

# EXPOSURE DRAFT OF THE RELIGIOUS DISCRIMINATION BILL 2019

EXPLANATORY NOTES

## **RELIGIOUS DISCRIMINATION BILL 2019**

### **GENERAL OUTLINE**

1. The Religious Discrimination Bill 2019 (the Bill) prohibits discrimination on the ground of religious belief or activity in key areas of public life.
2. This Bill gives effect to three recommendations of the Report of the Expert Panel on Religious Freedom (the Religious Freedom Review) (recommendations 3, 15 and 19).
3. The Religious Freedom Review recognised that there is an opportunity to enhance the statutory protection of the right to freedom of religion in Australia.
4. The right to freedom of religion protects both the freedom to have or adopt a religion or belief and the freedom to manifest that belief. The right to freedom of religion importantly not only protects people who hold religious beliefs, but also protects the right not to hold a religious belief and the right not to engage in religious activities. In addition to these rights, international human rights law also protects the right not to be discriminated against on the basis of one's religious belief or activity, and the right to equal effective protection against such discrimination.
5. All Australians, regardless of their religious belief or activity, should be able to participate fully in our society. All people are entitled not to be discriminated against on the basis of their religious belief or activities in public life, and are entitled to the equal and effective protection of the law.
6. Existing federal anti-discrimination legislation advances the rights to equality and non-discrimination for a wide variety of attributes. However, current protections in Commonwealth, state and territory laws for discrimination on the basis of a person's religious belief or activity are piecemeal, have limited application and are inconsistent across jurisdictions. In order to address this gap in Australia's statutory anti-discrimination framework, the Religious Freedom Review recommended that the Commonwealth develop a Religious Discrimination Act to render it unlawful to discriminate on the basis of a person's religious belief or activity.
7. In implementing this recommendation, this Bill will introduce comprehensive federal protections to prohibit discrimination on the basis of a person's religious belief or activity in a wide range of areas of public life, including in relation to employment, education, access to premises, the provision of goods, services and facilities, and accommodation. This will ensure that all people are able to hold and manifest their faith, or lack thereof, in public without interference or intimidation.
8. This Bill will bring legislative protections for religious belief and activity to the same standard as those already afforded under federal anti-discrimination law to discrimination on the basis of age, disability, sex, sexual orientation, gender identity, intersex status, family responsibilities, marital or relationship status, pregnancy or potential pregnancy, breastfeeding, race, colour, national or ethnic origin, descent or immigrant status.
9. In addition, this Bill is intended to promote attitudinal change, to ensure that people are judged on their capacity and ability, rather than on generally unfounded negative

stereotypes that some may have about people who hold certain religious beliefs or undertake certain religious activities.

10. This objective is strengthened through the creation of the office of the Freedom of Religion Commissioner at the Australian Human Rights Commission (the Commission). As the Religious Freedom Review recognised, the Commission has a leading role to play in educating and engaging with the public about issues regarding freedom of religion. The new Freedom of Religion Commissioner will have responsibility for freedom of religion, including discrimination on the ground of religious belief or activity, at the Commission. The Commissioner will promote understanding of and compliance with this Bill and advocate, inquire into and report on issues pertaining to freedom of religion in Australia.

## **Background**

### **Religious Freedom Review**

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

12. 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.

13. 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 Expert Panel was required to consider the intersections between the enjoyment of the right to freedom of religion and other human rights.

14. 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.

15. The Religious Freedom Review concluded 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.

16. 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.

17. This Bill implements recommendations 3, 15 and 19 of the Religious Freedom Review.

18. Recommendation 3 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.

19. This recommendation is implemented (in respect of this Bill) by clause 3 of this Bill, which introduces an objects clause which specifies that in giving effect to the objects of this 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. Similar provisions will be introduced into objects clauses in existing anti-discrimination law by the Human Rights Legislation Amendment (Freedom of Religion) Bill 2019.

20. Recommendation 15 recommended that the Commonwealth enact a Religious Discrimination Act, to render it unlawful to discriminate on the basis of a person's 'religious belief or activity', including on the basis that a person does not hold any religious belief.

21. This Bill in its entirety implements this recommendation. Specifically, Parts 2 and 3 define the concept of discrimination on the ground of religious belief or activity and prohibit discrimination on the ground of religious belief or activity in key areas of public life.

22. Recommendation 19 recommended that the Commission take a leading role in the protection of freedom of religion, including through enhancing engagement, understanding and dialogue.

23. This recommendation is implemented by Parts 5 and 6 of this Bill, which establish the statutory office of the Freedom of Religion Commissioner at the Commission, and confer functions relating to discrimination on the ground of religious belief or activity on the Commission.

### **Outline of the Bill**

24. This Bill makes discrimination on the ground of religious belief or activity unlawful in specified areas of public life.

25. To ensure consistency as far as possible, the provisions in this Bill reflect the existing prohibitions on discrimination in the *Age Discrimination Act 2004*, *Disability Discrimination Act 1992* and the *Sex Discrimination Act 1984*, with some alterations to reflect the distinct nature of religious belief or activity as a protected attribute.

26. Religious belief or activity is defined broadly under this Bill to include holding, or not holding, a religious belief and engaging in, not engaging in, or refusing to engage in, a lawful religious activity. Discrimination on the ground of religious belief or activity under this Bill is extended to also include discrimination on the basis of past, present or presumed religious belief or activity, as well as discrimination on the basis of characteristics associated with particular religious beliefs or activities.

27. This Bill prohibits both direct discrimination and indirect discrimination on the ground of religious belief or activity. This will ensure that treating a person less favourably because of their religious belief or activity, or imposing apparently neutral conditions, requirements or practices which have the effect of disadvantaging people of a particular religious belief or activity are both made unlawful by this Bill.

28. As part of the prohibition of indirect discrimination, this Bill imposes additional requirements on large business who seek to impose standards of dress, appearance or

behaviour which would have the effect of restricting or preventing employees from making statements of religious belief outside of work. If compliance with such standards is not necessary to avoid unjustifiable financial hardship, these standards will not be reasonable and therefore will constitute unlawful discrimination.

29. In addition, the Bill provides that conditions, requirements or practices imposed on health practitioners which would have the effect of restricting or preventing a health practitioner from conscientiously objecting to providing a health service on the basis of their religious belief or activity are not reasonable in certain circumstances for the purposes of the test of indirect discrimination, and therefore will constitute unlawful discrimination.

30. Certain conduct is not captured by the prohibition on discrimination in this Bill. Conduct engaged in by religious bodies in good faith that reasonably conforms to the doctrines, tenets, beliefs or teachings of their religion is not discrimination on the basis of religious belief or activity for the purposes of this Bill. This protects conduct engaged in by religious educational institutions, charities and other religious bodies which are conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion. This ensures that nothing in this Bill affects the ability for inherently religious organisations to manifest their religious belief and operate in accordance with their religious ethos in good faith.

31. Similarly, a person does not discriminate under this Bill by engaging in reasonable conduct intended to meet a need arising out of a person or group's religious belief or activity or to reduce a disadvantage experienced by a person or group based on their religious beliefs or activities.

32. Part 3 of this Bill provides that it is unlawful to discriminate on the ground of religious belief or activity in the areas of work, education, access to premises, the provision of goods, services and facilities, accommodation, the disposal of land, sport, membership of clubs, the administration of Commonwealth laws and programs and in requesting or requiring certain information.

33. This Part also provides relevant exceptions to the prohibition of discrimination. All of the exceptions within the Bill have a strong policy rationale which justifies allowing otherwise discriminatory conduct.

34. For example, the Bill includes a general exception for discrimination against a person where a reasonable person would conclude that the person has expressed a particular belief that is counselling, promoting, encouraging or urging conduct that would constitute a serious criminal offence. This exception is intended to ensure that the counselling, promotion, encouragement or urging of serious offences, which are inconsistent with Australian values and would cause harm to the individuals or the community at large, are not protected by the Bill or otherwise condoned by anti-discrimination law by being clothed in the mantle of religious belief.

35. The Bill also contains exceptions which themselves protect the right to freedom of religion and the ability of people to manifest their religious belief in community. This includes exceptions for voluntary bodies and clubs whose membership is restricted to persons who have or engage in a particular religious belief or activity.

36. In addition, the Bill contains exceptions which reflect the distinction between public life, which this Bill intends to regulate, and private life, in which individuals are free to conduct themselves in whatever manner they please (so long as such conduct is not otherwise unlawful), such as exceptions for sharehouses and the disposal of land by gift or through wills.

37. Exceptions are also included to account for situations in which this Bill may conflict with other laws, such as in relation to conduct in direct compliance with Commonwealth, state and territory laws and conduct necessary to comply with court and tribunal orders, determinations and industrial instruments.

38. In addition, Part 4 of this Bill provides that a statement of belief does not constitute discrimination under Commonwealth, state or territory anti-discrimination law, nor does it contravene subsection 17(1) of the *Anti-Discrimination Act 1998* (Tas). This will ensure that the ability of people to simply express their genuine religious beliefs in good faith and without malice is not restricted by the operation of any Australian anti-discrimination law.

39. This Bill establishes the statutory office of the Freedom of Religion Commissioner at the Commission, and confers functions on the Commission in relation to discrimination on the grounds of religious belief or activity. These provisions emphasise public awareness and education as critical elements in overcoming discrimination.

40. Complaints of discrimination under this Bill can be made to the Commission. The necessary consequential amendments to ensure the Commission can inquire into and attempt to conciliate complaints under this Bill will be made by the Religious Discrimination (Consequential Amendments) Bill 2019. Where a complaint cannot be successfully conciliated by the Commission, an individual may make an application to the Federal Court or the Federal Circuit Court.

## **NOTES ON CLAUSES**

### **List of abbreviations**

|                               |                                                          |
|-------------------------------|----------------------------------------------------------|
| Acts Interpretation Act       | <i>Acts Interpretation Act 1901</i>                      |
| AHRC Act                      | <i>Australian Human Rights Commission Act 1986</i>       |
| Age Discrimination Act        | <i>Age Discrimination Act 2004</i>                       |
| Commission                    | <i>Australian Human Rights Commission</i>                |
| Disability Discrimination Act | <i>Disability Discrimination Act 1992</i>                |
| Fair Work Act                 | <i>Fair Work Act 2009</i>                                |
| Racial Discrimination Act     | <i>Racial Discrimination Act 1975</i>                    |
| Religious Freedom Review      | <i>Report of the Expert Panel into Religious Freedom</i> |
| Sex Discrimination Act        | <i>Sex Discrimination Act 1984</i>                       |

## **PART 1—PRELIMINARY**

### **Clause 1      Short title**

41. Clause 1 provides for the short title of the Act to be the *Religious Discrimination Act 2019*.

### **Clause 2      Commencement**

42. Clause 2 provides for the commencement of each provision of the Act, as set out in the table at subclause 2(1). The table provides that the whole of this Act commences on a date to be set by Proclamation, or otherwise six months from the day after Royal Assent.

43. 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      Objects of this Act**

44. Clause 3 sets out the objects of this Act.

45. This clause is intended to provide a clear statement of the principles and objectives underpinning the Act. This clause highlights that this Act is intended to promote community understanding that people have the same fundamental rights, regardless of their religious belief or activity.

46. Subclause 3(1) provides that the objects of the Act are:

- a. to eliminate, so far as possible, discrimination on the ground of religious belief or activity in a range of areas of public life
- b. to ensure, as far as practicable, that everyone has the same rights to equality before the law, regardless of religious belief or activity; and
- c. to ensure that people can, consistently with Australia's obligations with respect to freedom of religion and freedom of expression, and subject to specified limits, make statements of belief.

47. This subclause broadly reflects the existing objects clauses of existing federal anti-discrimination laws. In addition, paragraph 3(1)(c) reflects the principles underpinning Part 4, which protects the expression of statements of belief in good faith from the operation of certain provisions of Commonwealth, state and territory anti-discrimination law. The meaning of statements of belief is discussed at clause 41.

48. 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 this Act are to be read as being designed to carry out these objects as far as is possible.

49. Subclause 3(2) provides that in giving effect to the objects of the 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.

50. This implements recommendation 3 of the Religious Freedom Review. The Religious Freedom Review found that the objects clauses of existing 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.

51. Inclusion of subclause 3(2) in this 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 includes the right to freedom of religion.

52. The principles listed in 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 to 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).

53. To ensure consistency across anti-discrimination law, the Human Rights Amendment (Freedom of Religion) Bill 2019 will insert provisions analogous to subclause 3(2) into the existing objects clauses of the Age Discrimination Act, Disability Discrimination Act, Sex Discrimination Act and the new objects clause in the Racial Discrimination Act.

#### **Clause 4 Simplified outline of this Act**

54. This clause provides a simplified outline of the Act to assist the reader.

55. The outline notes that the Act makes discrimination on the basis of religious belief or activity unlawful in a range of areas of public life. This is subject to certain exceptions and exemptions.

56. In addition, the outline notes that statements of belief do not constitute discrimination and that certain conduct involving victimisation and discriminatory advertisements are criminal offences.

57. The outline notes that conduct that is unlawful or an offence constitutes ‘unlawful discrimination’ under the AHRC Act and complaints can be made to the Commission about such conduct.

58. The outline notes that the Act establishes the office of Freedom of Religion Commissioner within the Commission and confers certain functions on the Commission.

#### **Clause 5 Definitions**

59. Clause 5 defines terms that are used elsewhere in the Act.

60. Definitions are explained in the context of the clause to which they are relevant. For example, the extended meaning of the term employment, employer and employee under subclause 5(1) is discussed at clause 13.

61. Subclause 5(1) defines the term ‘religious belief or activity’ for the purposes of this Act to mean:

- a. holding a religious belief;

- b. engaging in lawful religious activity;
- c. not holding a religious belief; or
- d. not engaging in, or refusing to engage in, lawful religious activity.

62. This definition implements Recommendation 15 of the Religious Freedom Review, which recommended that the Religious Discrimination Act make it unlawful to discriminate on the basis of a person's religious belief or activity, including on the basis that a person does not hold any religious belief.

63. This term is defined broadly and explicitly includes not holding a religious belief or not engaging in, or refusing to engage in, a religious activity, in accordance with the recommendation of the Religious Freedom Review. This definition reflects the definition of religious belief or activity (or analogous terms) in state and territory anti-discrimination legislation, such as the *Anti-Discrimination Act 1992* (NT), *Anti-Discrimination Act 1991* (Qld) and the *Equal Opportunity Act 2010* (Vic).

64. The concept of religious belief is not defined for the purposes of this Act. Religious belief is intended to include beliefs associated with major faith traditions (such as Buddhism, Christianity, Hinduism, Islam or Judaism) in addition to the beliefs of smaller and emerging faith traditions.

65. The term religious belief is intended to capture genuine religious beliefs. It is not intended to capture, for the purposes of this Act, beliefs caused by mental illness or which are motivated by criminal intent.

66. It is intended that the attribute of religious belief or activity will capture beliefs, such as atheism and agnosticism, which are defined by reference to a lack of religious belief.

67. However, this definition will not capture non-religious beliefs which are not fundamentally connected to religion. This Act does not protect 'belief' more generally, in the sense protected in Article 18 of the International Covenant on Civil and Political Rights. As such, not holding a religious belief is not intended to capture belief systems, such as veganism and pacifism, which are not fundamentally connected to religion.

68. As the term is defined to include not holding a religious belief, discrimination on the grounds of 'religious belief or activity' will capture instances where a person has been discriminated against because they do not hold a particular religious belief. This reflects the fact that people may experience discrimination both because they have a particular attribute, and because they do not have a particular attribute. For example, discrimination on the ground of religious belief or activity would apply equally to discrimination against a person because they are Sikh, and to discrimination against a person on the basis that they are not Muslim or are not Christian.

69. The concept of religious activity is also not defined for the purposes of this Act. Religious activities may include participating in religious observances (such as prayers, fasting, ceremonies or other holidays), wearing religious dress (such as a hijab, kippah or kirpan) or not engaging in certain conduct in accordance with religious belief (such as not eating meat or drinking alcohol). The expression of a religious belief may also constitute

engaging in a religious activity. For example, evangelising may constitute a religious activity where adherents of that religious group are required, or encouraged, to evangelise.

70. The definition of religious belief or activity is limited to lawful religious activities. This is a similar approach to the *Anti-Discrimination Act 1991* (Qld) and the *Equal Opportunity Act 2010* (Vic). This ensures that this Act does not protect religious activities which are not consistent with Commonwealth, state or territory law, such as religious activities which may constitute criminal conduct. This includes for example, conduct such as forced or child marriages.

71. Religious belief is not similarly limited in this definition as a belief cannot be unlawful until it is expressed. Clause 27 specifies that the expression of religious beliefs which a reasonable person would conclude advocate conduct which would constitute a serious criminal offence are not protected by this Act.

72. Consistent with the approach taken in other Australian anti-discrimination laws, the Act does not seek exhaustively to define the concept of ‘religion’, or further to define the concept of ‘religious belief or activity’. Rather, the Act is informed by the approach taken by the High Court in *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120, which adopted a broad, principled approach to the concept of religion and accepted that faith traditions may emerge or develop over time. Rather than recognise and protect particular doctrines, tenets, or faith traditions, the High Court in that case accepted that it is the dignity of the believer and the freedom to adhere to a religion of his or her choice that are worthy of protection at law. In the same vein, the Act recognises that a prescriptive or exhaustive definition of ‘religion’ or ‘religious belief or activity’ may be too rigid or become easily outdated, and so undermine the principle that the freedom of religion is conferred equally on all.

