

EXPOSURE DRAFT OF THE HUMAN RIGHTS LEGISLATION AMENDMENT (FREEDOM OF RELIGION) BILL 2019

EXPLANATORY NOTES

HUMAN RIGHTS LEGISLATION AMENDMENT (FREEDOM OF RELIGION) BILL 2019

GENERAL OUTLINE

Purpose and objective

1. The Human Rights Legislation Amendment (Freedom of Religion) Bill 2019 amends the *Age Discrimination Act 2004*, *Charities Act 2013*, *Disability Discrimination Act 1992*, *Marriage Act 1961*, *Racial Discrimination Act 1975* and the *Sex Discrimination Act 1984* in order to better protect the right to freedom of religion within existing Commonwealth legislation.
2. This Bill gives effect to three recommendations of the Report of the Expert Panel on Religious Freedom (Religious Freedom Review) (recommendations 3, 4 and 12).
3. A wide range of Commonwealth legislation touches upon issues of freedom of religion, and there is a need to ensure that any such legislation protects, or gives appropriate weight to, the right to freedom of religion. The Religious Freedom Review considered that there were opportunities to strengthen this existing legal framework in three areas of law in which government regulation most commonly interacts with the right to freedom of religion: anti-discrimination law, charities law and marriage law.
4. Firstly, the Review noted the importance of ensuring that the right to freedom of religion is given appropriate weight in situations where it is in tension with other public policy considerations, including other human rights.
5. Anti-discrimination law represents an area of law in which the rights to equality and non-discrimination frequently intersect with other rights, including the right to freedom of religion. However, the objects clauses in federal anti-discrimination law do not currently reflect the potential tensions between these rights. Accordingly, this Bill amends federal anti-discrimination legislation to ensure that each Act has an objects clause which recognises the indivisibility and universality of all human rights. These provisions recognise that anti-discrimination law should be interpreted in a manner which is consistent with all human rights, so far as is possible.
6. Secondly, the freedom to manifest religion or belief is a fundamental aspect of the right to freedom of religion. This includes manifestation through establishing and maintaining places of worship and appropriate charitable institutions. It is imperative that Australian laws do not unduly burden this freedom.
7. Accordingly, this Bill makes amendments to the Charities Act and the Marriage Act to clarify the application of aspects of those Acts which may infringe upon the right to freedom of religion. These amendments go directly to the ability of individuals and faith-based organisations to manifest their religious beliefs.
8. Faith-based charities play a vital role in Australian civil society. The amendments in this Bill recognise that the law must protect the reasonable ability for such faith-based

charities to manifest their faith and express their religious beliefs, without threat to their charitable status.

9. The solemnisation of marriage has particular significance for people of faith and can be a significant way in which faith is manifested. The amendments in this Bill recognise that religious institutions, including religious educational institutions, should not be compelled to provide goods, services or facilities in support of marriages which are not in accordance with their religious beliefs.

Background

Religious Freedom Review

10. On 22 November 2017, the then Prime Minister, the Hon Malcolm Turnbull, announced a review into religious freedom in Australia.

11. The review was conducted by an Expert Panel, chaired by the Hon Philip Ruddock, and comprising Emeritus Professor Rosalind Croucher AM, the Hon Dr Annabelle Bennett AO SC, Father Frank Brennan SJ AO and Professor Nicholas Aroney.

12. The Review was announced in response to proposals for legislative reform to protect freedom of religion during the debate on marriage equality, recognising that any legislative reforms to protect freedom of religion should be undertaken carefully to avoid the risk of unintended consequences. The terms of reference for the Review required the Expert Panel to examine and report on whether Australian law (Commonwealth, state, territory) adequately protects the human right to freedom of religion. In doing so, the Panel was required to consider the intersections between the enjoyment of the right to freedom of religion and other human rights.

13. The Expert Panel's final report was provided to the then Prime Minister on 18 May 2018. The report was the result of extensive public consultation, including consideration of over 15,500 submissions and 90 consultation meetings with a wide range of stakeholders in each state and territory.

14. The Religious Freedom Review did not support the enactment of a standalone Commonwealth Act to enshrine the right to freedom of religion, given that would be out of step with the treatment of other rights in Australia. However, it did conclude that there is an opportunity to further protect, and better promote, the right to freedom of religion under Australian law and in the public sphere.

15. The Religious Freedom Review made 20 recommendations to enhance the protection of freedom of religion in Australia, both through legislative amendments to Commonwealth, state and territory laws, and through non-legislative measures.

