Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the *Religious Discrimination Bill* 2021 and related bills

About Freedom for Faith

Freedom for Faith (FFF) 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.

Freedom for Faith supports religious freedom for all faiths. It endeavours to work with leaders of other faiths and all political parties on constructive proposals for legislation that protects religious freedom in the context of a diverse and multicultural society.

This submission has been prepared by Prof. Patrick Parkinson AM, with input from the Board.

Executive Summary

Freedom for Faith supports the passage of this package of legislation. It is modest, sensible and limited in its scope – much too modest and limited to address the most serious concerns that we have about religious freedom, but a good start.

Claims made by a very small minority of Australians who have been actively campaigning against the legislation only illustrate why it is necessary. A number of the claims that have been aired in the press are quite simply wrong, and plainly so. They have served only to create hysteria and foster division in Australian society.

While supporting passage of the legislation, FFF offers some recommendations for improvement.

What Does the Religious Discrimination Bill Actually Do?

It is important to have a clear understanding of what the Bill does, because a few activists, whose views have been given considerable attention in parts of the mainstream media, have created a misleading impression that the legislation has much greater impact than it does. It is,

in reality, a Bill which, if enacted, will lead only to modest advances in terms of prohibition of discrimination. These improvements are nonetheless welcome.

An additional remedy for individuals

The main effect of the Religious Discrimination Bill, if enacted, would be to add a right to complain about religious discrimination in federal law to the rights already contained in most state and territory laws and in the federal Fair Work Act 2009.

In all states currently, except NSW and South Australia, it is unlawful to discriminate against someone on the basis of their belief. In South Australia there is a prohibition on discrimination against someone because of their religious dress. The ACT and NT also prohibit discrimination on the basis of religious belief. There are also some relevant provisions prohibiting religious discrimination under the federal Fair Work Act.

While therefore having a very limited additional benefit outside of NSW and South Australia, the Bill is welcome inasmuch as it adds to the body of laws across the country that prohibit discrimination on the basis of religious belief. It will also provide a minimum 'baseline' for State and Territory laws and prevent changes unduly watering down protections currently provided under those laws.

No new rights for religious bodies

With the exception of a provision concerning employment in faith-based schools which we will discuss later in this submission, the legislation does not give any new rights to religious bodies at all. It simply gives individual people rights to complain about discrimination. It doesn't even give religious organisations a right to complain about discrimination (although there is a mechanism by which an individual might be able to complain on behalf of an affected group of people).

What it does provide to religious bodies, necessarily, is a defence to unwarranted discrimination claims made under the legislation. Any law on religious discrimination has to define the scope and limits of the right to complain about being discriminated against. There have to be limits on that right, as with any other discrimination law. An atheist should not be able to complain about discrimination because he is not accepted for training as a rabbi or imam. A Hindu should not be able to complain if she is not shortlisted for appointment as a church youth worker. This is obvious.

So the legislation protects the right of faith-based organisations to maintain their religious identity and ethos, as it should do. Those provisions are only necessary *because* the Parliament is enacting a new law concerning religious discrimination.

Some of the commentary about the Bill seems to suggest that it gives religious bodies new rights. With the exception of one provision in the Consequential Amendments Bill concerning

schools, it doesn't. If the Bill is enacted, religious bodies will have exactly the same rights as they do now.

Provision of services

It is fundamental to the practice of the Christian faith that services are delivered to people who are in need, irrespective of whether they have a faith. The charities sector has a great many such religious organisations that do a great deal to care for the disadvantaged, the disabled, the elderly, those suffering from drug or alcohol addiction, and the homeless, to name just some examples.

In a few situations, there may be a valid reason why a service should be limited to people of a certain faith or otherwise involve discrimination on the basis of religious belief. For example, an aged care facility might have been set up to meet the needs of people of a particular religious community. There are specific provisions in the Bill dealing with hospitals, aged care services, accommodation providers, religious campsites and conference centres where such exceptions might be applicable. On such issues, the Bill adopts a similar formulation to that found in existing state and territory laws that prohibit religious discrimination. However, religious organisations seeking to rely on such exemptions will need to have a publicly available policy.