73. Subclause 5(1) provides that the term ‘person’ for the purposes of this Act has a meaning affected by the Acts Interpretation Act.

74. Section 2C of the Acts Interpretation Act provides that expressions used to denote persons generally, such as person, include a body politic or corporate as well as an individual. Accordingly, consistent with that Act, a person for the purposes of this Act includes natural persons, bodies corporate and bodies politic.

75. The note under the definition of person notes that a body corporate may include a religious body or other religious institution. Religious body is defined in subclause 10(2). The term ‘other religious institutions’ is intended to refer to bodies which are conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion but do not constitute a religious body for the purposes of subclause 10(2) because they engage solely or primarily in commercial activities.

76. This note is not intended to extend the definition of person beyond the meaning given by the Acts Interpretation Act, but is intended to clarify on the face of the Act that a body corporate (which may include a religious body or other religious institution) is a person for the purpose of this Act.

77. As such, it is open for a body corporate to make a complaint under this Act alleging that it had been discriminated against on the basis of its religious belief or activity. In order to

make such a complaint, a body corporate must be able to establish that it has or engages in a religious belief or activity.

78. For example, a religious body corporate which was refused a facility booking in order to undertake a religious activity, such as for communal prayer, may be able to make a complaint under this Act that the refusal constituted discrimination on the basis of the body's religious belief or activity.

#### **Clause 6 Extended meaning of ground**

79. Clause 6 extends the meaning of discrimination on the ground of a person's religious belief or activity.

80. This clause provides that discrimination is unlawful under this Act not only on the basis of a person's current or actual religious belief or activity, but also on the basis of a person's past or presumed religious belief or activity. The clause further extends the grounds on which discrimination is unlawful under this Act to discrimination on the basis of characteristics associated with particular religious beliefs or activities or characteristics which people of that religious belief or activity are generally presumed to have.

81. This approach is consistent with existing anti-discrimination legislation and ensures that all conduct that has a discriminatory intent or effect is made unlawful by this Act, even if such conduct is by reason of a religious belief or activity that the person did not hold at the relevant time.

82. Clause 6 provides that discrimination on the ground of religious belief or activity includes discrimination on the basis of:

- a. characteristics that people of that religious belief or activity generally have
- b. characteristics that people of that religious belief or activity are generally presumed to have
- c. a person's current religious belief or activity
- d. a person's past religious belief or activity
- e. a person's presumed religious belief or activity; and
- f. a person's presumed past religious belief or activity.

83. Subclause 6(a) extends the meaning of discrimination on the basis of religious belief or activity to discrimination on the basis of a characteristic that people who have or engage in the religious belief or activity generally have.

84. For example, a characteristic that Sikh men generally have is the wearing of a turban. Discrimination against a person on the basis that they wore a turban could constitute discrimination on the basis of their religious belief or activity, if the wearing of a turban is a characteristic that they have because they are a Sikh.

85. Subclause 6(b) extends the meaning of discrimination on the basis of religious belief or activity to discrimination on the basis of a characteristic that people who have or engage in the religious belief or activity are generally presumed to have.

86. For example, it may be generally presumed that a characteristic of Muslim men is that they are required to have a beard, although this presumption may not be an accurate representation of Islamic beliefs or activities. Discrimination against a potential male employee on the basis that they have a beard and are therefore presumed to be Muslim could constitute discrimination on the basis of religious belief or activity.

87. Subclause 6(c) extends the meaning of discrimination on the basis of religious belief or activity to discrimination on the basis of the religious belief or activity that the person currently has or engages in. This reflects the definition of religious belief or activity in subclause 5(1).

88. Subclause 6(d) extends the meaning of discrimination on the basis of religious belief or activity to discrimination on the basis of the religious belief or activity that the person has had or engaged in in the past. For the purposes of this subclause, it is irrelevant whether or not the person still has or engages in that religious belief or activity.

89. This subclause recognises that people should not face discrimination on the basis of past religious belief or activity, and reflects that all people should be free to change their religious belief or activity free from coercion or adverse consequences. This protects against discrimination on the basis that a person has converted or no longer holds or engages in a particular religious belief or activity. For example, it could be unlawful to discriminate against someone because they were a convert to Islam from Christianity, or because of Hindu beliefs someone held before deciding to hold no religious belief.

90. Subclause 6(e) extends the meaning of discrimination on the basis of religious belief or activity to discrimination on the basis of the religious belief or activity that the person is thought to have or engage in. For the purposes of this subclause, it is irrelevant whether or not the person actually has or engages in that religious belief or activity.

91. This subclause relates to presumed religious belief or activity. For example, it could be unlawful to discriminate against an Irish person because they are presumed to be Catholic or to discriminate against a person who wears a cross necklace because they are presumed to be Christian.

92. Subclause 6(f) extends the meaning of discrimination on the basis of religious belief or activity to discrimination on the basis of the religious belief or activity that the person is thought to have had or engaged in in the past. For the purposes of this paragraph, it is irrelevant whether or not the person has had or engaged in that religious belief or activity.

93. This subclause relates to past presumed religious belief or activity. For example, if it was presumed that a Buddhist person was a convert to Buddhism and previously had no religious belief or a non-Buddhist religious belief, it could be unlawful to discriminate against the person on the basis of that presumed past belief.

## **PART 2—CONCEPT OF DISCRIMINATION ON THE GROUND OF RELIGIOUS BELIEF OR ACTIVITY**

94. Part 2 of this Act sets out the concept of discrimination on the ground of religious belief or activity.

95. This Part defines discrimination on the ground of religious belief or activity to include direct discrimination and indirect discrimination. Discrimination on the ground of religious belief or activity for the purposes of this Part includes discrimination on the basis of any of the extended grounds as provided by clause 6.

96. This Part also clarifies that certain conduct is not covered by the prohibition of discrimination under this Act. Conduct engaged in by religious bodies in accordance with their faith and reasonable conduct intended to meet a need or reduce a disadvantage arising out of a person or group's religious belief or activity do not constitute discrimination on the grounds of religious belief or activity under this Act.

### **Clause 7 Discrimination on the ground of religious belief or activity—direct discrimination**

97. Clause 7 defines direct discrimination on the ground of religious belief or activity.

98. Direct discrimination occurs where a person treats another person less favourably than someone in similar circumstances, because of that person's religious belief or activity.

99. The test of direct discrimination in this Act reflects the tests of direct discrimination in the Age Discrimination Act, Disability Discrimination Act and the Sex Discrimination Act.

100. Clause 7 defines direct discrimination to comprise three elements:

- a. treatment – the first person treated, or proposed to treat, the other person in a particular way (subclause 7(a))
- b. differential treatment – that treatment is less favourable than the treatment of another person who does not have or engage in the other person's religious belief or activity in circumstances that are not materially different (also known as the comparator element) (subclause 7(a)); and
- c. causation – the reason for the less favourable treatment is the other person's religious belief or activity (subclause 7(b)).

101. Subclause 7(a) specifies that the definition of direct discrimination includes both actual and proposed treatment. This subclause ensures that a person does not actually have to suffer a threatened detriment before being able to bring a complaint for discrimination. For instance, the provision would make clear that it is not only unlawful for an employer to dismiss an employee because of their religious belief or activity, but it is also unlawful for an employer to propose to dismiss an employee because of their religious belief or activity.

102. The differential treatment test in subclause 7(a) requires that the person who discriminates must treat the other person less favourably than a comparator in circumstances which are not materially different.

103. The causation test in subclause 7(b) requires that the discrimination be by reason of the other person's religious belief or activity. This requires a causal connection between the religious belief or activity of the other person and any less favourable treatment afforded to them. However, this does not require an intention or motive to discriminate, nor must the first person have regarded the treatment as less favourable.

104. As provided by clause 9, if an act is done for multiple reasons, the person's religious belief or activity need not be the dominant or substantial reason for the treatment.

**Clause 8 Discrimination on the ground of religious belief or activity—indirect discrimination**

105. Clause 8 defines indirect discrimination on the ground of religious belief or activity.

106. Indirect discrimination occurs where an apparently neutral condition, requirement or practice has the effect of disadvantaging people who have or engage in a particular religious belief or activity.

107. The test of indirect discrimination in this Act is broadly consistent with the tests of indirect discrimination in the Age Discrimination Act and the Sex Discrimination Act.

108. Subclause 8(1) provides that it is discrimination to impose, or propose to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons who have the same religious belief or activity as the aggrieved person.

109. An example of such a condition, requirement or practice could be a condition of employment that all employees are to attend meetings every Friday afternoon. This would disadvantage Jewish employees who leave early on Fridays to observe the Sabbath.

110. Paragraph 8(1)(c) provides that the imposition of a condition, requirement or practice only constitutes indirect discrimination where that condition, requirement or practice is not reasonable. If a condition is reasonable in all of the circumstances, the imposition of that condition will not constitute unlawful discrimination. This reflects the need for people to be able to impose reasonable conditions, even where such conditions may disadvantage a group of people on the basis of their religious belief or activity.

111. Subclauses 8(2) to (6) provide how reasonableness is to be assessed for the purposes of paragraph 8(1)(c).

112. Subclause 8(2) specifies that whether a condition, requirement or practice is reasonable for the purposes of paragraph 8(1)(c) depends on all the relevant circumstances of the case.

113. Subclause 8(2) lists factors which may be taken into account in determining whether a condition, requirement or practice is reasonable. These general factors include:

- a. the nature and extent of the disadvantage;
- b. the feasibility of overcoming or mitigating the disadvantage; and
- c. whether the disadvantage is proportionate to the result being sought.

114. This list is not exhaustive and courts may take into account any other matters they deem relevant in determining the question of reasonableness.

115. For example, a requirement imposed by a cricket club that all batsmen wear a helmet whilst batting for safety reasons may disadvantage persons who wear religious dress, such as Sikh men who wear turbans. However, this could be reasonable if it is necessary for the safety of players and is restricted to on-field activities.

116. Paragraph 8(2)(d) specifies an additional factor to be considered in relation to the reasonableness of employer conduct rules.

117. An employer conduct rule is defined in subclause 5(1) as a condition, requirement or practice that is imposed, or proposed to be imposed, by an employer on its employees or prospective employees that relates to standards of dress, appearance or behaviour of those employees. Examples of employer conduct rules may include dress codes and codes of conduct, whether enforced through company policy or contractual terms.

118. If the relevant condition, requirement or practice imposed by the employer is an employer conduct rule, in determining whether that rule is reasonable, paragraph 8(2)(d) provides that the court may take into account the extent to which the rule would limit the ability of the employee to have or engage in their religious belief or activity. This recognises that standards of dress, appearance or behaviour which disproportionately limit an employee's ability to have or engage in their religious belief or activity are generally not reasonable and should constitute unlawful discrimination under this Act.

119. For example, a requirement that all employees involved in food preparation wear certain clothing for food safety purposes may disadvantage persons who wear religious dress. This is likely to be reasonable if it is necessary to satisfy food safety requirements. However, if the dress code prohibited employees from wearing any form of religious dress that was not related to food safety requirements, or prohibited them from wearing religious dress at all times while in the workplace, this could disproportionately limit the ability of employees to engage in their religious activity, and therefore could be unreasonable.

120. Subclauses 8(3) and (4) provide that certain employer conduct rules imposed by very large businesses (a 'relevant employer') are prima facie unreasonable for the purposes of paragraph 8(1)(c).

121. Subclause 8(3) protects against the imposition of employer conduct rules which would have the effect of restricting or preventing employees from making a statement of belief at a time other than when the employee is performing work. Subclause 5(1) defines statement of belief. The meaning of statement of belief is discussed in relation to clause 41.

122. Subclause 8(3) provides that an employer conduct rule imposed, or proposed to be imposed, by a relevant employer which would have the effect of restricting or preventing an employee from making a statement of belief outside of work hours is not reasonable unless compliance with the rule is necessary to avoid unjustifiable financial hardship to the employer. The provision relates solely to unjustifiable financial hardship. Other forms of hardship to the employer, such as emotional or mental hardship, are not relevant for the purposes of this provision.

123. This provision recognises the fundamental significance of religion in an individual's life, which includes the ability to express their religious beliefs at a time other than when performing work on behalf of the employer. The provision also recognises that the freedom to express religious beliefs in good faith should not be restricted, and that from time to time this freedom may conflict with employer conduct rules (such as codes of conduct intended to protect corporate branding) that may apply to an employee even when they are not engaged in work for their employer.

124. Subclause 8(3) balances these competing considerations by establishing a presumption that, unless compliance with the rule is necessary to avoid unjustifiable financial hardship to the employer, the interference in employees' manifestation of their religion outside of their working lives is not reasonable.

125. The additional requirement to demonstrate unjustifiable financial hardship only applies to employer conduct rules imposed by relevant employers. Subclause 5(1) provides that an employer is a 'relevant employer' at a particular time in a financial year if the employer has, or had in the previous financial year, revenue of at least \$50 million.

126. This ensures that the additional requirements in subclause 8(3) only apply to the largest businesses operating in Australia. The Act recognises that these businesses play a significant role in setting standards of workplace culture across the country. The provision will assist in building a corporate culture that supports religious diversity across the Australian community at large.

127. Paragraph (b) of the definition of 'relevant employer' provides that the Commonwealth, a state or a territory, or a body established for a public purpose by or under a law of the Commonwealth, a state or a territory, are not relevant employers for the purposes of subclause 8(3). This provision captures departments of state as well as agencies, statutory bodies and other government entities, such as government-controlled corporations, regardless of whether the entity is or is not a body corporate.

128. Accordingly, subclause 8(3) does not apply to public sector employers. This recognises that the proper functioning of representative government relies on an impartial, apolitical public service, and there is a legitimate need to impose codes of conduct on public sector employers to protect these unique qualities of public service.

129. Subclause 8(3) only applies to employer conduct rules which restrict religious expression outside of work hours. Nothing in this subclause affects the ability of relevant employers to regulate religious expression at work. The reasonableness of employer conduct rules which restrict religious expression during work must be considered in accordance with the general reasonableness test at subclause 8(2), including paragraph 8(2)(d).

130. If an employer conduct rule is not prima facie unreasonable by virtue of subclause 8(3), a court would still need to consider whether the rule was reasonable in accordance with subclause 8(2), including paragraph 8(2)(d).

131. For the avoidance of doubt, the note under subclause 8(3) clarifies that an employer conduct rule which is unreasonable by virtue of this subclause is also not an inherent requirement of employment for the purposes of the inherent requirements exception in subclauses 31(2)-(7).

132. Subclause 8(4) clarifies that clause 8(3) does not apply to statements which are malicious, would harass, vilify, or incite hatred or violence against a person or group, or which advocate for the commission of a serious criminal offence. These provisions acknowledge that employers may legitimately restrict their employees' religious expression where it may cause harm to a person, group of persons or the community at large.

133. Subclauses 8(5) and (6) relate to the imposition of health practitioner conduct rules.

134. A 'health practitioner conduct rule' is defined in subclause 5(1) as a condition, requirement or practice that is imposed, or proposed to be imposed, by a person on a health practitioner that relates to the provision of a health service by a health practitioner, that would have the effect of restricting or preventing the practitioner from conscientiously objecting to providing the health service because of a religious belief or activity held or engaged in by that practitioner. A 'health practitioner conduct rule', for the purposes of the Act, applies solely to conscientious objections based on beliefs that may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the practitioner's religion.

135. 'Health practitioner' is defined by subclause 5(1) to mean a person who is registered or licensed to provide a health service under a law of a state or territory. In addition, subclause 5(1) defines 'health service' broadly to mean a service provided in the practice of a range of listed health professions. These professions include Aboriginal and Torres Strait Islander health practice, dental, medical, medical radiation practice, nursing, midwifery, occupational therapy, optometry, pharmacy, physiotherapy, podiatry and psychology.

136. The definitions are consistent with the definition of health practitioner in the *Therapeutic Goods Act 1989*, and will ensure that all registered health providers may benefit from the additional protections in subclauses 8(5) and (6).

137. Examples of health practitioner conduct rules may include rules which require doctors, nurses and other health practitioners to undertake procedures, or provide information, prescriptions, or referrals, related to services such as abortion, euthanasia, contraception or sterilisation, regardless of their religious conscientious objections to those services.

138. Subclauses 8(5) and (6) provide that the imposition of health practitioner conduct rules is prima facie not reasonable for the purposes of paragraph 8(1)(c) in certain circumstances.

139. These provisions reflect the significance of maintaining the ability for health practitioners to conscientiously object to providing certain health services in accordance with their religious beliefs, and recognise that health practitioners should not be forced or coerced into acting in contravention of their fundamental religious beliefs.

140. Subclause 8(5) recognises that in some circumstances states and territories allow health practitioners to refuse to provide certain services, such as abortion and voluntary assisted dying, where those services are legalised in their jurisdiction and where the health practitioner has a conscientious objection to those services. The provision further recognises that statutory conscientious objections provisions are primarily a matter for the states and territories. Subclause 8(5) reinforces those state and territory provisions by making clear that, for the purposes of this Act, a health practitioner conduct rule is not reasonable if it is

inconsistent with the provision of the relevant state or territory law that allows the health practitioner to refuse to provide the service if they have a conscientious objection.

141. The reference to ‘law of a State or Territory’ in subclause 8(5) means a law that applies in the jurisdiction where the health practitioner conduct rule is imposed. The provision makes clear that if a person imposes a health practitioner conduct rule that is not consistent with the relevant law, then (regardless of the validity of the rule under the state or territory law) it is unreasonable, and therefore unlawful discrimination, for the purposes of this Act.