16. This Bill implements recommendations 3, 4 and 12.

Outline of the Bill

17. Recommendation 3 of the Religious Freedom Review recommended that Commonwealth, state and territory governments should consider the use of objects, purposes

or other interpretative clauses in anti-discrimination legislation to reflect the equal status in international law of all human rights, including freedom of religion.

18. This recommendation is implemented by Items 1, 2, 5, 6, 8, 9 and 10 of this Bill, which amend existing objects clauses in the Age Discrimination Act, Disability Discrimination Act and the Sex Discrimination Act, and introduce an objects clause into the Racial Discrimination Act, to provide that, in giving effect to the objects of each Act, regard is to be had to the indivisibility and universality of human rights and the principle that every person is free and equal in dignity and rights.

19. Recommendation 4 of the Religious Freedom Review recommended that the Commonwealth should amend section 11 of the Charities Act to clarify that advocacy of a 'traditional' view of marriage would not, of itself, amount to a 'disqualifying purpose'.

20. This recommendation is implemented by Items 3 and 4 of this Bill which amend the Charities Act to clarify that engaging in, or promoting, activities that support marriage as the union of a man and a woman to the exclusion of all others, voluntarily entered into for life, will not, of itself, amount to a disqualifying purpose.

21. Recommendation 12 of the Religious Freedom Review recommended that the Commonwealth should progress legislative amendments to make it clear that religious schools are not required to make available their facilities, or to provide goods or services, for any marriage, provided that the refusal:

- conforms to the doctrines, tenets or beliefs of the religion of the body, or
- is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

22. This recommendation is implemented by Item 7 of this Bill which amends the Marriage Act to extend the existing exemption for bodies established for religious purposes to refuse to provide goods, services and facilities in relation to the solemnisation of a marriage in accordance with their religious beliefs to educational institutions established for religious purposes.

NOTES ON CLAUSES

List of abbreviations

Age Discrimination Act	<i>Age Discrimination Act 2004</i>
AHRC Act	<i>Australian Human Rights Commission Act 1986</i>
Commission	Australian Human Rights Commission
Charities Act	<i>Charities Act 2013</i>
Disability Discrimination Act	<i>Disability Discrimination Act 1992</i>
Marriage Act	<i>Marriage Act 1961</i>
Racial Discrimination Act	<i>Racial Discrimination Act 1975</i>
Religious Discrimination Bill	Religious Discrimination Bill 2019
Religious Freedom Review	Report of the Expert Panel into Religious Freedom
Sex Discrimination Act	<i>Sex Discrimination Act 1984</i>

Preliminary

Clause 1 Short title

23. This clause provides for the short title of the Act to be the *Human Rights Legislation Amendment (Freedom of Religion) Act 2019*.

Clause 2 Commencement

24. This clause provides for the commencement of each provision in the Bill, as set out in the table at subclause 2(1).

25. Item 1 in the table provides that the whole of this Act will commence on the day on which the Act receives the Royal Assent.

26. Subclause 2(2) specifies that information in column 3 of the table at subclause 2(1) is not a part of the Act, and information may be inserted in this column, or information in it may be edited, in any published version of this Act.

Clause 3 Schedules

27. This clause enables legislation that is specified in a Schedule to this Act to be amended or repealed as set out in the applicable items in the Schedule concerned, and specifies that any other item in a Schedule to this Act has effect according to its terms.

Schedule 1 – Amendments

Age Discrimination Act 2004

Item 1 Section 3

28. Item 1 converts existing section 3 of the Age Discrimination Act into new subsection 3(1). This reflects the insertion of new subsection 3(2) by Item 2.

Item 2 At the end of section 3

29. Item 2 inserts a new subsection into section 3 of the Age Discrimination Act which provides that, in giving effect to the objects of that Act, regard is to be had to the indivisibility and universality of human rights and the principle that every person is free and equal in dignity and rights.

30. This item implements recommendation 3 of the Religious Freedom Review.

31. The Religious Freedom Review found that the objects clauses of anti-discrimination legislation referred to objects related to the promotion of the right to equality or equality of opportunity, but made no express reference to other human rights, such as the right to freedom of religion.

32. The existing objects clause in section 3 of the Age Discrimination Act provides that the objects of that Act are to:

- eliminate discrimination on the ground of age in a range of areas of public life
- ensure that everyone has the same rights to equality before the law, regardless of age
- allow appropriate benefits and other assistance to be given to people of a particular age
- promote recognition and acceptance of the principle that people of all ages have the same fundamental rights, and
- respond to demographic change by removing barriers to participation and changing negative stereotypes.

33. Insertion of new subsection 3(2) into the Act ensures that in giving effect to these objects, which focus on the rights to equality and non-discrimination, appropriate regard must be had to all human rights. This may include, where relevant, the right to freedom of religion.