Other discrimination laws are completely unaffected

It is important to note that the Bill does not alter the operation of other federal anti-discrimination laws in terms of the provision of services. For example, it provides no licence to religious organisations to discriminate on the basis of sex, marital status, pregnancy, sexual orientation or gender identity. The law on such matters is contained in the Sex Discrimination Act 1984. Similarly, issues concerning disability, race and age are matters dealt with by these other well-established anti-discrimination laws.

Claims to the contrary by some advocacy groups, as reported in the media, have absolutely no foundation. In particular, the legislation has no adverse impact whatsoever on the rights of those who are same-sex attracted or identify as transgender either in terms of employment or the provision of goods and services. These matters continue to be covered by the Sex Discrimination Act and the Fair Work Act (and also by state and territory laws). Any arguments about the provisions in those other Acts need to be dealt with if and when such other legislation comes up for consideration. This Senate Committee's remit is confined to the Religious Discrimination Bill and the other Bills consequential upon it.

If a same-sex attracted person considers she has been discriminated against because of her sexual orientation, she has a right to complain, inter alia, under the Sex Discrimination Act, the Fair Work Act, and the state or territory laws in the jurisdiction in which she lives. If her complaint is that she has been discriminated against because of her religious belief or lack thereof, then she can bring a complaint under this new legislation, the Fair Work Act, if applicable, and any state or territory laws available to her. If her complaint of sexual orientation

discrimination is brought under the Religious Discrimination law, then she has simply made a category error.

As this example illustrates, even in relation to matters of religious belief, the legislation does nothing more than to give to the complainant an option to complain about religious discrimination to the Australian Human Rights Commission *in addition* to the other options that the person already has under state and territory laws or the *Fair Work Act* 2009. If people consider themselves to have been discriminated against by a religious organisation and, for whatever reason, their claim is unlikely to succeed under this legislation, they may choose to bring the complaint to a state anti-discrimination body instead. For example, if they live in Victoria, they can bring their complaint to the Victorian Equal Opportunity and Human Rights Commission and pursue a remedy under Victorian law. If they live in Western Australia, they can pursue a remedy under WA law through the WA Equal Opportunity Commission. Those claims will be determined under state laws.

One of the most disappointing aspects of the public discussion of the Bill to date is how many bizarre claims have been made about the effects of the Bill by people and organisations that ought to behave more responsibly, particularly if they are practising lawyers. Lawyers, at least, ought to adhere to higher ethical standards.

Employment in faith-based organisations

Freedom of religion necessitates that faith-based organisations have a right to select staff who are not only adherents of that faith, but support the doctrines and practices of the religious faith to which the organisation is committed. This is no different from any other organisation that has a mission or purpose. 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. Inclusion of "preference" is an important principle which recognises that 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.

Accordingly, the Religious Discrimination Bill makes clear that that it is not discrimination against others to select or prefer someone who adheres to the beliefs of the religious organisation. This is consistent with the UN's Human Rights Committee view, as expressed in paragraph 13 of the Human Rights Committee's General Comment 18 (Non-Discrimination), which states 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'. See also s.153(2) of the federal *Fair Work Act* 2009 which is drafted in quite similar terms.

As noted above, this does not involve giving any new rights to religious bodies. If the Bill is enacted, religious organisations will have less rights than they do currently in New South Wales

and South Australia for the simple reason that neither of these two states currently has a general prohibition on religious discrimination. By enacting the prohibition on religious discrimination, necessarily the Parliament has to define its scope in application to religious organisations. If it did not, the law would actually be one which severely restricts religious freedom.

A weakness of this legislation is that, as it only deals with discrimination claims, it does not provide a general principle of protection for the right of faith-based organisations to select or prefer to select staff who adhere to the faith or values of the organisation. The protections for religious bodies only apply as a defence when a claim of religious discrimination is being made under this legislation. Despite much urging by *Freedom for Faith* for more than three years, the Government has chosen not to clarify the employment rights of faith-based organisations through the Fair Work Act and in so doing to ensure a nationally consistent law. It is eminently reasonable that faith-based organisations should be able to select or prefer staff who adhere to the beliefs and values of the organisation and support its mission just as environmental lobby groups or political parties do. Faith-based organisations should not have lesser rights than secular groups.

The issue in Victoria

The Bill does at least help address the religious freedom problem in Victoria, consistently with both the declared policy of the federal Government and the federal Labor Party. Both major political groupings agree that faith-based organisations have the right to protect their religious identity and ethos in staffing decisions. This ought to be an entirely uncontroversial proposition in a multicultural society.