142. For example, if a Victorian hospital established a rule that purported to have the effect of requiring a Catholic doctor to provide information about voluntary assisted dying contrary to the conscientious objection protections in the *Voluntary Assisted Dying Act 2017* (Vic), the rule would also be unreasonable under subclause 8(5), and therefore also constitute unlawful discrimination for the purposes of this Act.

143. Subclause 8(5) will not affect the imposition of rules which limit the ability of a health practitioner to refuse to provide a service where they have a conscientious objection, but which are consistent with an applicable state or territory law. For example, it would not be unreasonable under this subclause for a medical practice in Victoria to set a policy requiring a nurse who has a conscientious objection nevertheless to assist a registered medical practitioner in performing an abortion in an emergency where the abortion is necessary to preserve the life of the pregnant woman, as provided for in the *Abortion Law Reform Act 2008* (Vic) if the policy is consistent with that Act.

144. For the avoidance of doubt, the note under subclause 8(5) clarifies that a health practitioner conduct rule which is unreasonable by virtue of this subclause is also not an inherent requirement in the area of work for the purposes of the inherent requirements exception in subclauses 31(2)-(7).

145. In circumstances where a state or territory law does not provide for health practitioners to refuse to provide a service on the grounds of conscientious objections based on their religious belief or activity, subclause 8(6) provides that a health practitioner conduct rule is not reasonable unless compliance with the rule is necessary to avoid an unjustifiable adverse impact on the ability of the person imposing the rule to provide the health service, or on the health of any person who would otherwise be provided with the health service.

146. This recognises that the right to conscientious objection should not be limited unless there would be an unjustifiable adverse impact on third parties, such as the practitioner’s employer and potential patients.

147. For example, if non-compliance with a health practitioner conduct rule could result in the death or serious injury of the person seeking the health service, this would generally amount to an unjustifiable adverse impact.

148. Similarly, non-compliance with a policy that required the sole medical practitioner in a small rural community to prescribe contraception in appropriate cases may amount to an unjustifiable adverse impact on the ability of that practice to provide medical services to that community, and may also have an unjustifiable adverse impact on the health of women seeking contraception (such as women seeking the Pill for non-contraceptive use, such as in

order to treat endometriosis or polycystic ovary syndrome), as they may be unable to access alternative healthcare promptly without significant travel and cost.

149. For the avoidance of doubt, the note under subclause 8(6) clarifies that a health practitioner conduct rule which is unreasonable by virtue of this subclause is also not an inherent requirement of work for the purposes of the inherent requirements exception in clause 31.

150. Subclause 8(7) specifies that for the purposes of subclause 8(1), the burden of proving that a condition, requirement or practice is reasonable in the circumstances rests with the person who imposed the condition, requirement or practice. Placing the burden of proof on the person imposing or proposing to impose the condition, requirement or practice is appropriate as that person would be in the best position to explain or justify the reasons for the condition in all the circumstances, and would be more likely to have access to the information needed to prove that such a condition is reasonable. Conversely, requiring a complainant to prove that conduct is unreasonable is a significant barrier to successfully proving a complaint of indirect discrimination, particularly as the complainant is unlikely to have access to the information required to prove that an action is unreasonable.

151. For example, an employer who imposes uniform standards for food safety purposes is best placed to show why those standards are required and why they are reasonable. An employee or prospective employee is less likely to have access to all the information about food safety requirements for that particular business and any alternatives that may be available to the employer in complying with those standards or imposing that condition.

152. In accordance with this subclause, the note under subclause 8(7) explains that the burden of proving that compliance with an employer conduct rule or health practitioner conduct rule is necessary under subclauses 8(3) and (6) rests with the person who imposed the conduct rule. This is appropriate as the person imposing the rule is best placed to establish the impact of non-compliance.

153. Subclause 8(8) clarifies that in this section, a reference to an employee includes a reference to a prospective employee.

## **Clause 9      Conduct engaged in for 2 or more reasons**

154. Clause 9 provides that where the discriminator has two or more reasons for doing a discriminatory act, the discriminatory reason need only be one of the reasons for the act, whether or not it is the dominant or a substantial reason for the doing of the act.

155. Clause 9 specifies that where conduct is engaged in for multiple reasons, which includes a person's religious belief or activity, then the conduct is taken to be engaged in for that reason. This ensures that the prohibition against discrimination on the basis of religious belief or activity extends to discriminatory acts motivated by more than just religious belief or activity.

156. Subclause 9(b) specifies that a person's religious belief or activity need not be the dominant or a substantial reason for the conduct. This provision recognises that it would be very difficult for a complainant to prove that a discriminatory reason was the dominant or a substantial reason for the conduct. In addition, this provision is intended to avoid situations in which a person is able to avoid liability for otherwise discriminatory conduct where they can

prove that there were additional motivations for their conduct and the person's religious belief or activity was only a secondary motivation.

157. This provision is intended to promote attitudinal change and build community understanding that less favourable conduct which is motivated by a person's religious belief or activity, to whatever extent, constitutes discrimination and is not permissible in public life. This ensures that this Act promotes the elimination of all forms of discrimination on the basis of religious belief or activity, in line with the objects of the Act in clause 3.

158. This provision ensures that there is an effective remedy for discriminatory conduct motivated by a person's religious belief or activity, regardless of whether a person's religious belief or activity was the sole, dominant, or a substantial reason for that conduct.

### **Clause 10 Religious bodies may act in accordance with their faith**

159. Clause 10 provides that certain conduct engaged in by religious bodies in accordance with their faith is not covered by the prohibition of discrimination under this Act.

160. This provision is not framed as an exception to the prohibition of discrimination under Part 3. Rather, this clause clarifies that the conduct outlined in this provision is not, in and of itself, discrimination under this Act.

161. Subclause 10(1) provides that a religious body does not discriminate against another person under this Act by engaging in conduct in good faith that may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion in relation to which the body is conducted.

162. This provision applies to conduct in all of the areas of public life protected in Part 3, Divisions 2 and 3. The application of this provision to all areas of public life recognises the importance of the right to freedom of religion, including the freedom to manifest one's religion through worship, observance, practice and/or teaching in community with others.

163. This provision solely relates to the ability of religious bodies to discriminate against a person on the basis of that person's religious belief or activity. This provision does not affect the operation of other Commonwealth anti-discrimination law and does not provide a basis for religious bodies to engage in conduct in accordance with their religious beliefs which discriminates against persons on the basis of other protected attributes (such as age, sex, disability or race).

164. In order to rely upon this provision, a body must establish that:

- a. it is a religious body within the meaning of subclause 10(2);
- b. the relevant conduct was engaged in in good faith; and
- c. the conduct may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion in relation to which the religious body is conducted.

165. Religious body is defined in subclause 10(2) as:

- a. an educational institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion;
- b. a registered charity conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion (other than a religious charity that engages solely or primarily in commercial activities); or
- c. any other body that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion (other than a body that engages solely or primarily in commercial activities).

166. The term ‘religious educational institution’ for the purposes of paragraph 10(2)(a) includes schools, colleges and universities or any other educational or training institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion.

167. This paragraph will capture the same religious educational institutions as are currently captured by section 38 of the Sex Discrimination Act. Accordingly, a religious educational institution which may discriminate in the provision of education under that Act may also discriminate on the basis of religious belief or activity under this Act.

168. In relation to paragraph 10(2)(b), subclause 5(1) defines a registered charity as an entity registered under the *Australian Charities and Not-for-profits Commission Act 2012* as a charity.

169. This definition will capture all registered charities which are conducted in accordance with a particular religion, regardless of their charitable purpose. Accordingly, it is not necessary for a charity to have the charitable purpose of advancing religion in order to fall within the definition of a religious body. Religious charities with other charitable purposes, such as advancing health or advancing social or public welfare, as well as public benevolent institutions, could be captured by this provision.

170. Paragraphs 10(2)(b) and (c) clarify that the definition of religious body does not include a registered charity or any other body who engages solely or primarily in commercial activities.

171. These provisions recognise that bodies which engage solely or primarily in commercial activities, and are operating within the secular marketplace, should be subject to the prohibition of discrimination in this Act, regardless of their religious affiliation.

172. Commercial activities may include activities such as providing goods, services or facilities to the public, or sectors of the public, on a fee basis. For example, a halal butcher or a Christian-run bakery would not constitute religious bodies for the purpose of this clause as they are primarily engaged in selling goods to the public for profit.

173. However, it is not necessary that a body operate for-profit in order to fall within the commercial exception. For example, a registered charity which primarily sells goods to the general public on a commercial basis will not constitute a religious body for the purposes of this Act even if the profits are directed to other charitable purposes or activities so that it operates as a not-for-profit entity.

174. Religious hospitals and aged care providers are not religious bodies for the purposes of this clause because they provide services to the public on a commercial basis and are not otherwise captured by the definition of ‘religious body’. Accordingly, a religious hospital could not, for example, discriminate against a potential or existing patient on the basis of the patient’s religious belief or activity.

175. Although commercial religious entities are not entitled to rely upon this provision, such entities may rely upon other exceptions in this Act in order to maintain their religious ethos. For example, a religiously-affiliated business could discriminate in employment on the ground of religious belief or activity in relation to senior leadership positions if it was an inherent requirement of those positions that the employee be of the same religion as the business.

176. In order for conduct to be protected by clause 10, the religious body’s conduct must have been engaged in in good faith and must be conduct that may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the relevant religion.

177. It is intended that this provision will apply to conduct that has an intrinsically religious character or is fundamental to the practice of religion, as well as other conduct engaged in by a religious body in good faith in accordance with the doctrines, tenets, beliefs or teachings of that religion.

178. For example, a religious body would not discriminate by engaging in conduct in relation to the ordination, appointment or training of priests, ministers of religion or members of any religion, or the selection or appointment of persons to perform duties or functions for, or to participate in, any religious observance or practice. This could include, for example, a religious order requiring prospective members be of that religion, or for a church to require that anyone taking communion be Christian.

179. In addition, it would not be discrimination for a place of worship to refuse to hire out its facilities for a religious observance of another religion, or to require that only people of the religious belief or activity of that place of worship are able to enter the premises, where this conforms to the doctrines, tenets or beliefs of that religion and is done in good faith.

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

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

**Clause 11 Conduct that is not *discrimination*—reasonable conduct intended to meet a need or reduce a disadvantage**

182. Clause 11 provides that certain beneficial measures to meet a need or to reduce a disadvantage arising out a person or group’s religious belief or activity are not discrimination under this Act.

183. This provision does not operate as an exception to the prohibition of discrimination under Part 3. Rather, this clause clarifies that the conduct outlined in these provisions is not, in and of itself, discrimination under this Act.

184. Subclause 11(1) clarifies that a person does not discriminate against another person under this Act by engaging in conduct that is reasonable in the circumstances, is consistent with the purposes of this Act, and is either:

- a. intended to meet a need arising out of a religious belief or activity of a person or group of persons; or
- b. intended to reduce a disadvantage experienced by a person or group of persons on the basis of the person or group's religious beliefs or activities.

185. This provision recognises the concept of legitimate differential treatment. It is informed by the exemption for positive discrimination in section 33 of the Age Discrimination Act. Similar provisions also exist in other Commonwealth anti-discrimination legislation (for example, section 45 of the Disability Discrimination Act or section 7D of the Sex Discrimination Act).

186. Subparagraph 11(1)(c)(i) allows for certain beneficial conduct which is intended to meet a need arising out of a person or group's religious belief or activity. This can include the provision of certain benefits, such as targeted programs or support. For example, humanitarian programs which provide assistance to support religious groups who have faced persecution on the basis of their religious belief, such as Rohingya Muslim people, may fall within this subparagraph. In addition, measures which are intended to address barriers to participation in public life, such as an employer providing flexible scheduling or providing a dedicated prayer room on work premises, may fall within this subparagraph.

187. In order to fall within the scope of this subparagraph, the relevant conduct must be reasonable in the circumstances and be intended to meet a need arising out of the religious belief or activity of the person or group. Whether certain conduct is reasonable requires consideration of whether it is necessary to meet the identified need. These requirements act as safeguards to ensure that this provision is not abused to justify otherwise discriminatory conduct where it is not reasonable, or where there is no relevant need.

188. In addition the conduct must be consistent with the purposes of the Act. This includes, but is not limited to, the objects of the Act outlined in clause 3. This is intended to capture the broader beneficial purposes for which the Act is established and the aims it is intended to meet.

189. Measures under this subparagraph may continue so far as the need of that person or group continues to exist. As such, conduct may be engaged in to meet an ongoing need and continue on a permanent basis.

190. Subparagraph 11(1)(c)(ii) allows for certain beneficial conduct which is intended to reduce a disadvantage experienced by a person or group on the basis of their religious belief or activity. This is intended to capture policies or programs which are necessary to help a disadvantaged group achieve substantive equality with other religious groups or with the broader community.

191. Measures under this subparagraph could include conduct engaged in to reduce disadvantage or to alleviate unequal access to opportunities for a particular religious group. Where a particular religious group has been historically disadvantaged, or where social circumstances at the time are such that a particular religious group has less access to certain social benefits or opportunities, measures that are aimed at alleviating these problems will be permissible under this clause. For example, employment programs to assist members of a particular religious group who have been historically underrepresented in the workforce to enter the workforce could constitute a measure under this subparagraph.

192. The requirements that conduct under this subparagraph be reasonable, which includes consideration of whether it is necessary to alleviate a disadvantage or substantive inequality, consistent with the purpose of the Act, and intended to reduce a disadvantage, are a safeguard to ensure this provision is not abused to justify discrimination or measures that are intended to disadvantage the particular religious individual or group subject to the measures.

193. Measures under this subparagraph are intended to cease to fall within the scope of this subparagraph once the disadvantage has been overcome and substantive equality has been achieved. However, where substantive equality can only be achieved through the maintenance of such measures, these are likely to be valid indefinitely.

194. It is not intended that conduct falling within subclause 11(1) would disproportionately disadvantage people of different religious beliefs or activities to that of the targeted group, or constitute an impermissible limitation on the rights and freedoms of others. In accordance with paragraphs 11(1)(a) and (b), as part of determining whether conduct is reasonable in the circumstances, it should be considered whether that conduct was engaged in with regard to the indivisibility and universality of human rights and the principle that every person is free and equal in dignity and rights, in accordance with the objects of the Act in subclause 3(2).

195. Subclause 11(2) provides that this clause applies despite anything else in this Act.

## **PART 3—UNLAWFUL DISCRIMINATION**

### **Division 1—Introduction**

#### **Clause 12 Introduction**

196. Clause 12 introduces Part 3 of this Act.

197. Part 3 of this Act sets out when discrimination on the ground of a person's religious belief or activity is unlawful (Divisions 2 and 3) and the associated exceptions which are available (and exemptions which may be granted) in certain circumstances (Division 4).

198. The protected areas of public life in Divisions 2 and 3 and the exceptions in Division 4 are broadly analogous to those provided for by the Age Discrimination Act, Disability Discrimination Act and the Sex Discrimination Act. This Part therefore ensures that discriminatory conduct on the ground of a person's religious belief or activity is protected in the same manner as discrimination on the basis of existing protected attributes including age, sex or disability.

199. The note under subclause 12(1) clarifies that complaints of unlawful discrimination under Part 3 of this Act can be made to the Commission. The necessary consequential amendments to support the ability of the Commission to inquire into complaints of unlawful

discrimination under this Act will be made by the Religious Discrimination (Consequential Amendments) Bill.

## **Division 2—Discrimination in work**

### **Clause 13 Employment**

200. Clause 13 provides that it is unlawful for an employer to discriminate against an employee or prospective employee on the ground of religious belief or activity.

201. Employment is defined broadly under subclause 5(1) to include work under a contract or work that a person is otherwise appointed or engaged to perform, whether on a full-time, part-time, temporary or casual basis, or whether the work is paid or unpaid. Subclause 5(1) also clarifies that an employer includes a person acting or representing themselves to be acting on behalf of an employer.

202. The note following subclause 13(1) clarifies that employment has an extended meaning in this Act, in accordance with the definition under subclause 5(1). The note also clarifies that, in accordance with section 18A of the Acts Interpretation Act, the terms employee and employer have a corresponding extended meaning.

203. This extended meaning of employment includes, for example, contract work, work on commission and appointments, such as appointments to company boards. It is intended that, similar to existing anti-discrimination law, discrimination against contract workers and commission agents on the basis of religious belief or activity would be unlawful under this Act. This ensures that work relationships outside of the traditional employer to employee context are afforded the same protections under this Act.

204. In addition, the extended meaning of employment includes unpaid work, such as work undertaken by volunteers or unpaid interns. This ensures that any person who is undertaking work for an employer is protected from discrimination under this Act, regardless of whether they are paid or not. The inclusion of unpaid work in this Act reflects modern work practices and ensures that workers who are particularly vulnerable to exploitation, such as unpaid interns, cannot be subject to discrimination on the ground of their religious belief or activity merely because they are working in an unpaid capacity.

205. Subclause 13(1) prohibits discrimination in recruitment decisions. This subclause provides that it is unlawful for an employer to discriminate against another person on the ground of their religious belief or activity in the arrangements made for determining who should be offered employment (paragraph 13(1)(a)), in determining who should be offered employment (paragraph 13(1)(b)), or in the terms and conditions on which the employment is offered (paragraph 13(1)(c)).

206. For example, it may be unlawful for an employer to require a person who observes the Jewish Sabbath to attend an interview for an employment opportunity on a Saturday, or for an employer to offer employment to that person on the proviso that they are not allowed to interact with customers if they wear a kippah.

