sub-para (a)(iii) these are said to be limited to a statement of "a belief that the person *genuinely* considers to be in accordance with the doctrines, tenets, beliefs or teachings of that religion". The focus on the "genuineness" of the belief is the right approach, and consistent with international precedents.[14] On the other hand, in s 7(2) and s 9(3) when describing good faith behaviour that is not to amount to discrimination, reference is made to "conduct that a person of the same religion as the religious body *could reasonably consider* to be in accordance with the doctrines, tenets, beliefs or teachings of that religion". The "reasonably consider" standard is also adopted in s 40(2)(c), in relation to decisions made by persons who conduct a campsite or conference centre which "is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion", when deciding not to offer a booking to someone because of that person's religion.

It seems that the different standards may have been adopted because the "statement of belief" definition will apply to individuals, whereas the provisions in ss 7 and 40 will usually apply to corporate bodies, and because it seems to have been considered difficult to frame a way in a corporate entity can be described as holding a belief. However, as others have suggested, it would be perfectly possible to adopt a rule of "attribution of belief" for a corporate body that has regard to the *genuine* beliefs of the leaders of the institution, its documents, and its conduct. The "genuine" standard should be adopted wherever religious belief is referred to in the Bill.

Another area where the Bill should be amended to align it more closely with the ICCPR, on which it is based, is the way that an "indirect discrimination" claim will be resolved. In a claim made under s 14 a "condition, requirement or practice" is imposed on a person which has a more detrimental effect on them, than it does on others, due to their religious belief or activity. Such a condition etc will be unlawful if it is not "reasonable" under s 14(1)(c). There are two problems with this provision.

The first is that, as noted above, limitations on religious freedom under art 18(3) of the ICCPR must be "**necessary** to protect public safety, order, health, or morals or the fundamental rights and freedoms of others". Rejection of a s 14 claim will be a limitation on the religious freedom of the aggrieved person, for example, a lawyer told that she must always attend a Friday evening "team meeting" when her Orthodox Jewish religious beliefs mean that she should not be working after sunset on the Sabbath.

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[14] See the material reviewed in M Fowler, 'Judicial Apprehension of Religious Belief under the Commonwealth Religious Discrimination Bill', in Michael Quinlan and A. Keith Thompson (eds) *Inclusion, Exclusion and Religious Freedom in Contemporary Australia*, (Shepherd Street Press, 2021).

Rather than a standard of "reasonableness", international law requires that the employer be able to show that the discrimination is "necessary" for the achievement of the specific goals set out above (none of which seem relevant in this example.) It is suggested that s 14(1)(c) be amended to provide that "the condition, requirement or practice is not necessary to further the outcomes listed in art 18(3) of the ICCPR".

The second issue with s 14 is that it seems, as it stands, that the onus of proving that a condition etc is "not reasonable" (or whatever phrasing is adopted) lies with the aggrieved person. As others have noted, this is contrary to the way that the onus is framed in the *Sex Discrimination Act* 1984 (Cth) s 7C, which provides that "the burden of proving that an act does not constitute discrimination because of section 7B [the "reasonableness" provision] lies on the person who did the act". A similar statement is found in s 6(4) of the *Disability Discrimination Act* 1992 (Cth), and s 15(2) of the *Age Discrimination Act* 2004 (Cth). It is no doubt for these reasons that the Second Exposure Draft of the RDB contained a specific provision putting the onus of proof that a condition etc was "reasonable" on the person imposing that condition. This provision should be restored to the RDB.

Also, in line with the *Disability Discrimination Act* 1992 (Cth), s 5(2), a "reasonable adjustments" obligation should be introduced to the RDB, so that an employer or other person would have a positive duty to accommodate religious belief or activity where this could be done without imposing an "unjustifiable hardship".

In addition to the above suggestions, footnote 7 to para 29 above suggests that there has been a drafting error in the associated RDCA Bill which should be corrected before the legislation is enacted.

Conclusion

Overall, the Bill makes a significant contribution to the protection of religious freedom in Australia. It prohibits detrimental treatment of Australians generally on the grounds of their religion, recognises the important principle that usually religious organisations ought to be able to conduct their affairs in accordance with their faith commitments (while including clauses to balance other rights), and provides some protection against the worst excesses of State laws undermining the principles of freedom of religious speech and freedom of association. In Part 6, it establishes the role of an official "champion" of these important principles. While not perfect, our view is that it ought to be supported by all parties in Parliament as a very good start.