Unfortunately, the Labor government in Victoria is at odds with its federal counterparts. In November 2021 it introduced the Equal Opportunity (Religious Exceptions) Amendment Bill which was enacted without amendment and has now received the Royal Assent. This largely deprives religious organisations of the right to select or prefer staff of the same faith unless that religious belief is an inherent requirement of the position, and in addition that a decision of this sort is “reasonable and proportionate”. It is not enough for the religious organisation to think that being a believer is an inherent requirement. Courts and tribunals will decide whether it is, and rule on the issues of “reasonableness” and “proportionality”. The legislation also strips away the exemptions that faith-based organisations have had to uphold their values and beliefs on sexual activity and family life.

This legislation is particularly detrimental to religious schools. It is apparent from the materials accompanying the Bill that the Labor Government in Victoria is seeking to ensure that Christian schools, and schools identified with other faiths, are in most respects indistinguishable from the secular school next door. That is, the Government is seeking to deprive faith-based schools of the right to maintain their identity and ethos, thereby negating their reason for existence.

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.

Aware that the Victorian government was planning to introduce this legislation, the federal Government included in the RDB a provision that allows it to introduce a regulation that empowers it to name a piece of state legislation that is inconsistent with the Bill's provisions on employment in religious organisations and thereby override it. However, this provision, if utilised, will only protect religious educational institutions. This is a surprising limitation. The Victorian law applies to severely limit the freedom of all religious bodies. This reaches into the heart of the right of faith-based organisations to express their religious commitment through their work. It has major ramifications for the future of religious organisations working in the health and welfare sectors, as well as the education sector.

In addition to the provision in the RDB, the government has a section in the Consequential Amendments Bill which effectively operates as an amendment to the RDB now that the Equal Opportunity (Religious Exceptions) Amendment Act (Vic.) has been passed. The Consequential Amendments provision, if enacted, will restore to Victorian religious schools the right to select or prefer staff of the same faith in educational institutions. It will not affect the removal of the various exemptions relating to sexual orientation, gender identity, marital status and lawful sexual conduct (including heterosexual conduct). On these issues, the law in Victoria will continue to apply a secular monocultural approach to contested issues about sexual conduct and family life in a highly multicultural society.

The federal over-ride in the Consequential Amendments Bill is necessary to ensure Australia's compliance with art 18(4) of the ICCPR. It is an important affirmation of the principle that the religious freedom of faith-based schools should be supported.

Freedom for Faith's view is that the policy objective 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 cl. 11 mechanism instead. We support it 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 cl.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.

Statements of belief

A lot of the objections to the Bill appear to focus upon the very moderate and limited provision in cl 12. This provides that moderately expressed statements of belief do not, in and of themselves, constitute discrimination, and this impacts upon the application of state and territory laws, as well as the other federal anti-discrimination laws.

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

The protection of moderate expressions of speech contained in the Bill is mainly of symbolic significance. Statements of belief would not ordinarily constitute 'discrimination' because discrimination arises from what someone does or refuses to do, not from what someone says.

Even if the provisions have a limited legal effect, they are still welcome as expressing some commitment by the federal Parliament to freedom of speech that is moderate and non-vilifying. A decade or so ago, such a provision would be completely uncontroversial. It is an indication of how far segments of our society have moved towards authoritarian restrictions on freedom of speech that such a provision could be seen as controversial now.

Some of the arguments and hypotheticals used by people to oppose the Bill really just demonstrate how much it is needed. They demonstrate enormous hostility to faith, mainly the Christian faith. A summary of some of these unjustified criticisms, 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.[1]

Some of the examples given are particularly misleading and offensive. For almost as long as there has been European settlement in Australia, it has been the churches and faith-based organisations that have cared for the disabled, the sick, the poor and the vulnerable. People of faith are still disproportionately represented in the workforce of caring organisations. Most charities registered with the ACNC are religious or come from a religious heritage.

Yet members of Parliament have been bombarded by emails and representations by a small number of activists making claims about the Bill that put people of faith in the worst possible light. Most distressing has been the vilification of Christians by activists claiming that the Bill would have an adverse impact on people with disabilities or suffering serious illness. TV news bulletins and the press have given these claims a great deal of attention with no

---

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

counterbalancing opinions from faith organisations or corrections from experienced lawyers who are not invested in an ideological position.