207. Subclause 13(2) prohibits discrimination in the course of an employee's employment. This subclause provides that it is unlawful for an employer to discriminate against an employee on the ground of their religious belief or activity in the actual terms and conditions

afforded to the employee (paragraph 13(2)(a)), by denying or limiting access to opportunities for promotion, transfer or training, or to any other benefits associated with employment (paragraph 13(2)(b)), by dismissing the employee (paragraph 13(2)(c)), or by subjecting the employee to any other detriment (paragraph 13(2)(d)).

208. For example, it may be unlawful for an employer to make training or development opportunities solely available to employees on Friday afternoons, when an employee who observes the Jumu'ah (Muslim Friday prayer) is consistently unable attend, or for an employer to dismiss an existing employee because they had decided to practise Buddhism.

209. This provision is subject to the inherent requirements of the work and domestic duties exceptions in clause 31.

#### **Clause 14 Partnerships**

210. Clause 14 provides that it is unlawful to discriminate in partnerships of 3 or more people on the ground of religious belief or activity.

211. Subclause 14(1) prohibits discrimination in the initial formation of a partnership. This subclause provides that it is unlawful for 3 or more persons proposing to form a partnership to discriminate against a person on the ground of their religious belief or activity in determining who should be invited to become a partner (paragraph 14(1)(a)) or in the terms or conditions upon which they are invited (paragraph 14(1)(b)).

212. Subclause 14(2) prohibits discrimination in the invitation of new persons to join an existing partnership. This subclause provides that it is unlawful for any partner or partners to discriminate against a person on the ground of their religious belief or activity in determining who should be invited to become a partner (paragraph 14(2)(a)) or in the terms or conditions upon which they are invited (paragraph 14(2)(b)).

213. For example, it may be unlawful for a group of five Catholic lawyers proposing to form a partnership to require that one of the lawyers who is a Protestant pay a higher financial contribution to the partnership, or to only invite Catholic lawyers to join the partnership.

214. Subclause 14(3) prohibits discrimination against an existing partner. This subclause provides that it is unlawful for any partner or partners to discriminate against another partner on the ground of their religious belief or activity by denying or limiting access to any benefit (paragraph 14(3)(a)), by expelling the partner (paragraph 14(3)(b)), or by subjecting the partner to any other detriment (paragraph 14(3)(c)).

215. For example, it may be unlawful for a partner in an accounting partnership to expel an existing partner because they are Buddhist or to require a Jewish partner's attendance at events which are consistently held on the Sabbath.

216. This provision is subject to the inherent requirements of the work exception in subclause 31(2).

#### **Clause 15 Qualifying bodies**

217. Clause 15 provides that it is unlawful for a qualifying authority or body to discriminate against a person in relation to authorisations or qualifications on the ground of religious belief or activity.

218. Subclause 15(1) specifies that this provision applies to authorities or bodies that have certain powers in relation to authorisations or qualifications that are required to practice a profession, trade or occupation. This could include, for example, bodies which certify professionals such as lawyers or accountants, or bodies which grant qualifications which are necessary to carry out particular occupations such as surf lifesaving qualifications.

219. Subclause 15(2) prohibits discrimination in the conferral, renewal, extension, revocation, variation or withdrawal of an authorisation or qualification. This subclause provides that it is unlawful for a qualifying authority or body to discriminate against a person on the ground of their religious belief or activity by refusing or failing to confer, renew, extend or vary an authorisation or qualification (paragraph 15(2)(a)), in the terms or conditions on which the authority or body is prepared to confer, renew, extend or vary the authorisation or qualification (paragraph 15(2)(b)), or by revoking, varying or withdrawing the authorisation or qualification (paragraph 15(2)(c)).

220. For example, it may be unlawful for a body registering medical professionals to refuse to renew a person's registration because they had converted to Christianity or to require them to do additional continuing professional development that is not required of non-Christian professionals.

221. This provision is subject to the inherent requirements of the work exception in subclause 31(4).

## **Clause 16 Registered organisations**

222. Clause 16 provides that it is unlawful for a registered organisation, a registered organisation's committee of management or a member of the committee of management to discriminate against a person on the ground of religious belief or activity in relation to membership.

223. Subclause 16(3) defines a registered organisation to mean an organisation registered under the *Fair Work (Registered Organisations) Act 2009*. This includes associations of employers, associations of employees (a union) or an enterprise association.

224. Subclause 16(1) prohibits discrimination in applications for membership of a registered organisation. This subclause provides that it is unlawful for a registered organisation, committee of management or member of a committee of management to discriminate against a person on the ground of their religious belief or activity by refusing or failing to accept an application for membership (paragraph 16(1)(a)) or in the terms or conditions upon which the registered organisation is prepared to admit the person (paragraph 16(1)(b)).

225. For example, it may be unlawful for an enterprise association to refuse a person's application for membership because they regularly attended a Christian church or to require them to pay higher membership fees than other members.

226. Subclause 16(2) prohibits discrimination against existing members. This subclause provides that it is unlawful for a registered organisation, committee of management or member of a committee of management to discriminate against a member on the ground of their religious belief or activity by denying or limiting the member's access to any benefit provided by the registered organisation (paragraph 16(2)(a)), by depriving the member of their membership or varying its terms (paragraph 16(2)(b)), or by subjecting the member to any other detriment (paragraph 16(2)(c)).

227. For example, it may be unlawful for a union to refuse to allow a Buddhist member to participate in industrial action, or to revoke their membership if they refuse to participate in such action on the basis of their religious belief or activity.

### **Clause 17 Employment agencies**

228. Clause 17 provides that it is unlawful for an employment agency to discriminate against a person in the provision of its services on the ground of religious belief or activity.

229. Clause 17 prohibits discrimination in the provision of an employment agency's services. This clause provides that it is unlawful for an employment agency to discriminate against a person on the ground of their religious belief or activity by refusing to provide the person with any of its services (subclause 17(a)), in the terms or conditions on which it offers to provide its services (subclause 17(b)) or in the manner in which it provides its services (subclause 17(c)).

230. For example, it may be unlawful for an employment agency to screen potential applicants for a position on the basis of their religious belief, or to require that a person not wear religious dress to any of their interviews with the agency.

231. This provision is subject to the inherent requirements of the work exception in subclause 31(5).

### **Division 3—Discrimination in other areas**

#### **Clause 18 Education**

232. Clause 18 provides that it is unlawful for an educational institution to discriminate against a student or prospective student on the ground of religious belief or activity.

233. Educational institution is defined broadly in subclause 5(1) to include schools, colleges, universities and other institutions in which education or training is provided.

234. Subclause 18(1) prohibits discrimination in admission decisions. This subclause provides that it is unlawful for an educational institution to discriminate against a prospective student on the ground of their religious belief or activity by refusing or failing to accept an application for admission (paragraph 18(1)(a)), or in the terms or conditions upon which the institution is prepared to admit the person as a student (paragraph 18(1)(b)).

235. For example, it may be unlawful for a school to refuse to admit a student because they were Muslim.

236. Subclause 18(2) prohibits discrimination against existing students throughout their education or training. This subclause provides that it is unlawful for an educational institution

to discriminate against an existing student on the ground of their religious belief or activity by denying or limiting the student's access to any benefit provided by the institution (paragraph 18(2)(a)), expelling the student (paragraph 18(2)(b)) or subjecting the student to any other detriment (paragraph 18(2)(c)).

237. For example, it may be unlawful for a school to provide that a student could not attend after-school activities because they are Hindu, or to expel a student because they converted to Islam.

238. This provision is subject to clause 10, which provides that certain conduct engaged in by religious bodies, which includes religious educational institutions, does not constitute discrimination.

### **Clause 19 Access to premises**

239. Clause 19 provides that it is unlawful for a person to discriminate against another person on the ground of religious belief or activity in relation to the provision of access to public premises and facilities.

240. Subclause 5(1) defines premises non-exhaustively to include structures, buildings, aircraft, vehicles, vessels, places and parts of premises.

241. This provision solely relates to access to, or the use of, premises that the public or a section of the public is entitled or allowed to use, on a commercial or non-commercial basis. Accordingly, this provision does not regulate access to private property.

242. Subclauses 19(a) and (b) prohibit discrimination in relation to access to premises. These subclauses provide that it is unlawful for a person to discriminate against another person on the ground of their religious belief or activity in refusing to allow that person access to, or the use of, public premises (subclause 19(a)), or in the terms and conditions upon which the person is prepared to allow the other person access to, or use of, the public premises (subclause 19(b)).

243. For example, it may be unlawful for a public museum to refuse entry to a person because they wear religious dress, or for a public swimming pool to require people of a certain religious belief to enter using a separate entrance.

244. Subclauses 19(c) and (d) prohibit discrimination in relation to the use of public facilities within such premises. These subclauses provide that it is unlawful for a person to discriminate against another person on the ground of their religious belief or activity in refusing to allow the person the use of any such facilities (subclause 19(c)), or in the terms and conditions upon which the person is prepared to allow the other person the use of such facilities (subclause 19(d)).

245. For example, it may be unlawful for a gym to refuse to allow members of a particular religious faith to use certain equipment, or to provide that if they use such equipment, they clean the equipment afterwards in a way not required of other members.

246. Subclause 19(e) provides that it is unlawful for a person to discriminate against another person on the ground of their religious belief or activity by requiring a person to leave the premises or to cease using any public facilities.

247. For example, it may be unlawful for a cafe to require a person to leave the premises on the basis that they said grace before eating.

### **Clause 20 Goods, services and facilities**

248. Clause 20 provides that it is unlawful for someone who provides goods, services or facilities to discriminate against another person on the ground of religious belief or activity in relation to the provision of such goods, services or facilities.

249. This clause applies to the provision of goods, services and facilities on both a commercial and non-commercial basis. Subclause 5(1) defines services broadly to mean services of any kind. This includes, for example, services relating to banking, insurance, superannuation, grants, loans, credit, finance, entertainment, recreation, refreshment, transport, travel, telecommunications, services provided by a profession or trade, or services provided by government, a government authority or a local government body.

250. Clause 20 prohibits discrimination in the provision of goods, services or facilities. This clause provides that it is unlawful for a person to discriminate against another person on the ground of their religious belief or activity by refusing to provide goods, services or facilities (subclause 20(a)), in the terms or conditions on which those goods, services or facilities are provided (subclause 20(b)) or in the manner in which the goods, services or facilities are provided (subclause 20(c)).

251. For example, it may be unlawful for a halal butcher to refuse to sell meat to a Muslim woman who did not wear a hijab, or to only sell meat at a higher price or of a lower quality to that woman. Similarly, it may be unlawful for a venue to refuse to hire its facilities to a person who intended to use those facilities to undertake their religious activity, such as for an Eid dinner, or to provide the facilities at a higher cost.

### **Clause 21 Accommodation**

252. Clause 21 provides that it is unlawful for a principal or agent to discriminate against another person on the ground of religious belief or activity in relation to accommodation.

253. Accommodation is defined broadly in subclause 5(1) to include both residential and business accommodation.

254. Subclause 21(1) prohibits discrimination in applications for accommodation. This subclause provides that it is unlawful for a principal or agent to discriminate against another person on the ground of their religious belief or activity by refusing an application for accommodation (paragraph 21(1)(a)), in the terms or conditions upon which accommodation is offered (paragraph 21(1)(b)), or by deferring an application for accommodation or giving a person lower priority in a list of applicants (paragraph 21(1)(c)).

255. For example, it may be unlawful for a real estate agent to rank a Buddhist person's application for tenancy below people with other religious beliefs, or to require them to pay a higher bond or undertake not to pray in the accommodation.

256. Subclause 21(2) prohibits discrimination throughout a person's occupation of accommodation. This subclause provides that it is unlawful for a principal or agent to discriminate against another person on the ground of their religious belief or activity by denying or limiting the person's access to any benefit associated with the accommodation

(paragraph 21(2)(a)), by evicting the person (paragraph 21(2)(b)) or by subjecting the person to any other detriment (paragraph 21(2)(c)).

257. For example, it may be unlawful for a real estate agent to stop a resident from using a pool or barbeque area in an apartment block because they wore religious dress, or to evict the resident because they hosted a Shabbat dinner at the accommodation.

258. This provision is subject to the exception for resident accommodation providers in clause 32.

## **Clause 22 Land**

259. Clause 22 provides that it is unlawful for a principal or agent to discriminate against another person on the ground of religious belief or activity in the disposal of land.

260. Clause 22 prohibits discrimination in the disposal of an estate or interest in land. This clause provides that it is unlawful for a person to discriminate against another person on the ground of their religious belief or activity by refusing or failing to dispose of an estate or interest in land to that person (subclause 22(a)) or in the terms or conditions on which the estate or interest in land is offered (subclause 22(b)).

261. For example, it may be unlawful for a principal to refuse to sell their property to a Buddhist family, or to raise their asking price for that particular family.

262. This provision is subject to the exception for the disposal of land by way of wills or gifts in clause 33.

## **Clause 23 Sport**

263. Clause 23 provides that it is unlawful for a person to discriminate against another person on the ground of religious belief or activity in sporting activities.

264. Clause 23 provides that it is unlawful for a person to discriminate against another person on the ground of their religious belief or activity by excluding that person from participation in a sporting activity. Sporting activity includes, for example, umpiring, coaching and the administration of sporting activities.

265. For example, it may be unlawful for a netball club to refuse to allow a person of a particular religious belief to play netball, or to umpire or coach netball.

266. This provision does not affect the ability of sporting organisations to impose reasonable conditions, requirements or practices in relation to a sporting activity, in accordance with clause 8. It would not be unlawful for a sporting organisation to impose reasonable safety requirements, such as a requirement that all players wear a helmet or a requirement that no players may wear jewellery, even though these requirements may have a disproportionate effect on people who wear religious dress, such as Sikh men who wear turbans or Christian people who wear a crucifix.

## **Clause 24 Clubs**

267. Clause 24 provides that it is unlawful for a club, a club's committee of management or a member of the committee of management to discriminate against another person on the ground of religious belief or activity in relation to membership.

268. Club is defined in subclause 5(1) to mean an association of persons which comes together for social, literary, cultural, political, sporting, athletic or other lawful purposes. The club must provide and maintain its facilities at least in part from its own funds. It is not relevant whether the club is incorporated or unincorporated.

269. Subclause 24(1) prohibits discrimination in applications for membership of a club. This subclause provides that it is unlawful for a club, committee of management or member of the committee of management to discriminate against another person on the ground of their religious belief or activity by refusing or failing to accept an application for membership (paragraph 24(1)(a)) or in the terms or conditions upon which the club is prepared to admit the person (paragraph 24(1)(b)).

270. For example, it may be unlawful for a dog club which maintains facilities to refuse a person's application for membership because they are Lutheran or to limit the number of events that they are entitled to attend in a year.

271. Subclause 24(2) prohibits discrimination against existing members. This subclause provides that it is unlawful for a club, committee of management or member of the committee of management to discriminate against another person on the ground of their religious belief or activity in the terms or conditions of membership afforded to the member (paragraph 24(2)(a)), by refusing or failing to accept an application for a particular class of membership (paragraph 24(2)(b)), by denying or limiting the member's access to any benefit provided by the club (paragraph 24(2)(c)), by depriving the member of their membership or varying its terms (paragraph 24(2)(d)), or by subjecting the member to any other detriment (paragraph 24(2)(e)).

272. For example, it may be unlawful for a car club to provide that the highest levels of membership are not open to members who are not Christian, or to not allow non-Christian members to attend car shows or other events hosted by the club.

273. This provision is subject to the exception for clubs whose membership is restricted to people who have or engage in a particular religious belief or activity in clause 34.

### **Clause 25 Requesting or requiring information**

274. Clause 25 provides that it is unlawful for a person to request or require information from another person in order to discriminate against that person on the ground of religious belief or activity.

275. Subclauses 25(a) and (b) provide that it is unlawful for a person to request or require a person to provide information for the purposes of engaging in conduct that would constitute unlawful discrimination under this Part. This prohibition therefore extends to requesting or requiring information for the purposes of engaging in unlawful discrimination in all of the protected areas of public life in this Part. For example, the provision applies to requests for information in order for a school to discriminate against a student in education or for an employer to discriminate against a prospective employee.

276. This prohibition does not extend to requesting information which is not for the purpose of engaging in unlawful discrimination, such as requesting information necessary to determine whether that person could perform the inherent requirements of the work, or requesting information for the purpose of collecting statistical information about the composition of their workforce in terms of religious identity. For example, an employer asking a prospective employee whether they observed any holy days during which they could not work for the purposes of determining whether the prospective employee could undertake the inherent requirements of the work could constitute a non-discriminatory purpose.

277. This provision is most commonly applicable in recruitment situations, but extends to any situation where a person requests information for the purposes of engaging in future conduct which would constitute unlawful discrimination. For example, as noted by the example under subclause 25(b), it may be unlawful for an employer to ask questions in an interview as to what religious belief or activity a prospective employee has or engages in for the purpose of determining who should be offered employment. Similarly, it may be unlawful for a landlord to ask prospective tenants whether they engaged in certain religious activities for the purposes of determining whether to evict those tenants.

#### **Clause 26 Commonwealth laws and programs**

278. Clause 26 provides that it is unlawful for a person to discriminate in the administration of Commonwealth laws and programs.

