Submission by the
Australian Discrimination Law Experts Group (ADLEG)

to the
Commonwealth Attorney-General’s Department

Religious Discrimination Bill
Exposure Draft

1 October 2019
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1. **Australian Discrimination Law Experts Group**

We make this submission on behalf of the undersigned Australian Discrimination Law Experts Group (ADLEG), a group of legal academics and practitioners with significant experience and expertise in discrimination and equality law and policy. This submission was coordinated by Liam Elphick and Alice Taylor, and focuses primarily on the exposure draft of the Religious Discrimination Bill 2019 (Cth).

We are happy to answer any questions about the submission or other related issues, or to provide further information on any of the areas covered. Please let us know if we can be of further assistance in this inquiry, by emailing liam.elphick@uwa.edu.au.

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2. Summary

As set out in further detail below, our recommendations are as follows (all clauses refer to the Religious Discrimination Bill Exposure Draft):

**Recommendation 1:** Clause 41 should be removed.

**Recommendation 2:** Clauses 8(2)(d), 8(3), 8(4) and 31(6) should be removed.

**Recommendation 3:** Clauses 8(5), 8(6) and 31(7) should be removed.

**Recommendation 4:** Clause 10(1) should be amended to read: ‘A religious body does not discriminate against a person under this Act by engaging, in good faith, in conduct that conforms to the doctrines, tenets, beliefs or teachings of the religion in relation to which the religious body is conducted.’

**Recommendation 5:** Clause 10(3) should be removed, and replaced with the following: ‘Nothing in this section affects the operation of section 18(2) of this Act.’

**Recommendation 6:** Clause 10(2)(b) should be amended to read: ‘a registered charity that is conducted for the charitable purpose of advancing the doctrines, tenets, beliefs or teachings of a particular religion (other than a registered charity that engages solely or primarily in commercial activities); or’

**Recommendation 7:** Clause 10(2)(c) should be amended to read: ‘any other body that is conducted for the purpose of advancing the doctrines, tenets, beliefs or teachings of a particular religion (other than a body that engages solely or primarily in commercial activities).’

**Recommendation 8:** A new clause 10(4) should be added, to read: ‘This section does not apply to conduct that is connected with commercial activities.’

**Recommendation 9:** Further consideration should be given to constitutional law concerns regarding the Religious Discrimination Bill before its tabling, to ensure its validity.

**Recommendation 10:** Further consideration should be given to the practical effects of the definitions of ‘religious belief or activity’ and ‘statement of belief’ in clause 5, and of related provisions in clauses 6 and 7, and amendments proposed to ensure equal protection for those who do not hold religious beliefs.

**Recommendation 11:** The definition of ‘person’ should be removed from clause 5 and the Explanatory Notes to the Religious Discrimination Bill should be amended to make clear that a complaint of discrimination on the ground of religious belief or activity may only be made by or on behalf of a natural person.
**Recommendation 12:** Further consideration should be given to the necessity of a Religious Freedom Commissioner, and to the creation of a Sexual Orientation, Gender Identity and Expression, and Sex Characteristics (SOGIESC) Commissioner.

**Recommendation 13:** Further time should be allowed for consultation on the Religious Discrimination Bill and the related religious freedom Bills to allow fair and non-discriminatory participation for people with disabilities.

**Recommendation 14:** Further consideration should be given to the practical effects of amending, under the Human Rights Legislation Amendment (Freedom of Religion) Bill, the objects clauses of the four existing federal discrimination laws.
3. Introduction

ADLEG supports the prohibition of religious discrimination at the federal level through the introduction of ‘shield’-like protections to mirror existing federal protections for race, sex, disability and age. However, the draft Religious Discrimination Bill (‘the Bill’) goes far beyond what is necessary to do this. The Bill is deeply flawed as it privileges and prioritises religious belief and activity over other protected attributes, and overrides existing protections for women, LGBTQI+ people and other vulnerable groups. In doing so, it grants positive rights to individuals to harm others through ‘sword’-like provisions.

We are therefore unable to support the Bill in its present form. We propose several amendments to ensure the Bill aligns more closely with the standard structure and content of existing federal discrimination laws, and to remove provisions that undermine existing protections for other groups.

4. The Right to Make Statements of Belief: Clause 41

4.1 Substantive Override of Other Federal, State and Territory Laws

Clause 41(1)(a) of the Bill protects all ‘statements of belief’ from any discrimination claim under any Australian discrimination laws, whether at federal, State or Territory level. Clause 41(1)(b) also protects ‘statements of belief’ from a claim under section 17(1) of the Anti-Discrimination Act 1998 (Tas).