Take for example, a quotation from the CEO of one of the most prominent advocacy organisations, who went on national television to say that it would be lawful if this Bill is enacted, for a nurse to say to a patient with HIV that AIDS is a punishment from god, or a disability worker to say to a girl with a disability that her disability is caused by the devil.[2]

This is wrong on so many levels. First, this is simply not the kind of thing people of faith say. There are no examples of this happening. To suggest that this is in some way a significant problem is deeply misleading and disrespectful of the incredible work that Christians do every day in caring for the sick, the disabled and the vulnerable. It was Catholic nuns running hospices who were so often in the frontline of caring for people who were dying from AIDS at the height of that health crisis. Michael O'Loughlin has recently published a book about this, recounting many stories of the courage and self-sacrifice of these devout Christians who demonstrated their love for dying gay men at great personal cost.[3] Secondly, it is wrong to claim that such statements, if anyone were to make them, are unlawful across Australia now, but would be made lawful by this Bill. A discrimination claim based only upon what someone has said on one occasion, not what they have done, would almost certainly be unsuccessful.[4] The law on discrimination refers to *treating* an aggrieved person less favourably, not saying something which offends.[5] Hence her claim that "a statement that is discrimination today could be lawful tomorrow" is quite simply wrong.

In any event, do we really want to live in a world where the law bans anything that a person says to anyone else which is unkind or offensive? On any analysis, the comments made by some activists vehemently opposed to the enactment of this Bill are deeply offensive to Christians and other people of faith. They are similar to the tropes about Jewish people that have long been accepted as examples of anti-semitic hostility. Equality cuts both ways. Do anti-religious activists want to be dragged before tribunals every time they say something

---

[2] https://junkee.com/religious-discrimination-bill-explained/315993

[3] M. O'Loughlan, Hidden Mercy: AIDS, Catholics, and the Untold Stories of Compassion in the Face of Fear (2021).

[4] At most, there are one or two isolated *dicta* that might support such a view that speech could be sufficient: e.g. *Qantas Airways v Gama* (2008) 157 FCR 537, at [78].

[5] Section 5(1) of the Disability Discrimination Act 1992 provides as follows: "For the purposes of this Act, a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of a disability of the aggrieved person if, because of the disability, the discriminator treats, or proposes to treat, the aggrieved person less favourably than the discriminator would treat a person without the disability in circumstances that are not materially different."

offensive to Christians? If activists want laws prohibiting any offensive speech then they must support legislation that is non-discriminatory and applies as much to *their* offensive speech as to the speech, real or imagined, of those they wish to silence.

Freedom for Faith does not think that the involvement of anti-discrimination laws and tribunals is the way to deal with speech that some people find offensive, or with which they disagree. Some aggressive litigators would be delighted to have such laws, no doubt. However, it would not lead to a more harmonious society.

The specific reference to Tasmania's laws

Specifically, clause 12 provides that moderate statements of belief are not grounds for action under section 17 of Tasmania's anti-discrimination law that gives people who are in protected categories, such as those identifying as LGBTQ+, a legal right to complain if they are offended by someone else's expression of their religious beliefs. Notoriously, the Tasmanian Anti-Discrimination Commissioner at the time, Robin Banks, accepted a complaint from someone about a booklet distributed by the Australian Catholic Bishops Conference articulating the case for the preservation of marriage as being between a man and a woman. This is perhaps the worst example to date of overreach by a state or territory anti-discrimination commission seeking to restrain basic religious freedoms.

Section 17(1) of the *Anti-Discrimination Act 1998* (Tas.) is itself discriminatory. It singles out for protection only certain attributes from the long list contained in section 16 of the Act but, remarkably, this excludes religion. Thus Senator Claire Chandler can be summoned to attend a conciliation conference by the Anti-Discrimination Commissioner under s.75 of the Act, with penalties for non-attendance, on the basis that she considers women's sports, changing rooms and toilets were designed for those of the female sex and should remain that way. Archbishop Porteous could similarly be summoned to the Commission for articulating the case against legalising same-sex marriage; but people in Tasmania, including the former Tasmanian Anti-Discrimination Commissioner, Robin Banks, can say the most offensive and insulting things about Christians without being subject to being summoned by the Anti-Discrimination Commissioner under the same provision.