279. Subclause 26(a) provides that it is unlawful for a person who performs functions or exercises powers under Commonwealth laws or for the purposes of a Commonwealth program to discriminate against a person on the basis of that person's religious belief or activity in the performance of those functions or exercise of those powers. In addition, subclause 26(b) provides that it is unlawful for a person who has any other responsibility for the administration of Commonwealth laws or the conduct of Commonwealth programs to discriminate against a person on the basis of that person's religious belief or activity in fulfilling that responsibility.

280. This prohibition includes programs run by Commonwealth government departments and decisions made by Commonwealth officers under federal law. For example, it may be unlawful for a Commonwealth officer administering a grants program to decide not to grant funding to a person because they had an Islamic name or for a program to unreasonably only provide services on Saturdays when a Jewish person or Seventh Day Adventist observing the Sabbath would be unable to attend.

281. This provision is subject to the exception for conduct in direct compliance with Commonwealth legislation in clause 29.

#### **Division 4—Exceptions and exemptions**

##### **Subdivision A—General exceptions**

#### **Clause 27 Counselling, promoting etc. a serious offence**

282. Clause 27 provides a general exception from the prohibition on discrimination for discrimination on the basis that a person has expressed a particular religious belief and in

doing so counsels, promotes, encourages or urges conduct that would constitute a serious criminal offence.

283. This exception recognises that the protections in this Act from discrimination on the grounds of religious belief or activity should not extend to advocacy for the commission of serious offences under Australian law.

284. This provision does not regulate the holding of religious beliefs, and nothing in this provision interferes with the ability of an individual to freely hold any religious belief. Rather, this provision ensures that certain expressions of particular religious beliefs will not attract the protection of anti-discrimination law.

285. Subclause 27(1) provides that it is not unlawful to discriminate against a person on the ground of their religious belief or activity if:

- a. the person has expressed a particular religious belief (paragraph 27(1)(a))
- b. a reasonable person, having regard to all the circumstances, would conclude that, in expressing the belief, the person is counselling, promoting, encouraging or urging conduct that would constitute a serious offence (paragraph 27(1)(b)); and
- c. at the time the discrimination occurs, it is reasonable to assume that the person holds the particular belief (paragraph 27(1)(c)).

286. Paragraphs 27(1)(a) and (c) clarify that this exception solely applies to religious beliefs that the individual has expressed and currently holds.

287. Paragraph 27(1)(a) requires that the particular religious belief must have been expressed by the individual subject to the discrimination. This exception therefore does not apply to discrimination on the ground of beliefs which are imputed to a person on the basis of their religious belief or activity. This is intended to ensure that the exception does not allow discrimination which is based on religious stereotypes. For example, this exception would not apply to discrimination against a Christian on the basis that they are imputed or presumed to promote slavery due to references to slavery in the Old Testament.

288. This requirement also recognises the distinction between the holding of beliefs, which an individual is free to do, and the expression of those beliefs in the public sphere in a manner which advocates conduct which would constitute a serious offence.

289. Paragraph 27(1)(a) uses the term ‘expresses a particular religious belief’ rather than ‘has or engages in a religious belief or activity’, as used elsewhere in this Act. Although ‘has or engages in a religious belief or activity’ does encompass the expression of religious beliefs, the use of ‘expresses a particular religious belief’ in this provision is intended to reflect the limited application of this provision to only those beliefs which have been outwardly expressed by a person (and which counsel, promote, encourage or urge serious offences). It is not necessary to also apply paragraph 27(1)(a) to religious activities as most forms of religious activity which would engage this provision could be characterised as expressing a religious belief (for example, public prayer) or would be an unlawful religious activity (and so not covered by the Act).

290. A person may express a particular religious belief by making a statement, communication or any other oral or written form of expression of that belief. For example, a person may express a particular religious belief by stating that belief to another person or group of people or writing about that belief online or in an essay or pamphlet.

291. There is no requirement under this paragraph that the belief must have been expressed directly to the discriminator. For example, a person may discriminate against another person on the basis of beliefs that have been expressed in public, in the media, online, or in any forum where the expression is attributable to that particular person.

292. Paragraph 27(1)(c) requires that, at the time the discrimination occurs, it must be reasonable to assume that the individual holds that particular belief. This is an objective test and is intended to ensure that past beliefs are not captured by this exception where it is not reasonable to assume the person still holds that same belief.

293. For example, it may be reasonable to assume that a person still holds a religious belief that adulterous women should be stoned if that belief was expressed the day prior. However, it may not be reasonable to assume that a person holds that belief if it was expressed many years prior, if the person had converted since they expressed that belief, or if the person had subsequently renounced that particular belief.

294. Paragraph 27(1)(b) requires that a reasonable person, having regard to all the circumstances, would conclude that the person, in expressing the belief, is counselling, promoting, encouraging or urging conduct that would constitute a serious offence.

295. This is an objective test and is intended to ensure that the expression of beliefs, or an expression concerning particular religious beliefs, are only captured by this exception where that expression would reasonably be considered to be advocating the commission of a serious criminal offence.

296. For example, it may be reasonable to conclude that a religious leader who directly calls for adherents to use corporal punishment to discipline their wives is advocating the commission of family violence. However, it may not be reasonable to conclude that a member of that community simply reading out relevant religious texts which relate to the use of corporal punishment as discipline is advocating the commission of family violence. Accordingly, this provision is not intended to capture a person merely stating the beliefs of a particular religion or to limit public discourse.

297. Subclause 27(2) defines serious offence for the purposes of subclause 27(1). Subclause 27(2) defines serious offence as an offence involving harm or financial detriment that is punishable by imprisonment for 2 years or more under a law of the Commonwealth, state or territory

298. For the purposes of this clause, harm has the meaning given by the *Criminal Code Act 1995* (the Criminal Code). The Dictionary of the Criminal Code defines harm as physical harm or harm to a person's mental health, whether temporary or permanent, but does not include being subjected to any force or impact that is within the limits of what is acceptable as incidental to social interaction or to life in the community.

299. This definition is intended to capture serious offences which cause harm to individuals and the community at large. For example, it is intended that offences related to

murder, assault, family violence, terrorism, slavery, sexual assault and sexual activity involving children would be captured.

300. Financial detriment is not defined for the purposes of this provision. It is intended that offences related to fraud and dishonesty would be captured by this term.

301. It is intended that this exception will apply to the advocacy of conduct that would constitute a serious offence under any Commonwealth, state or territory law, regardless of the jurisdiction in which the discrimination occurs. As the intention of this provision is not to criminalise conduct, ordinary jurisdictional boundaries are not relevant. Rather, the provision ensures that the protections in the Act do not extend to advocacy for serious offences, and is intended to apply consistently on a national basis.

302. This provision does not limit the application or the operation of any of the other exceptions in this Part.

### **Clause 28 Registered charities**

303. Clause 28 provides a general exception from the prohibition on discrimination for the provision of benefits by registered charities in accordance with their governing rules.

304. This exception is consistent with the existing exemptions for registered charities in section 34 of the Age Discrimination Act, section 49 of the Disability Discrimination Act and section 36 of the Sex Discrimination Act.

305. Subclause 5(1) defines a registered charity as an entity registered under the *Australian Charities and Not-for-profits Commission Act 2012* as a charity.

306. Clause 28 provides that the prohibition on discrimination on the ground of religious belief or activity in work (Division 2) and in other areas (Division 3) does not affect any provision of the governing rules of a registered charity which confers charitable benefits, or allows such benefits to be conferred, on persons of a particular religious belief or activity. Subclause 28(b) clarifies that it is not unlawful to discriminate in giving effect to such a provision.

307. This exception applies to all the areas of public life protected in Divisions 2 and 3 and is intended to operate alongside clause 10, which provides that certain conduct engaged in by religious bodies, which includes religious charities, does not constitute discrimination. This provision ensures that secular registered charities may continue to provide charitable benefits to particular religious groups so long as it is in accordance with their governing rules. This recognises the vital role that charities play in civic life in Australia and that in order to address disadvantage it is often necessary to restrict benefits to those who need it most, which may include restricting benefits to persons of a particular religious belief or activity.

308. For example, it would not be unlawful for a registered charity to set up a leadership program for young Muslim people or to provide free trauma counselling and services for Yazidi refugees.

309. However, this provision does not allow registered charities to discriminate in conferring charitable benefits generally. For example, it would be unlawful for a charity providing general services to assist the homeless to refuse to provide such services to a homeless Sikh person.

310. This exception solely applies to charities registered in accordance with the Australian Charities and Not-for-profits Commission Act. Whether or not a particular benefit is charitable is dependent on the *Charities Act 2013*.

**Clause 29 Conduct in direct compliance with certain legislation etc.**

311. Clause 29 provides a general exception from the prohibition on discrimination for acts done in direct compliance with certain Commonwealth, state and territory legislation.

312. This exception is broadly consistent with the existing exemptions in section 39 of the Age Discrimination Act, section 47 of the Disability Discrimination Act and section 40 of the Sex Discrimination Act.

313. Subclause 29(1) relates to Commonwealth legislation. Subclause 29(1) provides that it is not unlawful for a person to discriminate against another person on the ground of religious belief or activity if the conduct constituting the discrimination is in direct compliance with a provision of a Commonwealth law, or instrument, which is not prescribed by the regulations.

314. This provision addresses situations in which obligations that arise under this Act may conflict with other laws or obligations and recognises that some public policy issues are for the Parliament to determine.

315. Paragraph 29(1)(b) allows for the prescription of Commonwealth laws which would not be protected by this exception. This is a safeguard to ensure that laws under which it would not be appropriate to make decisions which may discriminate on the basis of religious belief or activity are not protected by this exception.

316. Subclause 29(2) relates to law enforcement, national security and intelligence functions and powers. Subclause 29(2) provides that it is not unlawful for a person to discriminate against another person on the ground of religious belief or activity if:

- a. the person is performing a function or exercising a power relating to law enforcement, national security or intelligence under a law or program of the Commonwealth; and
- b. the conduct constituting the discrimination is reasonably necessary in performing the function or exercising the power.

317. National security is defined in subclause 29(5) to have the meaning given by the *National Security Information (Criminal and Civil Proceedings) Act 2004* (NSI Act). Section 8 of that Act defines national security to mean Australia's defence, security, international relations or law enforcement interests, with security, international relations and law enforcement interests given the meaning by sections 9, 10 and 11 of the NSI Act respectively. In particular, section 9 of the NSI Act provides that security has the same meaning as in the *Australian Security Intelligence Organisation Act 1979*. Subclause 29(5) also clarifies that national security for the purposes of this Act includes granting, revoking or denying Australian Government security clearances, within the meaning of the Criminal Code.

318. The terms law enforcement and intelligence take their ordinary meaning. It is intended that together these three terms will encompass functions and powers that include

policing, investigations, intelligence gathering (including defence intelligence) and security vetting.

319. It is intended that this exception will apply to the performance of functions or exercise of powers by, or on behalf of, federal agencies including by the National Intelligence Community, the Australian Federal Police, other agencies or parts of agencies which have such functions or powers, and state and territory agencies when exercising functions or powers under Commonwealth laws or programs.

320. This exception is intended to ensure that nothing in this Act will disrupt the lawful performance or exercise of functions and powers related to law enforcement, national security and intelligence. This will provide clarity that Australian law enforcement, security and intelligence bodies can continue to lawfully perform their powers and functions in circumstances where a person's religious beliefs or activities may have a connection to law enforcement, national security or intelligence. This includes situations in which a person's religious views, in the same way as their political or ideological views, may have relevance to security. Clause 9 of the Act captures conduct done for two or more reasons, making conduct unlawful even if the person's religious belief or activity was not the primary or dominant reason for the conduct.

321. This exception only applies to the performance of powers or exercise of functions relating to law enforcement, national security or intelligence under a law or program of the Commonwealth.

322. This exception also requires the discriminatory conduct be reasonably necessary in exercising those powers or performing the relevant functions. This is an objective standard and will require persons performing functions or exercising powers relating to law enforcement, national security or intelligence to consider whether any conduct which may constitute discrimination under this Act is reasonably necessary in the performance of their functions or the exercise of their powers.

*Example – law enforcement agency investigations*

323. An example of where a person's religious beliefs or activities may be relevant is in the various stages of an investigation by the Australian Federal Police (AFP) into Commonwealth criminal activity that has a religious aspect, justification or motivation as an element of the offence. This is especially applicable for many of the Commonwealth terrorism offences, as the definition of terrorist act in 100.1 of the Criminal Code includes action that is done, or a threat that is made 'with the intention of advancing a political, religious or ideological cause'.

324. A person's religious beliefs or activities may also be relevant in various stages of an investigation by the AFP into other Commonwealth criminal offences where there is a religious motivation for committing the offence, even if religion does not feature in the elements of the offence. For example, this issue may arise in investigations into forced marriage or slavery.

325. The exception in subclause 29(2) will ensure that otherwise lawful action undertaken by the AFP in the course of police powers and functions throughout an investigation will not constitute unlawful discrimination for the purposes of the Act.

326. Subclause 29(3) relates to state and territory legislation. Subclause 29(3) provides that it is not unlawful for a person to discriminate against another person on the ground of religious belief or activity if the relevant conduct was in direct compliance with a provision of a state or territory law which is not prescribed by the regulations.

327. This provision reflects that this Act does not generally intend to override or interfere with state or territory legislation. Conduct in direct compliance with state and territory laws, such as in policing, will not be unlawful under this Act (though such conduct may be regulated through the anti-discrimination legislation of that state or territory).

328. However, this provision allows the Commonwealth to prescribe state or territory laws which would not be protected by this exception. This is a safeguard in the event that a state or territory passed a law which authorised or required discriminatory conduct. For example, if a state or territory passed a law which provided that all people of a particular religious belief or activity could not be educated in public schools, the Commonwealth could prescribe this legislation in the regulations and any conduct done in direct compliance with that legislation would be excluded from this exception and would therefore be unlawful.

329. Subclause 29(4) clarifies that despite subsection 14(2) of the *Legislation Act 2003*, regulations made for the purposes of paragraph 29(3)(b) of this clause may prescribe state or territory provisions as in force at a particular time or as in force from time to time.

330. Subsection 14(2) of the *Legislation Act* provides that legislative instruments may not apply, adopt or incorporate any matter contained in an instrument or other writing (which includes state or territory legislation) as in force or existing from time to time, unless a contrary intention appears. Subclause 29(4) is a standard provision to ensure that subsection 14(2) does not operate to prevent the regulations prescribing state or territory laws as in force or existing from time to time. The overriding of subsection 14(2) of the *Legislation Act* is necessary in order to provide flexibility in the way in which laws are prescribed by the regulations under this subclause.

331. The Commonwealth, state and territory provisions that are prescribed by the regulations will be publicly accessible through relevant public legislation databases.

### **Clause 30 Orders, determinations and industrial instruments**

332. Clause 30 provides a general exception from the prohibition on discrimination for conduct necessary to comply with orders of courts or tribunals, determinations and industrial instruments.

333. This provision addresses situations in which obligations that arise under this Act may conflict with orders of courts or tribunals, determinations and industrial instruments. This provision is necessary to ensure that this Act does not undermine the proper functioning of Australia's judicial and industrial relations systems.

334. This exception is broadly consistent with the existing exemptions in section 39 of the *Age Discrimination Act*, section 47 of the *Disability Discrimination Act* and section 40 of the *Sex Discrimination Act*.

335. Subclause 30(a) provides that it is not unlawful for a person to discriminate against another person on the ground of religious belief or activity if the relevant conduct was necessary to comply with an order of a Commonwealth, state or territory court or tribunal.

336. Subclauses 30(b) and (c) provide that it is not unlawful for a person to discriminate against another person on the ground of religious belief or activity if the relevant conduct was necessary to comply with:

- a. an order, determination or award of a court or tribunal with the power to fix minimum wages or other employment terms and conditions (subclause 30(b))
- b. a fair work instrument, which includes a modern award, enterprise agreement, workplace determination or an order of the Fair Work Commission (paragraph 30(c)(i)); or
- c. a transitional instrument or Division 2B state instrument within the meaning of the *Fair Work (Transitional Provisions and Consequential Amendments Act 2009)* (paragraph 30(c)(ii)).

337. For example, it is not unlawful for an employer to require that all employees take the Christmas period off using annual leave for non-public holidays if this is specified in the relevant enterprise agreement.

338. The Fair Work Act provides a separate statutory regime to ensure that terms of modern awards and enterprise agreements are not discriminatory (see section 153 and subsection 186(4) of the Fair Work Act). This includes terms which discriminate on the basis of religion.

339. This exception does not leave individuals without a remedy if they are subject to discrimination which was necessary to comply with an industrial instrument. Individuals, groups and trade unions may lodge a complaint with the Commission alleging that a person has done a discriminatory act under an industrial instrument, which can then be referred to the Fair Work Commission (see section 46PW of the AHRC Act).

340. A discriminatory act under an industrial instrument is defined as an act that would be unlawful under federal anti-discrimination law, but for the fact the act was done in direct compliance with the industrial instrument. The necessary consequential amendments to extend this definition to acts which are unlawful under this Act will be made by the Religious Discrimination (Consequential Amendments) Bill 2019.

## **Subdivision B—Specific exceptions relating to particular areas of public life**

### **Clause 31 Exceptions relating to work**

341. Clause 31 provides specific exceptions from the prohibition on discrimination in work in Division 2 of Part 3.

342. Subclause 31(1) provides an exception in relation to domestic duties.

343. Subclause 31(1) provides that it is not unlawful for a person to discriminate against a prospective employee on the ground of religious belief or activity in the arrangements made for the purpose of determining who should be offered employment, or in determining who

should be offered employment, where that employment is to perform domestic duties at that person's private place of residence. 'Domestic duties' for the purposes of subclause 31(1) may include core and capacity building supports provided to people with disability.