34. The principles listed in new paragraphs 3(2)(a) and (b) reflect the existing duty of the Commission to ensure that its functions, under the AHRC Act or any other Act, are performed with regard for the indivisibility and universality of human rights and the principle that every person is free and equal in dignity and rights (paragraph 10A(1)(a) of the AHRC Act).

35. To ensure consistency across anti-discrimination law, Items 6 and 10 insert the same subsection into the existing objects clauses of the Disability Discrimination Act and the Sex Discrimination Act respectively. Item 8 inserts a new objects clause into the Racial Discrimination Act, which includes this subsection.

Charities Act 2013

Item 3 Section 11

36. Item 3 converts existing section 11 of the Charities Act into new subsection 11(1) to accommodate the insertion of new subsection 11(2) by Item 4.

Item 4 At the end of section 11

37. Item 4 inserts new subsection 11(2) into the Charities Act to clarify that, for the avoidance of doubt, the purpose of engaging in, or promoting, activities that support a view of marriage as the union of a man and a woman to the exclusion of all others, voluntarily entered into for life, is not, of itself, a disqualifying purpose.
38. This item implements recommendation 4 of the Religious Freedom Review.
39. The definition of ‘charity’ in section 5 of the Charities Act requires that none of the purposes of the entity are ‘disqualifying purposes’. Section 11 provides that a disqualifying purpose means the purpose of engaging in, or promoting, activities that are unlawful or contrary to public policy or the purpose of promoting or opposing a political party or a candidate for political office.
40. The Religious Freedom Review noted possible ambiguity around whether, following the debate on marriage equality, advocacy of a ‘traditional view of marriage’ (referring to marriage as defined by the *Marriage Act 1961* prior to the *Marriage Amendment (Definition and Religious Freedoms) Act 2017*) could constitute a disqualifying purpose.
41. The Review ultimately considered that under the existing legal framework, mere advocacy of a position contrary to Government policy (such as a traditional view of marriage) did not meet the threshold of a disqualifying purpose and may itself be considered a charitable purpose. However, the Review recognised that there was benefit in amending the Charities Act to give certainty to faith-based charities and put the issue beyond doubt.
42. Accordingly, new subsection 11(2) does not make substantive amendments to the existing disqualifying purpose test in section 11 of the Charities Act, but rather inserts a provision to clarify that for the purposes of that test, engaging or promoting activities that support a view of marriage as the union of a man and a woman will not of itself constitute a disqualifying purpose. Therefore, a charity that advocates for a traditional view of marriage will not lose its charitable status solely due to such advocacy.
43. However, engaging in or promoting activities that support a traditional view of marriage, in conjunction with another disqualifying purpose, will constitute a disqualifying purpose. Accordingly, having a purpose of engaging in violent protests in favour of traditional marriage could constitute a disqualifying purpose in accordance with current paragraph 11(a).

44. In addition, having the purpose of promoting a political party for its support of traditional marriage could constitute a disqualifying purpose in accordance with current paragraph 11(b). However, the note under paragraph 11(b) clarifies that this prohibition does not apply to distributing information or advancing debate about the policies of political parties or candidates. Accordingly, it would not be a disqualifying purpose for a charity to distribute information comparing the policies of different political parties regarding marriage.

Disability Discrimination Act 1992

Item 5 Section 3

45. Item 5 converts existing section 3 of the Disability Discrimination Act into new subsection 3(1). This reflects the insertion of new subsection 3(2) by Item 6.

Item 6 At the end of section 3

46. Item 6 inserts a new subsection into section 3 of the Disability Discrimination Act which provides that, in giving effect to the objects of that Act, regard is to be had to the indivisibility and universality of human rights and the principle that every person is free and equal in dignity and rights.

47. This item implements recommendation 3 of the Religious Freedom Review.

48. The Religious Freedom Review found that the objects clauses of anti-discrimination legislation referred to objects related to the promotion of the right to equality or equality of opportunity, but made no express reference to other human rights, such as the right to freedom of religion.

49. The existing objects clause in section 3 of the Disability Discrimination Act provides that the objects of that Act are to:

- eliminate discrimination on the ground of disability in a range of areas of public life
- ensure that people with disability have the same rights to equality before the law as the rest of the community, and
- promote recognition and acceptance of the principle that people with disability have the same fundamental rights as the rest of the community.

50. Insertion of new subsection 3(2) into the Act ensures that in giving effect to these objects, which focus on the rights to equality and non-discrimination, appropriate regard must be had to all human rights. This may include, where relevant, the right to freedom of religion.