Section 12 of the RDB 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.

A Religious Discrimination Commissioner

In addition to giving complainants a right to complain about discrimination, the Bill also creates the position of Religious Discrimination Commissioner in the Australian Human Rights

Commission. Freedom for Faith recommended that there should be a Freedom of Religion Commissioner, and this title was contained in the first two exposure drafts of the Bill. However, it has now been changed to focus on discrimination.

This is a regrettable change. There are good reasons for the Commissioner to have a broader brief, even if the legislation itself is almost entirely limited to religious discrimination. We make recommendations for amendment at the end of this submission.

The appointment of the Commissioner will be a positive step towards promoting protection against religious discrimination and freedom of speech on religious matters, provided that a person of sufficient calibre, conviction and standing within faith communities is appointed. In a diverse, multicultural society, it is as important to promote acceptance of different religious beliefs as it is to promote racial harmony, for many ethnic minorities are also religious minorities. The Commissioner can also be a significant voice within the Australian Human Rights Commission, which has, in the recent past, had a very mixed record on supporting the internationally protected human rights of freedom of religion and conscience, and the related freedoms of speech and association for people of faith.

Why is the legislation needed?

Having analysed what the Bill does, it is now necessary to turn to why a religious discrimination Bill is necessary. It fills a gap in two States. In adopting such a law, Parliament would be merely following the example of other major democracies who have had such laws for many years.[6]

Such legislation also has an educative effect, demonstrating Parliament's commitment to denouncing adverse treatment of people because of their religious beliefs. This is a growing problem. Anti-semitism is a particular serious issue. It can be motivated either by racism or hostility to the Jewish faith, or both. The ECAJ's 2020 report lists just some of the many serious incidents of hatred of, and violence against, Jewish people and organisations.[7] In previous years it has recorded sharp rises in anti-semitic incidents, particularly in 2018.[8]

---

[6] 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 .

[7] https://www.ecaj.org.au/wordpress/wp-content/uploads/ECAJ-Antisemitism-Report-2020.pdf at 65-66.

[8] https://www.jpost.com/Diaspora/Australia-sees-30-percent-increase-in-antisemitic-incidents-609164.

There has also been growing discrimination against Christians, for example trying to drive people out of jobs or having them disqualified from professional occupations because of their beliefs about marriage or their opposition to some of the more extreme beliefs about 'gender fluidity'. Some of the worst discrimination against people because of faith is from people who proclaim most loudly their commitment to non-discrimination and 'equality'. Discriminatory attitudes were seen in the same-sex marriage debate in the regularity with which those who were opposed to the redefinition of marriage to include same-sex couples were vilified as 'homophobes' and 'bigots'. It was seen in how acceptable it apparently was for people to engage in this repeated name-calling, and how little this was criticised by the political leaders of the day or by media commentators.

Churches have also been subjected to arson attacks and other criminal damage. In Geelong, for example, five churches were burned down between 2015-16, belonging to different Christian denominations. One was being used as a mosque. The motivation for the arson attacks is unknown. In Waverley, a suburb of Melbourne, a Baptist Church and an Anglican church were both vandalised in October 2017. Graffiti was sprayed in white paint on the church walls, equating Christians with the Nazis, urging people to vote 'yes' in the same-sex marriage postal survey and to 'bash bigots'. Another message urged people to 'crucify' no voters. Mosques and other Islamic institutions have also been attacked.

A few other examples from NSW:

- In Newcastle, a young man was sacked from his casual job at a coffee shop for no other reason than that his employer overheard conversations he had with customers who attended his church. The employer told him: "We don't tolerate Christianity in our café".
- Also in NSW, complaints were made about a university lecturer both to the university in which she taught and to her professional association. The complaints were that as a health professional, she was teaching about Christian sexual ethics. In so doing, it was alleged, she was in breach of her professional codes of conduct, even though she was speaking to Christian audiences. The University investigated and took no disciplinary action; but the professional association upheld the complaint and invited her to resign her honorary life membership or agree to comply with its code.
- In a suburb of northern Sydney, the Jewish community went through an 8 year long legal and political battle to see an eruv established around their synagogue. An eruv is an urban area enclosed by a wire boundary which symbolically extends the private domain of Jewish households into public areas, permitting activities within it that are normally forbidden in public on the Sabbath. Though no harm could be shown to fall on local residents, pamphlets were distributed claiming the area would become a 'Jewish Ghetto'. At a local council meeting a representative of a local residents' group said they did not want more Jews in the area. Some said that Jews did not mix with others and did not contribute in the same way to the local community. An anonymous letter sent to residents warned the real purpose of the eruv was to "establish a

> modern version of the ghetto under Rabbinical control". It said the "consequences of an eruv establishment is the division of the community and eventual expulsion of secular people". This was religious discrimination, not racial discrimination. Secular Jews were not targeted.