344. This exception reflects the distinction between public life, where discrimination is prohibited, and private life, which is not regulated by this Act. For example, it would not be unlawful for a person hiring a live-in nanny or in-home carer services to require that they be of the same religious belief or activity as that person. This exception is consistent with the existing exemptions for domestic duties in subsection 18(3) of the Age Discrimination Act, subsection 15(3) of the Disability Discrimination Act and subsection 14(3) of the Sex Discrimination Act.

345. Subclause 31(2) provides an exception in relation to the inherent requirements of the work. This reflects the existing exemptions in subsection 18(4) of the Age Discrimination Act, section 21A of the Disability Discrimination Act and section 30 of the Sex Discrimination Act.

346. Subclause 31(2) provides that it is not unlawful for a person to discriminate against another person on the ground of religious belief or activity in employment or in a partnership if the other person is unable to carry out the inherent requirements of the employment or the partnership because of their religious belief or activity.

347. The High Court has held that whether certain requirements constitute inherent requirements of particular work depends on whether the requirements are 'something essential' to, or an 'essential element' of, the particular position. The High Court held that this question must be answered by reference not only to the terms of the employment contract but also by reference to the function which the employee performs as part of the employer's undertaking and by reference to the organisation (*Qantas Airways Ltd v Christie* (1998) 193 CLR 280).

348. The inherent requirements exception applies in relation to all work relationships covered by this Act (being employees, which has an extended meaning under this Act, and partners) and applies to the following work-related activities:

- c. the arrangements made for determining who should be offered employment
- d. determining who should be offered employment or who should be invited to become a partner
- e. the terms or conditions on which employment is offered, or on which a person is invited to become a partner
- f. the terms or conditions of employment that the employer affords the employee
- g. determining who should be offered promotion or transfer; or
- h. dismissing the employee or expelling a partner.

349. For example, it would not be unlawful for a store only open on Saturdays to not hire a Jewish person because they observed the Sabbath and therefore could not work on Saturdays. Additionally, it would not be unlawful for an organisation which solely provided support

services to women at risk to dismiss an employee whose religious belief did not allow them to be alone with women.

350. Subclause 31(3) clarifies that the exception does not apply in relation to denying or limiting an employee's access to opportunities for training or any other benefits associated with employment, or a partner's access to any benefit arising from being a partner, other than in determining who should be offered promotion or transfer. In addition, subclause 31(3) clarifies that the exception does not apply in relation to subjecting an employee or a partner to any other detriment.

351. Accordingly, this exception extends not only to offers of employment, but also to other work-related activities, such as dismissal and opportunities for promotion or transfer. The scope of this exception reflects the scope of the inherent requirements exemption in section 21A of the Disability Discrimination Act.

352. The scope of this provision recognises that it is necessary to consider whether a person can carry out the inherent requirements of each particular position they may hold. A person's ability to carry out the inherent requirements of their current position does not necessarily mean that they could carry out the inherent requirements of a promotion or transfer.

353. For example, it may be an inherent requirement of senior leadership positions at a religiously-affiliated business that those leaders are adherents of that religion, which is not an inherent requirement of more junior positions. It would therefore not be unlawful for that business not to promote an existing junior employee to that position if they were not an adherent of that religion.

354. In addition, the scope of this exception ensures that it is not unlawful to dismiss a person on the basis that, in the course of their work, they become unable to carry out the inherent requirements work. This recognises that religious belief or activity may change over an individual's lifetime. As such, a person may be able to perform the inherent requirements work when they are first hired, but they may later convert to a different religious belief or start engaging in different religious activities which means that they can no longer perform the inherent requirements of the work.

355. For example, if an employee who was hired by a defence company as a weapons engineer converted to become a Quaker and as such refused to manufacture any weaponry to be used in conflict, it would not be unlawful to dismiss that employee as they could no longer carry out the inherent requirements of the work.

356. Subclause 31(6) provides that a requirement to comply with an employer conduct rule which is unreasonable by virtue of subclause 8(3) is not an inherent requirement of employment for the purposes of subclause 31(2). Similarly, subclause 31(7) provides that a requirement to comply with a health practitioner conduct rule which is unreasonable by virtue of subclause 8(5) or (6) is not an inherent requirement of work for the purposes of subclauses 31(2), (4) or (5). These provisions clarify that employers (or other relevant persons in the case of a health practitioner conduct rule) may not argue that compliance with such rules is an inherent requirement of work in order to discriminate against their employees or prospective employees on that basis.

357. Subclause 31(4) provides that it is not unlawful for a qualifying body to discriminate against another person on the ground of religious belief or activity if the person is unable to carry out the inherent requirements of the profession, trade or occupation because of their religious belief or activity.

358. For example, it would not be unlawful for a qualifying body to refuse to issue a certificate in meat processing to a Jain person who is vegetarian and cannot harm animals in accordance with the tenets of Jainism, as slaughter or butchery would be an inherent requirement of that occupation. Additionally, it would not be unlawful for a qualifying body to revoke the qualifications of a tax accountant who held a religious belief that no one should have to pay tax and had refused to complete tax returns on that basis.

359. Subclause 31(5) provides that it is not unlawful for an employment agency to discriminate against another person on the ground of religious belief or activity if the person is unable to carry out the inherent requirements of the work sought because of their religious belief or activity.

360. For example, it would not be unlawful for an employment agency to not interview a person for a position as a sommelier if that person does not drink alcohol in accordance with their religious belief.

### **Clause 32 Exception for accommodation provider who is resident etc.**

361. Clause 32 provides a specific exception from the prohibition on discrimination in accommodation for sharehouse situations where the accommodation provider, or their near relative, is resident.

362. Clause 32 provides that it is not unlawful for a person to discriminate against another person on the ground of religious belief or activity in the provision of accommodation if that person or their near relative lives, and intends to continue to live, on the relevant premises, and the accommodation is offered for no more than three other people.

363. Subclause 5(1) defines near relative to include spouses or de facto partners of the accommodation provider, as well as parents, grandparents, children, grandchildren, siblings, including step-relations of all of these categories, and anyone who has any of those relationships to the spouse or de facto partner of the accommodation provider. The terms child, step-child, de facto partner, parent and step-parent are also defined in subclause 5(1).

364. This exception reflects the distinction between public life, where discrimination is prohibited, and private life, which is not regulated by this Act, and is consistent with the existing exemptions for sharehouse situations in subsection 29(3) of the Age Discrimination Act, subsection 25(3) of the Disability Discrimination Act and subsection 23(3) of the Sex Discrimination Act.

365. For example, it would not be unlawful for a homeowner seeking a tenant for their spare room to require that the tenant be of the same religious belief or activity as the homeowner.

### **Clause 33 Exception for disposal of land**

366. Clause 33 provides a specific exception from the prohibition on discrimination in the disposal of land for the disposal of land by wills and gifts.

367. Clause 33 provides that it is not unlawful for a person to discriminate against another person on the ground of religious belief or activity in relation to the disposal of an estate or interest in land by will or by gift.

368. This clause recognises that individuals are free to dispose of their land through private means in the manner in which they determine, as distinct from the disposal of land in the public marketplace. This exception is consistent with the existing exemptions for the disposal of land in subsection 30(2) of the Age Discrimination Act, subsection 26(2) of the Disability Discrimination Act and subsection 24(2) of the Sex Discrimination Act.

369. For example, it would not be unlawful for a person to require that their beneficiary adhere to a particular religious belief in order to take ownership of the land.

#### **Clause 34 Exception relating to clubs**

370. Clause 34 provides a specific exception from the prohibition on discrimination in the membership of clubs.

371. Clause 34 provides that it is not unlawful to discriminate against a person on the ground of religious belief or activity in relation to the membership of a club, if membership of that club is restricted to persons who have or engage in a particular religious belief or activity, and the person does not have or engage in that religious belief or activity.

372. This provision is intended to operate alongside clause 10, which provides that certain conduct engaged in by religious bodies, which may include certain religious clubs, does not constitute discrimination. This provision ensures that it is not unlawful for clubs with membership based on religious criteria, but which may not constitute religious bodies for the purposes of clause 10 because they are not conducted in accordance with the doctrines, tenets, beliefs or teachings of the religion, to require members and potential members to be of that religious belief or activity.

373. This recognises the significant and meaningful role that many religious clubs play in the community, including in providing support to members and promoting, advocating and protecting the interests of people in their particular religious group. This exception is consistent with the existing exemptions for clubs in subsection 27(4) of the Disability Discrimination Act and subsection 25(3) of the Sex Discrimination Act.

374. For example, it would not be unlawful for a Shaolin Kung Fu club which requires all members to be Buddhist to refuse membership to a person who was not Buddhist.

#### **Clause 35 Exception relating to voluntary bodies**

375. Clause 35 provides a specific exception from the prohibition on discrimination in relation to voluntary bodies.

376. Subclause 5(1) defines a voluntary body as a not-for-profit association or other body (which may either be incorporated or unincorporated). Subclause 5(1) specifies that a voluntary body does not include a club, a statutory body established under Commonwealth state or territory legislation, or an association that provides grants, loans, credit or finance to its members.

377. Consistent with other Commonwealth anti-discrimination laws, clubs and voluntary bodies are distinct concepts under this Act. For example, a club must provide and maintain facilities, at least in part, from its own funds, and there is no requirement that a club be not-for-profit.

378. Subclause 35(2) provides that it is not unlawful for a voluntary body to discriminate against a person on the ground of religious belief or activity in relation to admission as a member of that body (paragraph 35(2)(a)), or in the provision of benefits, facilities or services to members of that body (paragraph 35(2)(b)).

379. Subclause 35(1) specifies that this exception solely applies to voluntary bodies whose membership is restricted to persons who have or engage in a particular religious belief or activity

380. This provision is intended to operate alongside clause 10, which provides that certain conduct engaged in by religious bodies, which may include certain religious voluntary bodies, does not constitute discrimination. This provision ensures that it is not unlawful for voluntary bodies with membership based on religious criteria, but which may not constitute religious bodies for the purposes of clause 10 because they are not conducted in accordance with the doctrines, tenets, beliefs or teachings of the religion, to discriminate in the admission of members and the provision of benefits, facilities or services to members.

381. For example, it would not be unlawful for a Jewish body to only provide certain services to Orthodox members.

382. This exception does not extend to other possible acts of discrimination by voluntary bodies, such as in employment or in the provision of services to the public.

383. This provision protects the right to freedom of assembly as it allows a voluntary organisation to choose its members, and provide benefits to those members, in any way in which the members of that organisation agree. This exception is broadly consistent with the existing exemptions for voluntary bodies in section 36 of the Age Discrimination Act and section 39 of the Sex Discrimination Act

### **Subdivision C—Exemptions granted by the Commission**

#### **Clause 36 Commission may grant exemptions**

384. Clause 36 provides that the Commission may grant temporary exemptions for conduct that would otherwise constitute unlawful discrimination under this Act.

385. Subclause 36(1) provides that the Commission may grant an exemption in respect of discrimination in work (Division 2) or discrimination in other areas, such as education or goods, services and facilities (Division 3).

386. The Commission is currently able to grant temporary exemptions under the Age Discrimination Act, Disability Discrimination Act and the Sex Discrimination Act. These provisions provide flexibility and recognise that in particular circumstances, conduct which would otherwise be unlawful discrimination should be permitted on a temporary basis. This may include providing exemptions on a transitional basis, such as providing protection for organisations while they transition toward full compliance with this Act, or addressing circumstances where considerable adjustments may need to be made.

387. Subclause 36(1) specifies that the grant of a temporary exemption must be done by notifiable instrument. This requirement ensures that the community at large is aware of temporary exemptions granted by the Commission. It is intended that such an instrument would set out the findings of the Commission, refer to the evidence on which those findings are based, and detail the reasons for making the decision.

388. Subclause 36(2) clarifies the content of a temporary exemption. In accordance with this subclause, the exemption must specify those covered by the exemption, the provisions of this Act to which the exemption applies and the period for which the exemption is granted. Paragraph 36(2)(c) clarifies that the exemption must not be granted for a period of more than five years.

389. Subclause 36(3) provides that the exemption may be granted subject to terms and conditions specified in the instrument and may apply only in relation to the circumstances or activities specified in the instrument.

### **Clause 37 Applying for an exemption**

390. Clause 37 provides that a person or body, or a group of people or bodies, may apply to the Commission for the grant of a temporary exemption under clause 36.

391. Subclause 37(2) provides that an application must be in a form approved by the Commission in writing. The Commission may vary this form at any time.

### **Clause 38 Effect of exemptions**

392. Clause 38 provides that conduct engaged in in accordance with a temporary exemption granted by the Commission under clause 36 is not unlawful under the relevant provisions of this Act.

393. Clause 38 clarifies that a temporary exemption applies to both the people or bodies covered by the exemption, as well as employees or persons under the direction or control of a person or body that is covered by the exemption.

### **Clause 39 Variation and revocation of exemptions**

394. Clause 39 provides that the Commission or the Minister may vary or revoke a temporary exemption granted under clause 36.

395. Subclause 39(1) specifies that the variation or revocation of a temporary exemption must be done by notifiable instrument. This requirement ensures that the community at large is aware of any amendments to existing temporary exemptions, or the revocation of temporary exemptions. It is intended that such an instrument detail the reasons for revoking or varying the exemption.

396. Subclause 39(2) clarifies that the variation or revocation takes effect on the day specified in the notifiable instrument.

### **Clause 40 Review by Administrative Appeals Tribunal**

397. Clause 40 provides that a person affected by a decision under this subdivision may seek a review of that decision by the Administrative Appeals Tribunal.

398. This clause provides that a person may make an application to the Administrative Appeals Tribunal for review of a decision by the Commission in relation to the grant of a temporary exemption under clause 36, or for review of a decision by the Commission or the Minister in relation to the variation or revocation of an existing temporary exemption under clause 39.

#### **PART 4—STATEMENTS OF BELIEF DO NOT CONSTITUTE DISCRIMINATION ETC.**

##### **Clause 41 Statements of belief do not constitute discrimination etc.**

399. Clause 41 protects statements of belief that are made in good faith from the operation of certain provisions of Commonwealth, state and territory anti-discrimination law.

400. Subclause 41(1) provides that a statement of belief does not constitute discrimination for the purposes of any anti-discrimination law (within the meaning of the *Fair Work Act 2009*), contravene subsection 17(1) of the *Anti-Discrimination Act 1998* (Tas) or contravene a provision of a law prescribed by the regulations.

401. This provision is intended to protect the rights to freedom of expression and freedom of religion by ensuring that a person may express their religious belief in good faith regardless of Commonwealth, state or territory anti-discrimination laws that might have otherwise made that statement unlawful.

402. A key aspect of protecting the right to freedom of religion is protecting the ability of individuals to explain, discuss and share their fundamental beliefs. Protecting the freedom to express religious beliefs civilly and as part of public discourse is an essential part of maintaining a healthy and functioning democracy.

403. This clause does not protect the expression of all beliefs generally, but solely relates to the making of ‘statements of belief’. ‘Statement of belief’ is defined in subclause 5(1) to include two types of statements.

404. Firstly, paragraph (a) of the definition provides that a statement constitutes a statement of belief if it is made in good faith and is of a religious belief which is held by the person making the statement and that may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion.

405. Paragraph (a) refers to ‘religious belief’ only which is intended as a narrower concept to the attribute of religious belief or activity. In particular, it is not intended that religious belief for the purposes of this paragraph includes not holding a religious belief.

406. This definition is limited to beliefs which are genuinely held by the person making the statement. The definition will not capture religious beliefs which may not reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the relevant religion.

407. For example, a statement made in good faith by a Christian of their religious belief that unrepentant sinners will go to hell may constitute a statement of belief. However, a statement made in good faith by that same person that all people of a particular race will go to hell may not constitute a statement of belief as it may not reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of Christianity.

408. This definition will also capture intra-faith criticism. For example, a statement made in good faith by an Orthodox Jewish person of their religious belief that Jewish converts are not Jewish may constitute a statement of belief if that belief may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of Orthodox Judaism.

409. Secondly, paragraph (b) of the definition of statement of belief provides that a statement constitutes a statement of belief if it is made in good faith by a person who does not hold a religious belief and is of a belief about religion held by the person that arises directly from the fact that the person does not hold a religious belief.

410. This paragraph ensures the provision protects the expression of atheist and agnostic beliefs.

411. This definition solely captures beliefs about religion which arise directly because the person does not hold a religious belief. This may include beliefs which dispute the existence of religion, or which criticise religion or aspects of religion, and which the person holds because they do not hold a religious belief. It is not intended that this definition would capture philosophical beliefs which are not directly connected to a lack of religious belief.

412. For example, a statement made in good faith by an atheist explaining that they believe prayer to be useless, or a statement made in good faith by an agnostic that the existence of a god can never be known, may constitute a statement of belief.

413. However, a statement made by a vegan that criticises halal slaughter as constituting animal cruelty would not constitute a statement of belief as the belief does not arise directly from the fact that the person does not hold a religious belief.

414. Both definitions of statement of belief require that statements are made in good faith. For example, statements which are not made conscientiously or which are made for an improper purpose would not constitute a statement of belief.

415. Paragraph 41(1)(a) provides that a statement of belief does not constitute discrimination for the purposes of any anti-discrimination law within the meaning of the *Fair Work Act 2009*.