51. The principles listed in new paragraphs 3(2)(a) and (b) reflect the existing duty of the Commission to ensure that its functions, under the AHRC Act or any other Act, are performed with regard for the indivisibility and universality of human rights and the principle that every person is free and equal in dignity and rights (paragraph 10A(1)(a) of the AHRC Act).

52. To ensure consistency across anti-discrimination law, Items 2 and 10 insert the same subsection into the existing objects clauses of the Age Discrimination Act and the Sex Discrimination Act respectively. Item 8 inserts a new objects clause into the Racial Discrimination Act, which includes this subsection.

Marriage Act 1961

Item 7 After section 47B

53. Item 7 inserts new section 47C into the Marriage Act to allow religious educational institutions to refuse to provide facilities, goods or services in relation to the solemnisation of a marriage in accordance with their religious beliefs.

54. This item implements recommendation 12 of the Religious Freedom Review.

55. The Religious Freedom Review noted possible ambiguity around whether the existing protection in section 47B of the Marriage Act, which allows a body established for religious purposes to refuse to provide facilities, goods or services in relation to the solemnisation of a marriage consistent with their religious beliefs, applied to religious educational institutions. The Review concluded that religious educational institutions should be afforded the same protections as bodies established for religious purposes in relation to the solemnisation of marriages and should therefore not be required to provide facilities, goods or services for marriages to which they objected on religious grounds.

56. Accordingly, new section 47C replicates existing section 47B of the Marriage Act for educational institutions conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion.

57. New subsection 47C(1) provides that a religious educational institution may refuse to provide goods or services, or make a facility available, for the purposes of the solemnisation of a marriage if the refusal:

- conforms to the doctrines, tenets or beliefs of the religion of the educational institution (paragraph 47C(1)(a)); or
- is necessary to avoid injury to the religious susceptibilities of adherents of that religion (paragraph 47C(1)(b)).

58. This provision ensures that religious educational institutions are able to maintain their own religious practices and observances in relation to marriage. For example, a Catholic secondary school may refuse to hire out their chapel for a wedding ceremony to a same-sex couple, or to a couple where one of the partners was a divorcee, where such a refusal is in accordance with the school's religious beliefs.

59. New subsection 47C(2) clarifies that this exemption applies to facilities, goods or services provided on both a commercial and non-commercial basis. Therefore it is not relevant whether the institution requires payment to access such facilities, goods or services.

60. New subsection 47C(3) clarifies that this section does not limit the lawful grounds for a religious educational institution to refuse to provide goods, services or facilities in relation to the solemnisation of a marriage. For example, a religious educational

institution may still refuse to provide goods, services or facilities due to a lack of availability or double bookings.

61. New subsection 47C(4) clarifies that, for the avoidance of doubt, a reference to an educational institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion in this section has the same meaning as in section 38 of the Sex Discrimination Act. As such, a religious educational institution for the purposes of this section includes schools, colleges, universities and other institutions in which education or training is provided. This subsection ensures that there is consistency between the exemptions in the Marriage Act and the Sex Discrimination Act as it provides that only those religious educational institutions which may currently rely upon the exemptions in section 38 of the Sex Discrimination Act may rely upon this exemption.
62. New subsection 47C(1) provides that this exemption applies to the provision of facilities, goods or services for the purposes of the solemnisation of a marriage, or for purposes reasonably incidental to the solemnisation of a marriage. New subsection 47C(5) provides that, for the purposes of subsection 47C(1), a purpose is reasonably incidental to the solemnisation of marriage if it is intrinsic to, or directly associated with, the solemnisation of marriage.
63. This provision requires a close nexus between the facilities, goods or services and the solemnisation of marriage. This ensures that people are not unfairly discriminated against where there is only a distant or tenuous connection between the facilities, goods or services and the solemnisation of marriage. For example, a religious educational institution would be able to lawfully refuse the use of school facilities for a wedding ceremony or reception, but could not lawfully refuse the use of school facilities for an event hosted by a married same-sex couple unrelated to the solemnisation of marriage, such as a birthday party.

Racial Discrimination Act 1975

Item 8 After section 2

64. Item 8 inserts new section 2A into the Racial Discrimination Act which provides for the objects of that Act.
65. This item implements recommendation 3 of the Religious Freedom Review.
66. The Racial Discrimination Act is the only federal anti-discrimination law that does not contain an objects clause. This item will insert an objects clause which is a clear statement of the principles underpinning the Racial Discrimination Act and reflects the existing objects clauses in the Age Discrimination Act, Disability Discrimination Act and Sex Discrimination Act. The insertion of new section 2A will ensure consistency across federal anti-discrimination legislation.
67. New subsection 2A(1) provides the objects of the Racial Discrimination Act. The objects in this subsection are based on the objects in the Age Discrimination Act, Disability Discrimination Act and the Sex Discrimination Act, appropriately adapted to the Racial Discrimination Act.