These are just a few illustrations of the hatred expressed against people of faith, and discrimination towards them, sometimes covertly and sometimes overtly by people who hold positions of responsibility in the law, commerce, government, the education sector and elsewhere. The mainstream media has been remarkably silent about such issues.

For these reasons, people of faith are now seeking greater protection in terms of anti-discrimination laws.

The Human Rights Legislation amendments

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, 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[9] 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.

Improvements to the Bills

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

---

[9] 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.

Clauses 7 & 9 - Publicly available policies

Under cl 7(6), if faith-based schools are making employment decisions taking belief into account, 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.

Clause 9 also requires religious hospitals, aged care facilities, accommodation providers and disability service providers to have a publicly available policy.

Under both cls 7(7) and s 9(7) the relevant Minister administering the legislation may set down "requirements" to be met by publicly available policies. This is entirely unobjectionable if such requirements only 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."

Freedom for Faith is concerned that the broad language in the legislation itself could become a means by which a government minister engages in excessive and unnecessary interference in the internal affairs of a religious organisation that is subject to the requirement for a publicly available policy. The statutory provision should be clarified.

Recommendation 1

Clause 7(6) to be amended as follows:

> If a religious body that is an educational institution engages in conduct mentioned in subsection (2) or (4) in relation to the matters described in section 19 (about employment):
>
> (a) the conduct must be in accordance with a publicly available policy; and
>
> (b) if the Minister determines requirements <u>concerning the availability of the policy</u> under subsection (7) — the policy must comply with the requirements.

Recommendation 2

Clause 9(5)(e) to be amended as follows:

> (e) if the Minister determines requirements <u>concerning the availability of the policy</u> under subsection (7) — the policy must comply with the requirements.

Genuine or reasonable beliefs?

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.[10] 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.

Recommendation 3

The "genuine" standard should be adopted wherever religious belief is referred to in the Bill.

Clause 11

Clause 11 should be amended to apply to all religious bodies, not just educational institutions. The Government should also initiate a review of the Fair Work Act provisions to ensure nationally consistent legislation on the right of religious organisations to select or prefer staff who share the beliefs of the organisation and commit to upholding its values.

---

[10] 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).

Recommendation 4

Clause 11 should apply to all religious bodies, and not be limited to such bodies that are "educational institutions". This will mean removing references to "educational institutions" in sub-clauses 11(1), (3) and (4).

Indirect discrimination

Another area where the Bill should be amended to align it more closely with the ICCPR 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. 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 cl 14(1)(c) be amended as set out below.

The second issue with cl 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.

Recommendation 5

Clause 14(1)(c) should 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".

Recommendation 6

The onus of proving a condition is reasonable should be on the person imposing it.

Reasonable adjustments

In line with the *Disability Discrimination Act* 1992 (Cth), s 5(2), a "reasonable adjustments" obligation should be introduced to the RDB.

Recommendation 7

An employer should have a positive duty to accommodate religious belief or activity where this could be done without imposing an "unjustifiable hardship".

The Australian Human Rights Commission's role

The Australian Human Rights Commission's functions, for which the Religious Discrimination Commissioner will have primary responsibility, are tied to the objects of the Act – that is to prohibit discrimination against people based upon their beliefs or lack of beliefs. The objects also refer to the right to express statements of belief subject to limitations.

The Bill does not give the Commission broader functions in terms of the protection of religious freedom beyond these objects. This is unfortunate, as the International Covenant on Civil and Political Rights is not only concerned with discrimination. It seeks to protect religious freedom in a much more holistic way. Recommendation 19 of the Ruddock Report stated that the Commission should take a leading role in the protection of freedom of religion, "including through enhancing engagement, understanding and dialogue". The Bill represents only a partial implementation of this recommendation, notwithstanding claims in the Explanatory Memorandum that it fully implements the recommendation.