416. Subsection 351(3) of the Fair Work Act provides that the four existing Commonwealth anti-discrimination Acts (the Age Discrimination Act, the Disability Discrimination Act, the Racial Discrimination Act and the Sex Discrimination Act), as well as the relevant anti-discrimination Act or equal opportunity Act in each state and territory, are anti-discrimination laws for the purposes of that Act. Consequential amendments will be made to the Fair Work Act by the Religious Discrimination (Consequential Amendments) Bill 2019 to also prescribe this Act as an anti-discrimination law for the purposes of the Fair Work Act.

417. Accordingly, a statement of belief will not constitute discrimination for the purposes of this Act and existing Commonwealth, state and territory anti-discrimination law.

418. This provision applies solely to an action for discrimination under those Acts. This includes both direct and indirect discrimination, as well as racial discrimination under section 9 of the Racial Discrimination Act. It does not apply to harassment (including sexual

harassment), vilification or incitement under an anti-discrimination law (within the meaning of Fair Work Act).

419. In addition, a statement of belief will not constitute adverse action under the Fair Work Act. This is because paragraph 351(2)(a) of that Act provides that subsection 351(1) does not apply to conduct that is not unlawful under any anti-discrimination law listed in subsection 351(3) in force in the place where the action is taken.

420. Clause 41 does not affect actions for other unlawful conduct or offences under those Acts, such as harassment, vilification, or offences such as discriminatory advertisements or victimisation. For example, this provision does not affect the prohibition of offensive behaviour based on racial hatred in Part IIA of the Racial Discrimination Act.

421. Paragraph 41(1)(b) provides that a statement of belief does not contravene subsection 17(1) of the *Anti-Discrimination Act 1998* (Tas). Subsection 17(1) prohibits conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of a gender, race, age, sexual orientation, lawful sexual activity, gender identity, intersex variations of sex characteristics, disability, marital status, relationship status, breastfeeding, parental status or family responsibilities.

422. This subsection is specifically included for the purposes of this provision given its broad scope and demonstrated ability to affect freedom of religious expression. Tasmania is the only state or territory jurisdiction with a provision of this nature.

423. For example, a complaint that a statement of belief regarding a biblical view of marriage offends, humiliates, intimidates, insults or ridicules a person on the basis of their sexual orientation would not be made out under subsection 17(1) of the *Anti-Discrimination Act 1998* (Tas) if the requirements of this provision were met.

424. In addition, paragraph 41(1)(c) provides that a statement of belief does not contravene a provision of a law prescribed by the regulations. This regulations making power provides flexibility and acts as a safeguard in the event that other Commonwealth, state or territory laws are considered to unreasonably limit freedom of religious expression. Regulations made under clause 68 are legislative instruments and are subject to disallowance. This will ensure appropriate parliamentary scrutiny of any additional provisions prescribed for the purposes of this clause, including by the Parliamentary Joint Committee on Human Rights.

425. Subclause 41(2) provides that subclause 41(1) does not apply to certain statements which are malicious, would harass, vilify or incite hatred or violence against a person or group or which advocate for the commission of a serious criminal offence. This subclause provides a safeguard to ensure that harmful religious expression is not protected by this provision.

426. Paragraph 41(2)(a) provides that subclause 41(1) does not apply to statements that are malicious. This is in addition to the good faith requirements contained within the definition of statement of belief in subclause 5(1). Accordingly, statements which are made with ill will or improper intention, such as to spite, hurt or harm another person, will not fall within the protection of subclause 41(1)

427. Paragraph 41(2)(b) provides that subclause 41(1) does not apply to a statement that would, or is likely to, harass, vilify or incite hatred or violence against another person or

group of persons. This recognises that the law should not protect and sanction harmful religious expression, such as expression which constitutes harassment, hate speech, vilification or incitement to violence. This provision will therefore not operate to override Commonwealth, state and territory harassment, vilification and incitement to hatred or violence provisions.

428. Finally, paragraph 41(2)(c) provides that subclause 41(1) does not apply to a statement that is covered by paragraph 27(1)(b). Paragraph 27(1)(b) relates to the expression of particular religious beliefs that a reasonable person, having regard to all the circumstances, would conclude counsel, promote, encourage or urge conduct that would constitute a serious offence.

429. This paragraph will ensure that this clause does not protect statements of belief which advocate for the commission of serious criminal offences.

430. As clause 41 will directly affect the operation of state and territory anti-discrimination laws, nothing in clause 60 is intended to detract from the operation of this clause.

431. Clause 41 will not affect the operation of any other legislation at a Commonwealth, state or territory level, other than those listed in, or prescribed for the purposes of, subclause 41(1). For example, this provision will not protect statements of belief which contravene defamation or criminal law.

## **PART 5—OFFENCES**

432. Part 5 of this Act sets out the offences under this Act, being victimisation of a person who takes action under this Act and discriminatory advertisements.

433. The offences established by this Part fall under the definition of ‘unlawful discrimination’ in section 3 of the AHRC Act and may therefore give rise to a complaint of unlawful discrimination to the Commission. The necessary consequential amendments to support the ability of the Commission to inquire into complaints of unlawful discrimination under this Act will be made by the Religious Discrimination (Consequential Amendments) Bill 2019.

### **Clause 42 Unlawful conduct is not an offence unless expressly provided**

434. Clause 42 specifies that, except where expressly provided, nothing in this Act makes it a criminal offence to engage in unlawful discrimination under Part 3.

435. A person who is found to have engaged in unlawful discrimination under Part 3 will therefore not be criminally liable for such actions. This reflects the approach that the civil regime established by Part IIB of the AHRC Act is the appropriate mechanism to deal with matters that are unlawful under this Act.

### **Clause 43 Victimisation**

436. Clause 43 makes it an offence to commit acts of victimisation.

437. This clause is designed to ensure that people can safely use the complaints procedures established under the AHRC Act for discrimination on the ground of religious belief or activity, without being threatened or punished for doing so.

438. This provision creates two separate offences; victimisation involving actual detriment and victimisation involving threat of detriment.

439. Subclause 43(1) provides for the offence of victimisation involving actual detriment. This subclause makes it an offence for a person to engage in conduct which is intended to, and does, cause detriment to another person, because they believe that the person has taken, or proposes to take, some form of action under this Act or the AHRC Act.

440. Paragraph 43(1)(d) specifies that the action or proposed action undertaken by the second person includes making a complaint, commencing proceedings, giving information or producing documents, attending conferences, appearing as a witness, asserting rights under this Act or the AHRC Act, or making an allegation that a person has engaged in unlawful conduct under this Act.

441. For example, an offence of victimisation involving actual detriment could be made out where an employer dismisses an employee on the basis that the employee had made a complaint of unlawful discrimination to the Commission about that employer, or harasses an employee who appeared as a witness in later proceedings under this Act.

442. Subclause 43(2) provides for the offence of victimisation involving threat of detriment. This subclause makes it an offence for a person to threaten to cause detriment to another person because they believe that the person has taken, or proposes to take, some form of action under this Act or the AHRC Act. Paragraph 43(2)(b) provides that the first person must have intended the second person to fear that the threat will be carried out or have been reckless as to causing the second person to fear that the threat will be carried out. The offence also applies in relation to a threat to cause detriment to a third person.

443. Subclause 43(3) clarifies that a threat may be either express or implied or conditional or unconditional. Subclause 43(4) provides that it is not necessary to prove that the victim actually feared that the threat would be carried out.

444. For example, an offence of victimisation involving threat of detriment could be made out where the principal of a school threatens to expel a student if that student makes a complaint to the Commission regarding unlawful discrimination under this Act, or threatens to expel the student's sibling if the student makes a complaint to the Commission.

445. The concept of detriment is not defined under this Act and is left intentionally broad to ensure that a definition does not unintentionally limit the actions to which these offences would apply. Conduct that may constitute detriment could, in relation to the work context, include dismissal, injury, alteration of position or duties, or discrimination. Outside of the work context, detriment may include harassment or intimidation, harm or injury (including psychological harm), or damage to a person's property, reputation, business or financial position or any other damage.

446. The penalty for both offences of victimisation is imprisonment for 6 months, 30 penalty units or both. This penalty is consistent with analogous offences under existing anti-discrimination legislation.

447. The notes under subclause 43(1) and (2) clarify that a civil complaint of victimisation can also be made to the Commission (pursuant to subsection 3(1) and section 46P of the AHRC Act). The necessary consequential amendments to ensure the Commission may

inquire into and attempt to conciliate complaints of discrimination on the basis of religious belief or activity will be made by the Religious Discrimination (Consequential Amendments) Bill.

#### **Clause 44 Advertisements**

448. Clause 44 makes it an offence to publish or display discriminatory advertisements.

449. Clause 44 provides that a person commits an offence if they publish or display an advertisement or notice which indicates, or could be reasonably understood to indicate, an intention to engage in unlawful discrimination on the ground of religious belief or activity. It is also an offence for a person to cause or permit such an advertisement or notice to be published or displayed.

450. For example, advertisements indicating that only Hindu people will be accepted for a particular position, or that Sikh people would only be eligible for a position at a reduced rate of pay, would both indicate an intention to engage in unlawful conduct.

451. Examples of an advertisement that is published or displayed may include newspaper, television or radio advertisements or the display of notices or signs. It is intended that the publication or display of an advertisement for the purposes of this provision is not limited to advertisements which are displayed to the public.

452. It is not an offence under this Act for an employer to advertise an intention to employ persons on a basis that would not be unlawful under Part 3 of the Act, because, for example, the employment would fall within an exception. For example, it would not be an offence for a hospital to advertise that applicants for chaplaincy positions be of a particular religious belief if being of that religious belief was an inherent requirement of the job, as this would not constitute unlawful discrimination under clause 31(2).

453. Similarly, this provision does not make it an offence to advertise an intention to engage in conduct which is not discrimination for the purposes of this Act, and is therefore not unlawful under Part 3. For example, it would not be an offence for a church to advertise a position requiring applicants to be of their particular faith, as this would not be conduct covered by this Act by virtue of clause 10. In addition, it would not be an offence for a person to publish or display advertisements which relate to beneficial measures under clause 11.

454. The penalty for this offence is 10 penalty units. This penalty is consistent with analogous offences under existing anti-discrimination legislation.

455. The note under subclause 44(b) clarifies that a civil complaint regarding conduct that is unlawful under this clause can also be made to the Commission (pursuant to subsection 3(1) and section 46P of the AHRC Act). The necessary consequential amendments to ensure the Commission may inquire into and attempt to conciliate complaints of discrimination on the basis of religious belief or activity will be made by the Religious Discrimination (Consequential Amendments Bill).

#### **PART 6—FREEDOM OF RELIGION COMMISSIONER**

456. Part 6 of this Act establishes the office of the Freedom of Religion Commissioner.

457. This implements recommendation 19 of the Religious Freedom Review, which recommended that the Commission take a leading role in the protection of freedom of religion, including through enhancing engagement, understanding and dialogue.

458. This Part is based on equivalent provisions governing the offices of the Age Discrimination Commissioner (Part 6A of the Age Discrimination Act), the Disability Discrimination Commissioner (Part 6 of the Disability Discrimination Act), the Race Discrimination Commissioner (Part VI of the Racial Discrimination Act) and the Sex Discrimination Commissioner (Part V of the Sex Discrimination Act). The provisions in this Part are also consistent with, and operate in conjunction with, the administrative provisions governing all members of the Commission in Part II, Division 5 of the AHRC Act.

459. The Freedom of Religion Commissioner will be a member of the Commission. The necessary consequential amendments to support the establishment of the Freedom of Religion Commissioner as a member of the Commission will be made by the Religious Discrimination (Consequential Amendments) Bill 2019.

#### **Clause 45 Freedom of Religion Commissioner**

460. Clause 45 establishes the office of the Freedom of Religion Commissioner.

461. Subclause 45(1) provides that there is to be a Freedom of Religion Commissioner.

462. Subclauses 45(2) and (3) provide that the Commissioner is to be appointed by the Governor-General on either a full-time or part-time basis. In accordance with section 33AA of the Acts Interpretation Act, the Commissioner is eligible for reappointment.

463. Subclause 45(4) specifies that a person can only be appointed as Commissioner if the Minister is satisfied that the person has appropriate qualifications, knowledge or experience. This reflects the qualification requirements for the four existing anti-discrimination Commissioners, the Human Rights Commissioner and the National Children's Commissioner.

464. The qualification requirements in subclause 45(4) do not require the Freedom of Religion Commissioner to hold any religious beliefs or to engage in any religious activities. There is no requirement that the Commissioner be a representative of a major faith group. Rather, it is intended that the Commissioner be able to represent all those who may face discrimination on the basis of religious belief or activity under this Act, including smaller and emerging faith groups, and those who do not hold religious beliefs. Accordingly, this provision does not set a religious test for the office of the Freedom of Religion Commissioner.

#### **Clause 46 Term of appointment**

465. Clause 46 provides that the Freedom of Religion Commissioner is to hold office for the period specified in the instrument of appointment, which must not exceed seven years.

#### **Clause 47 Remuneration of Commissioner**

466. Clause 47 provides that the Freedom of Religion Commissioner is to be paid remuneration as determined by the Remuneration Tribunal.

467. Subclause 47(1) clarifies that in the event that no such determination exists in respect of the position, the Commissioner is to be paid the amount set out in the regulations.

468. Subclause 47(2) specifies that the Commissioner is to be paid any allowances as set out in the regulations. This provision is included for consistency with existing anti-discrimination law, although in practice, the Remuneration Tribunal sets allowances for statutory office holders, such as reunion allowances.

469. Subclause 47(3) specifies that this provision has effect subject to the *Remuneration Tribunal Act 1973*.

#### **Clause 48 Leave of absence**

470. Clause 48 specifies the leave entitlements of the Freedom of Religion Commissioner.

471. For full-time office holders, subclause 48(1) specifies that the Commissioner has the recreation leave entitlements determined by the Remuneration Tribunal. In addition, the Minister may grant the Commissioner other leave of absence. Such additional leave of absence is on the terms and conditions as determined by the Minister, including as to remuneration.

472. For part-time office holders, subclause 48(2) specifies that the Minister may grant leave of absence to the Commissioner. Such leave of absence is on the terms and conditions as determined by the Minister.

#### **Clause 49 Outside employment**

473. Clause 49 specifies the obligations of the Freedom of Religion Commissioner in respect of outside employment.

474. For full-time office holders, subclause 49(1) specifies that the Commissioner must not engage in paid work outside the duties of their office without the approval of the Minister. Paid work is defined by subclause 5(1) to mean any work for financial gain or reward.

475. For part-time office holders, subclause 49(2) specifies that the Commissioner must not engage in paid work which, in the opinion of the Minister, conflicts with the proper performance of the Commissioner's duties.

476. This provision ensures that any outside work carried out by the Commissioner does not conflict with their statutory duties. This includes employment that would give rise to a conflict of interest or that would unduly impinge on their capacity to undertake their role as Commissioner. The distinction in the obligations between a full-office holder and a part-time office holder reflects the principle that a part-time Commissioner should only be restricted in their ability to undertake paid work outside of the duties of their statutory office if such work would conflict with the performance of their duties.

477. If a Commissioner does engage in outside paid work in contravention of clause 49, clause 52 provides that the Governor-General must terminate the Commissioner's appointment.

#### **Clause 50 Other terms and conditions of employment**

478. Clause 50 provides that to the extent that the terms and conditions of the office of Freedom of Religion Commissioner are not covered by this Act, the Freedom of Religion Commissioner holds office on the terms and conditions determined by the Governor-General.

### **Clause 51 Resignation**

479. Clause 51 provides that the Freedom of Religion Commissioner may resign their appointment by tendering a written resignation to the Governor-General. Such a resignation takes effect on the date the resignation is received by the Governor-General, or if specified, a later day.

### **Clause 52 Termination**

480. Clause 52 empowers the Governor-General to terminate the appointment of the Freedom of Religion Commissioner in certain circumstances.

481. Subclause 52(1) provides for discretionary grounds of termination related to misbehaviour (paragraph 52(1)(a)) or where the Commissioner is unable to perform the duties of their office due to physical or mental incapacity (paragraph 52(1)(b)). Paragraph 52(1)(b) is intended only to apply where there are no reasonable adjustments that could be made to enable the member to meet the inherent requirements of the office.

482. Subclause 52(2) provides for mandatory grounds of termination. Accordingly, the Governor-General must terminate the Commissioner's appointment if the Commissioner:

- a. becomes bankrupt or takes certain steps in relation to insolvency or bankruptcy (paragraph 52(2)(a))
- b. is absent from duty for a specified period of time, depending on whether they are appointed on a full-time or part-time basis (paragraphs 52(2)(b) and (d));  
or
- c. engages in paid outside work without the necessary approvals specified in clause 49 (paragraphs 52(2)(c) and (e)).

### **Clause 53 Acting Commissioner**

483. Clause 53 provides for the appointment of an acting Freedom of Religion Commissioner.

484. Subclause 53(1) provides that during a vacancy in the office, or periods where the ordinary office holder is absent from duty, overseas, or for any reason unable to perform the functions of the office of the Freedom of Religion Commissioner, the Minister may appoint a person to act as Commissioner. Such an appointment must be by written instrument.

485. The note under subclause 53(1) clarifies that the rules applying to acting appointments as specified in sections 33AB and 33A of the Acts Interpretation Act apply to acting appointments made under this provision.

486. Subclause 53(2) provides that the same qualification requirement for a substantive appointment as Freedom of Religion Commissioner (as specified in clause 45) applies to an acting appointment.