68. New paragraph 2A(1)(a) recognises that the Racial Discrimination Act directly implements certain provisions of the *International Convention on the Elimination of All Forms of Racial Discrimination*.
69. New paragraph 2A(1)(b) provides that an object of the Racial Discrimination Act is to eliminate, as far as possible, discrimination on the grounds of race, colour, descent, national or ethnic origin or immigrant status in the areas of public life set out in Part II of the Racial Discrimination Act. The existing objects clauses in the Age Discrimination Act, Disability Discrimination Act and Sex Discrimination Act each contain a similar provision.
70. New paragraph 2A(1)(b) provides that an object of the Racial Discrimination Act is to eliminate, as far as possible, certain behaviour based on racial hatred. This paragraph reflects the prohibition of offensive behaviour based on racial hatred in Part IIB of the Racial Discrimination Act.
71. New paragraph 2A(1)(d) provides that an object of the Racial Discrimination Act is to ensure that everyone has the same rights to equality before the law, regardless of their race, colour or national or ethnic origin. This paragraph reflects the core human right that all people have the same right to equality before the law, which is reflected in section 10 of the Racial Discrimination Act, and is consistent with existing anti-discrimination objects clauses.
72. As section 15AA of the *Acts Interpretation Act 1901* provides that statutes should be interpreted in accordance with their objects, all the other provisions of the Racial Discrimination Act are to be read as being designed to carry out these objects as far as is possible.
73. New subsection 2A(2) provides that, in giving effect to the objects in new subsection 2A(1), regard is to be had to the indivisibility and universality of human rights and the principle that every person is free and equal in dignity and rights.
74. Insertion of new subsection 2A(2) into the Act ensures that in giving effect to these objects, which focus on the rights to equality and non-discrimination, appropriate regard must be had to all human rights. This may include, where relevant, the right to freedom of religion.
75. The principles listed in new paragraphs 2A(2)(a) and (b) reflect the existing duty of the Commission to ensure that its functions, under the AHRC Act or any other Act, are performed with regard for the indivisibility and universality of human rights and the principle that every person is free and equal in dignity and rights (paragraph 10A(1)(a) of the AHRC Act).
76. To ensure consistency across anti-discrimination law, Items 2, 6 and 10 insert the same subsection into the existing objects clauses of the Age Discrimination Act, Disability Discrimination Act and the Sex Discrimination Act respectively.

Sex Discrimination Act 1984

Item 9 Section 3

77. Item 9 converts existing section 3 into new subsection 3(1). This reflects the insertion of new subsection 3(2) by Item 10.

Item 10 At the end of section 3

78. Item 10 inserts a new subsection into section 3 of the Sex Discrimination Act, which provides that, in giving effect to the objects of that Act, regard is to be had to the indivisibility and universality of human rights and the principle that every person is free and equal in dignity and rights.

79. This item implements recommendation 3 of the Religious Freedom Review.

80. The Religious Freedom Review found that the objects clauses of anti-discrimination legislation referred to objects related to the promotion of the right to equality or equality of opportunity, but made no express reference to other human rights, such as the right to freedom of religion.

81. The existing objects clause in section 3 of the Sex Discrimination Act provides that the objects of that Act are to:

- give effect to certain international instruments
- eliminate discrimination on the ground of sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy or breastfeeding in a range of areas of public life
- eliminate discrimination on the ground of family responsibilities in work
- eliminate discrimination involving sexual harassment in a range of areas of public life, and
- promote recognition and acceptance of the principle of the equality of men and women.

82. Insertion of new subsection 3(2) into the Act ensures that in giving effect to these objects, which focus on the rights to equality and non-discrimination, appropriate regard must be had to all human rights. This may include, where relevant, the right to freedom of religion.

83. The principles listed in new paragraphs 3(2)(a) and (b) reflect the existing duty of the Commission to ensure that its functions, under the AHRC Act or any other Act, are performed with regard for the indivisibility and universality of human rights and the principle that every person is free and equal in dignity and rights (paragraph 10A(1)(a) of the AHRC Act).

84. To ensure consistency across anti-discrimination law, Items 2 and 6 insert the same subsection into the existing objects clauses of the Age Discrimination Act and the

Disability Discrimination Act respectively. Item 8 inserts a new objects clause into the Racial Discrimination Act, which includes this subsection.