Recommendation 8

The Commissioner should be renamed the Freedom of Religion Commissioner.

Recommendation 9

Clause 61 should be amended to replace the following sub-clauses as follows:

> (c) to undertake research and educational programs, and other programs, on behalf of the Commonwealth for the purpose of promoting the objects of this Act and supporting freedom of religion;
>
> (d) to examine enactments (within the meaning of the Australian Human Rights Commission Act 1986) to determine whether those enactments are inconsistent with or contrary to the 16 objects of this Act or detrimental to religious freedom;
>
> (e) at the request of the Minister, to examine proposed enactments (within the meaning of the Australian Human Rights Commission Act 1986) to determine whether those

> enactments would be inconsistent with or contrary to the objects of this Act or detrimental to religious freedom;…
>
> (g) on its own initiative or at the request of the Minister, to report to the Minister as to the laws that should be made by the Parliament, or action that should be taken by the Commonwealth, to support freedom of religion;…
>
> (i) where the Commission considers it appropriate, with the leave of the court conducting the proceedings and subject to any conditions imposed by the court, to intervene in proceedings that involve issues of religious freedom or discrimination on the ground of religious belief or activity.

Consequential Amendments Bill

Most of the objectionable provisions of the Victorian Equal Opportunity Amendment legislation are contained in Division 1 of Part 2 and will commence 6 months after Royal Assent - see that Act, s 2(2). In particular, the provisions that most concern faith-based schools, such as the new s 83A, are contained in Division 1. 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.

Accordingly, it seems that there has been a drafting error in the RDCA Bill.

Recommendation 10

Cl 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.)".

Conclusion

The Bill should be supported. It prohibits detrimental treatment of Australians generally on the grounds of their religion, recognises the important principle that 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. Our view is that the Bill ought to be supported by all parties in Parliament as a very good start, even if it leaves a lot of religious freedom matters to be dealt with by a future government.

Addendum: Amendments to the Sex Discrimination Act

Although it is not part of the terms of reference of this committee, we add a brief note to address an issue which seems to have excited certain parts of the media, but in relation to which no Bill is currently before Parliament. This is the unrelated issue of exemptions for religious educational institutions.

Three years ago, just before the last election, there was a flurry of activity in the federal Parliament which was stirred up by a claim that the Sex Discrimination Act allows Christian schools to expel gay and lesbian students. Despite a complete absence of any evidence that they do so or would wish to do so, this was deemed to be so urgent a problem that no less than three Bills were introduced into Parliament, very hurriedly, to address this problem. In the end, the major parties couldn't agree on how to change the law with the result that the issue was referred to the Australian Law Reform Commission to sort out.

Now, just before the next election, this non-issue is being raised again. The facts are that the relevant section of the Sex Discrimination Act 1984, which technically allows faith-based schools to expel gay or lesbian students, was introduced by the Labor Government in 2013, when Mark Dreyfus QC was Attorney-General. It was part of a package of amendments to prohibit discrimination on the basis of sexual orientation or gender identity. Faith-based schools never asked for the right to expel same-sex attracted students and have consistently made it clear that they do not do so. Generally, their pastoral care for all students is exemplary, which is one reason why so many parents want to send their children to these schools. Yet these claims continue to be ventilated.

For a range of reasons, the problem, such as it is, cannot be fixed simply by repealing the relevant section (38(3)) of the Act. Consideration needs to be given to ensuring that there are not unintended consequences for the rights of faith-based schools to teach in accordance with their faith and to uphold appropriate standards of conduct at school in ways which could potentially be impaired by the simple repeal of this provision. Furthermore, since the legislation was introduced in 2013, a range of serious issues have emerged concerning how the Act, insofar as it concerns gender identity discrimination, applies to schoolchildren and what obligations it imposes on schools. There are also serious issues concerning the interpretation of this legislation as it applies to female sports.

These are not issues that can be dealt with in a rush just before an election is called, however important it may appear to be to a small number of voters in a small number of marginal constituencies. There needs to be careful consideration of these issues. There should also be a comprehensive review of the law concerning gender identity discrimination in the light of evolving research concerning gender dysphoria and the controversies within the medical and psychiatric professions concerning what should be best practices in this difficult area.

Prof. Patrick Parkinson AM
Chair, Freedom for Faith December 2021