## **PART 7—FUNCTIONS OF THE AUSTRALIAN HUMAN RIGHTS COMMISSION**

487. Part 7 of this Act sets out the functions conferred on the Commission by this Act.

488. This Part reflects analogous provisions in existing anti-discrimination law, including Part 6 of the Age Discrimination Act, Part 4 of the Disability Discrimination Act, Part III of the Racial Discrimination Act and Part III of the Sex Discrimination Act.

### **Clause 54 Functions of the Commission**

2. Clause 54 confers functions related to discrimination on the basis of religious belief or activity under this Act on the Commission. These functions include:

- a. granting temporary exemptions under clause 36 (subclause 54(a))
- b. promoting understanding, acceptance of and compliance with the Act (subclause 54(b))
- c. undertaking research and educational programs (subclause 54(c))
- d. reporting to the Minister on policy and legislative development related to discrimination on the basis of religious belief or activity (subclauses 54(d)-(g))
- e. preparing guidelines for avoiding discrimination on the basis of religious belief or activity (subclause 54(h)); and
- f. intervening in court proceedings (subclause 54(i)).

489. Subclause 54(i) provides that the Commission may do anything incidental or conducive to the performance of any of the above functions.

490. These functions are conferred on the Commission, rather than the Freedom of Religion Commissioner. This reflects the approach in existing anti-discrimination legislation. The Commission may delegate such functions to the Commissioner as it sees appropriate, in accordance with clause 61.

491. Clause 54 does not confer functions on the Commission related to complaints handling. The Commission's function of inquiring into and attempting to conciliate complaints of unlawful discrimination is provided in Part IIB of the AHRC Act. The necessary consequential amendments to ensure the Commission may inquire into and attempt to conciliate complaints of discrimination on the basis of religious belief or activity will be made by the Religious Discrimination (Consequential Amendments) Bill 2019.

## **PART 8—APPLICATION AND CONSTITUTIONAL PROVISIONS**

492. Part 8 of this Act sets out provisions which relate to the application of this Act, and clarifies the constitutional basis for this Act.

493. This Part also includes provisions which clarify the interaction between this Act and state and territory anti-discrimination laws.

494. This Part reflects analogous provisions in existing anti-discrimination law, including in Part 2 of the Age Discrimination Act, Part 1 of the Disability Discrimination Act and Part I of the Sex Discrimination Act.

#### **Clause 55 This Act binds the Crown**

495. Clause 55 provides that this Act binds the Crown in each of its capacities but does not make the Crown liable to be prosecuted for an offence.

496. Accordingly, this Act binds the executive governments of the Commonwealth, of each of the states, of the Australian Capital Territory and of the Northern Territory. This is consistent with existing anti-discrimination law.

497. For example, a government employee is entitled to make a complaint under this Act concerning discrimination on the basis of religious belief or activity engaged in by the government department in which they are employed.

#### **Clause 56 Geographical application of this Act**

498. Clause 56 provides that this Act applies throughout Australia.

499. Subclause 5(1) defines Australia to include all of the external territories.

500. This provision ensures that this Act applies to all states, all internal territories and all external territories of Australia.

501. In addition, subclause 56(2) provides that this Act applies to conduct engaged in in Australia, even where such conduct involves people, things or matters outside of Australia.

#### **Clause 57 Main constitutional basis of this Act**

502. Clause 57 provides that this Act is supported by the external affairs power.

503. Clause 57 specifies that this Act gives effect to Australia's obligations under the:

- a. International Covenant on Civil and Political Rights
- b. the International Covenant on Economic, Social and Cultural Rights
- c. the Convention on the Rights of the Child
- d. the International Convention on the Elimination of All Forms of Racial Discrimination
- e. the ILO Convention concerning Discrimination in respect of Employment and Occupation (No.111); and
- f. the ILO Convention concerning Termination of Employment at the Initiative of the Employer (No. 158).

504. This provision clarifies that the external affairs power is the main constitutional basis for this Act. This recognises the important role of the Act in implementing Australia's international law obligations.

## **Clause 58 Other constitutional bases of this Act**

505. Clause 58 provides for the other constitutional bases of this Act, aside from the external affairs power as provided in clause 57.

506. Subclause 58(1) provides that, without limiting its effect as provided by clause 57 which refers to the external affairs power, the Act has effect to the extent directly supported by a number of other constitutional heads of power.

507. All Commonwealth anti-discrimination legislation relies on a range of constitutional powers to apply to the maximum extent possible throughout Australia.

508. Subclause 58(2) relies on the corporations power to extend the Act to the conduct of corporations and their officers, employees or agents (paragraphs 58(2)(a) and (b)), as well as conduct towards officers, employees or agents of corporations (paragraph 58(2)(c)), where the conduct is connected with the person's duties as an officer, employee or agent of the corporation.

509. Subclause 58(3) relies on the Commonwealth and territory matters power to extend the Act to the conduct of the Commonwealth, a territory, or a covered authority (as defined by subclause 58(4)), and their officers, employees or agents, where the conduct is connected with the person's duties as an officer, employee or agent (paragraphs 58(3)(a) and (b)). Subclause 58(3) also extends the Act to conduct towards officers, employees or agents of the Commonwealth, a territory or a covered authority, where the conduct is connected with the person's duties as an officer, employee or agent (paragraph 58(3)(c)). Subclause 58(3) also extends to conduct occurring in the course of the performance of a function or exercise of a power under a Commonwealth or territory law and to conduct that is engaged in within a territory (paragraphs 58(3)(d) and (e)).

510. Subclause 58(5) relies on the trade or commerce power to extend the Act to conduct engaged in while the discriminator or the person subjected to discrimination is acting in the course of, or in relation to, trade or commerce between Australia and places outside Australia, among the states, between a state and a territory or between two territories.

511. Subclause 58(6) relies on the banking and insurance power to extend the Act to conduct engaged in while the discriminator or the person subjected to discrimination is acting in the course of, or in relation to, the carrying on of the business of banking or the business of insurance, other than state banking or insurance (within the meaning of paragraphs 51(xiii) and (xiv) of the Constitution respectively) and not extending beyond the limits of the state concerned.

512. Subclause 58(7) relies on the telecommunications power to extend the Act to conduct engaged in by a person by means of a postal, telegraphic, telephonic or other like service, within the meaning of paragraph 51(v) of the Constitution.

513. Subclause 58(8) relies on the defence power to extend the Act to conduct engaged in by a person for purposes relating to the defence of Australia.

## **Clause 59 Compensation for acquisition of property**

514. Clause 59 ensures that property is acquired on just terms.

515. Subclause 59(1) provides that if the operation of this Act would result in the acquisition of property from a person otherwise than on just terms, the Commonwealth is liable to pay a reasonable amount of compensation. This is designed to ensure that this Act does not interfere with a person's property rights in a way that contravenes paragraph 51(xxxi) of the Constitution.

516. Subclause 59(2) confers jurisdiction on the Federal Court of Australia or the Supreme Court of a state or territory to determine the amount of compensation necessary to ensure that the acquisition takes place on just terms.

### **Clause 60 Relationship with State and Territory laws**

517. Clause 60 addresses the relationship between this Act and state and territory laws.

518. As a general proposition, it is not intended that this Act cover the field and override state and territory legislation. Accordingly, subclause 60(1) provides that this Act is not intended to exclude or limit the operation of a state or territory law, to the extent that that law is capable of operating concurrently with this Act.

519. However, the note under subclause 60(1) clarifies that nothing in this subclause detracts from the operation of Part 4. Part 4 is intended to apply to exclude certain provisions of state and territory anti-discrimination law despite this clause.

520. Subclause 60(2) provides that where a person has made a complaint or instituted a proceeding under a state or territory anti-discrimination law, they are not entitled to make a complaint to the Commission alleging discrimination under this Act in relation to the same conduct.

521. This requires complainants to choose the appropriate forum for an anti-discrimination complaint by prohibiting complaints relating to the same conduct from being brought under this Act as well as relevant state and territory legislation.

522. Subclauses 60(3) and (4) provides that a person may be prosecuted and convicted for an offence relating to particular conduct under this Act or a state or territory anti-discrimination law, but cannot be punished more than once in respect of the same conduct.

### **PART 9—OTHER MATTERS**

523. Part 9 of this Act sets out provisions which aid the general operation of this Act.

524. This includes provisions to assist the Commission in its functions, such as the power to delegate certain powers or functions (clause 61) and the protection of the Commission from civil actions (clause 64). This Part also includes provisions which extend liability for unlawful conduct to other persons, including to persons who are involved in unlawful conduct (clause 62) and to bodies corporate, bodies politic and individuals for the conduct of their representatives (clause 63).

525. This Part reflects analogous provisions in existing anti-discrimination law, including Part 7 of the Age Discrimination Act, Part 7 of the Disability Discrimination Act and Part VI of the Sex Discrimination Act.

## **Clause 61 Delegation**

526. Clause 61 provides the Commission with a broad ability to delegate its functions or powers under this Act.

527. Subclause 61(1) provides that the Commission may delegate all or any of its functions or powers under this Act to:

- a. the Freedom of Religion Commissioner
- b. the President or any of the other special-purpose Commissioners
- c. a member of the staff of the Commission; or
- d. any other person or bodies of persons.

528. Subclause 61(2) provides that the Freedom of Religion Commissioner may delegate all or any of the Commissioner's functions under this Act to an approved member of the staff of the Commission or any other approved person or body of persons.

529. This broad power of delegation is necessary to enable the Commission to carry out the wide range of functions conferred on it by this Act. This broad power also recognises that in certain circumstances, the Commission may consider it necessary to delegate to a person or body external to the Commission, such as a barrister, certain functions, such as in relation to the grant of exemptions or the preparation of reports, where there may be a conflict of interest with the Commission. This power is consistent with delegation powers in existing federal anti-discrimination legislation and in the AHRC Act.

530. Delegations under subclauses 61(1) and (2) must be in writing. Subclause 61(3) specifies that the delegate must comply with any written directions of the delegator in exercising the delegation.

531. The note under subclause 61(1) clarifies that the provisions in sections 34AA to 34A of the Acts Interpretation Act relating to delegations apply to delegations under this clause

## **Clause 62 Liability of persons involved in unlawful conduct**

532. Clause 62 provides that a person who engages in conduct ancillary to unlawful discrimination is also taken to have engaged in that unlawful discrimination.

533. Subclause 62(1) provides that a person must not:

- a. attempt to engage in unlawful discrimination
- b. aid, abet, counsel or procure unlawful discrimination
- c. induce unlawful discrimination
- d. be in any way knowingly concerned in, or party to, unlawful discrimination; or
- e. conspire with others to engage in, or effect, unlawful discrimination.

534. Subclause 62(2) provides that a person who engages in the conduct in subclause 62(1) is taken to have engaged in unlawful discrimination for the purposes of this Act.

535. The effect of this provision is that a complaint of unlawful discrimination can be made against the person who engaged in the ancillary conduct, as well as the person who actually did the unlawful act.

536. For example, it would be unlawful for a human resources manager to issue an instruction to recruitment panels that no person who wears a hijab should be selected. Although the human resources manager did not engage in the discriminatory conduct themselves, they will be equally liable as they instructed that the relevant conduct occur.

537. This provision is necessary to ensure a person is not able avoid liability for promoting or encouraging discriminatory conduct, despite not actually carrying out that conduct themselves.

538. This clause is consistent with the ancillary conduct provisions in section 92 of the *Regulatory Powers (Standard Provisions) Act 2014*.

### **Clause 63 Conduct by representatives**

539. Clause 63 provides that persons (including bodies corporate) may be liable for conduct amounting to unlawful discrimination done by their representatives.

540. This provision balances incentives for businesses to take reasonable measures to avoid unlawful conduct by directors, employees and agents with appropriate recourse for people who have suffered discrimination on the basis of religious belief or activity.

541. Subclause 63(1) provides that a person is taken to have engaged in conduct by their representative acting on their behalf within the scope of their actual or apparent authority. Representative is defined in subclause 63(4) as a director, employee or agent of a body corporate, or an employee or agent of a body politic or individual.

542. Subclause 63(2) specifies that where it is necessary to establish the state of mind of a person in relation to conduct engaged in by a representative, it is sufficient to establish that the representative engaged in the conduct within the scope of their actual or apparent authority, and had the relevant state of mind. Accordingly, it is not necessary to demonstrate that a body corporate, for example, had a particular state of mind in relation to discriminatory conduct engaged in by an employee.

543. Subclause 63(3) provides that a reference to state of mind in subclause 63(2) includes a reference to the representative's knowledge, intention, opinion, belief or purpose, or the reasons for the intention, opinion, belief or purpose.

544. For example, in accordance with this clause, a company may be liable for unlawful discrimination against a company employee by a director of the company, or a body politic may be liable for unlawful discrimination of its employee by another employee of the body politic.

545. However, subclause 63(1) provides an exception where a person is able to establish they took reasonable precautions and exercised due diligence to avoid the discriminatory conduct.

546. For example, it may be a reasonable precaution for a company to make and enforce workplace policies prohibiting discriminatory conduct and to regularly train staff on their responsibilities. Due diligence may include regularly reviewing this policy and its effectiveness, and ensuring staff members comply with this policy.

547. Subclause 63(5) provides that this clause does not apply to proceedings for an offence against Part 5 of this Act.

548. Part 2.5 of the Criminal Code applies to Commonwealth offences and sets out the rules governing when criminal responsibility can be attributed to a body corporate, based on the conduct of directors and employees and the surrounding circumstances. It is intended that Part 2.5 of the Criminal Code will continue to apply in relation to liability for bodies corporate under Part 5 of this Act. It is not intended that subclause 63(5) would displace that Part's application.

549. The offences of victimisation and discriminatory advertisements under clauses 43 and 44 of this Act respectively may be pursued civilly or criminally. Where a complaint is pursued civilly through the Commission, clause 63 applies in relation to liability of bodies corporate, bodies politic and individuals.

#### **Clause 64 Protection from civil actions**

550. Clause 64 provides protection from civil liability for the Commission and Commission officials for conduct engaged in in good faith in the performance or exercise of the Commission's function or powers.

551. Subclauses 64(1) and (2) provide that a person may not take civil action against the Commission, the Freedom of Religion Commissioner or any other member of the Commission, or a person acting on behalf of the Commission or a member of the Commission for, or in relation to, conduct engaged in in good faith in the performance of functions or exercise of powers conferred on the Commission by this Act. This includes the purported performance of functions and the purported exercise of powers.

552. Subclauses 64(3) and (4) provides that there is no right of action created where someone has suffered loss, damage or injury if the only reason they suffered such loss, damage or injury was due to the making of a submission or the giving of a document, information or evidence to the Commission or a person acting on behalf of the Commission.

553. Subclause 64(5) specifies that this provision is subject to clause 59 which concerns the acquisition of property on just terms.

#### **Clause 65 No right of action unless expressly provided**

554. Clause 65 specifies that, except where expressly provided, a person does not have a right of action in relation to unlawful discrimination or conduct that is an offence against a provision of this Act.

555. The AHRC Act provides the mechanism for dealing with matters that are unlawful under this Act. It is not intended that rights created under this Act give rise to separate civil actions in the courts.

556. The effect of this provision is that the only action available in relation to unlawful discrimination, or the offences under Part 5, is a complaint under the AHRC Act or the criminal prosecution of the victimisation or discriminatory advertisements offences.

### **Clause 66 Non-disclosure of protected information**

557. Clause 66 makes it an offence for certain Commission officials, and their delegates, to disclose protected information.

558. This clause is designed to ensure the confidentiality of personal information provided to the Commission by prohibiting the disclosure of such information by Commission officials. This protects the privacy of individuals who make, or who are the subject of, complaints to the Commission and ensures that the complaints handling process is safe for individuals making complaints regarding sensitive personal matters.

559. Clause 66 prohibits a person who is, or at any time has been, an entrusted person from disclosing protected information if such information was acquired in their capacity as an entrusted person.

560. Protected information is defined by subclause 66(4) to mean information obtained by an entrusted person that relates to the affairs of another person. An entrusted person is defined by subclause 66(4) to mean the Freedom of Religion Commissioner, another member of the Commission, a member of staff of the Commission or a delegate of the Commission or of the Commissioner.

561. The penalty for this offence is imprisonment for 2 years. This penalty is consistent with analogous offences under existing anti-discrimination legislation.

562. Subclause 66(2) provides exceptions to the general prohibition in subclause 66(1). Paragraph 66(2)(a) provides that protected information may be disclosed if it is authorised by a Commonwealth, state or territory law. In addition, paragraph 66(2)(b) provides that protected information may be disclosed in the performance of functions or exercise of powers under or in connection with this Act or in accordance with an intergovernmental arrangement between the Commonwealth and a state body under section 16 of the AHRC Act. The note under subclause 66(2) clarifies that a defendant bears an evidential burden in relation to a matter in this subclause.

563. Subclause 66(3) provides that a court must not require a person to disclose protected information or produce documents containing protected information that the person has acquired, has custody of or has access to in their capacity as an entrusted person, unless it is necessary to do so for the purposes of this Act. This provision is necessary to maintain the integrity of the complaints process and ensure that persons performing or exercising functions or powers under this Act are not compelled to disclose sensitive personal information concerning complainants or respondents except in relation to this Act.

564. Subclause 66(4) defines the terms court, entrusted person, produce and protected information for the purposes of this provision.

### **Clause 67 Commissioner to give information to the Commission**

565. Clause 67 provides that the Freedom of Religion Commissioner is required to give the Commission any information it requires in relation to the Commissioner's operations.

**Clause 68    Regulations**

566.    Clause 68 provides that the Governor-General may make regulations prescribing matters required or permitted by this Act to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to this Act.