This is the only example of a current provision in a federal discrimination law in Australia explicitly overriding State and Territory discrimination laws. Australia’s legislative framework is designed to create two concurrent systems of discrimination law – federal, and State/Territory – which can operate alongside each other. This is reflected in provisions made in every federal discrimination law explicitly stating that they do not exclude or limit the operation of State or Territory laws that are capable of operating concurrently.¹

There has long been bipartisan consensus to maintain these complementary and concurrent discrimination law systems, which allow claimants to pursue appropriate causes of action and allow States and Territories to pass laws that reflect their own values and principles. This balance between federal legislation, on the one hand, and State and Territory legislation, on the other hand, would be thrown into disarray by Clause 41.

Clause 41 would have wide-ranging consequences in limiting liability for discrimination, vilification, and derogatory comments against others targeting their protected attributes. For instance, it is currently unlawful for a person in Tasmania to use a racial epithet or slur to offend, ridicule, insult, intimidate or humiliate another person on the basis of their race. Under clause 41, this behaviour would become lawful, but only for those who do so on the basis of a religious belief.

¹ Racial Discrimination Act 1975 (Cth) s 6A(1); Sex Discrimination Act 1984 (Cth) s 10(3); Disability Discrimination Act 1992 (Cth) s 13(3); Age Discrimination Act 2004 (Cth) s 12(3).
Under clause 41, the following scenarios that are currently unlawful acts of discrimination under various State and Territory laws would likely become lawful if based on a religious belief:

a. an employer telling a transgender employee that their identity is against the laws of God;
b. a childcare provider stating to a single mother that they are evil for depriving their child of a father;
c. a student with a disability being told by a teacher that their disability is a trial imposed by God;
d. a waiter in a café saying repeatedly they will ‘pray for your sins’ to a gay couple.

This will create a particularly unworkable situation for businesses in regard to employment. Work health and safety laws impose a positive duty on employers to prevent bullying, and discrimination laws require businesses to provide their services free from discrimination, yet clause 41 would authorise bullying and discrimination. The Bill would have the normative effect of providing employers, employees and workplace participants with a carte blanche right to make such statements. It also reduces the already-low likelihood of vulnerable persons lodging legitimate discrimination complaints by introducing many levels of complexity into the legislative scheme.

Though an exception is contained for statements that are malicious and more serious statements of vilification in clause 41(2), the test provided in clause 41(2) is far narrower than most other vilification laws. Notably, as recently explained by the President of the Law Council of Australia, the clause 41(2) test is far narrower than the federal test for racial vilification.

Further, clause 41(1)(c) is highly unusual in permitting the overriding of any other state and territory laws (including laws that may be passed in future to respond to the needs of local communities) through regulation. An Act of Parliament would not be required to further extend this all-encompassing exception. This power would be unique, and appears largely unjustified.

4.2 Procedural Difficulties With Override of State and Territory Laws

There are also significant procedural issues with a federal defence applying to State- or Territory-based discrimination claims.

The overwhelming majority of discrimination claims are made in State and Territory systems, rather than the federal system, largely owing to State and Territory statutory authorities having a local presence and State and Territory tribunals operating on a ‘no costs’ basis in the area of

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3 See, eg, Sex Discrimination Act 1984 (Cth) s 22.
discrimination law. As such, a State or Territory tribunal will not award the payment of an unsuccessful party’s legal costs, other than in exceptional circumstances.

However, State and Territory tribunals are not Chapter III courts and cannot exercise federal jurisdiction or determine a federal question of law.\(^6\) A matter will involve the exercise of federal judicial power if a party has a defence which owes its existence to a law of the federal Parliament.\(^7\) Indeed, the High Court of Australia ruled last year in *Burns v Corbett* that a State tribunal cannot exercise juridical power in a complaint of discrimination across a State border.\(^8\)

Clause 41 of the Bill provides a federal defence to a complaint of unlawful discrimination made under State or Territory discrimination laws. This defence is undoubtedly a ‘federal question of law’. As such, State and Territory tribunals will be unable to hear this defence. Were a respondent to a State- or Territory-based claim of unlawful discrimination to raise this defence, only a Chapter III court could hear and adjudicate this defence. This means the defence would need to be raised in separate proceedings in the relevant State or Territory Supreme Court or the Federal Court of Australia for adjudication. While this occurs, the State or Territory tribunal would not be able to determine the substantive complaint of discrimination. This will significantly increase the costs and delay of discrimination litigation, when State and Territory discrimination claims are intended to proceed more quickly and cheaply than other claims. As a result, clause 41 significantly undermines the operation of State and Territory discrimination law adjudications.\(^9\)

On any remaining matters regarding this procedural difficulty regarding State and Territory tribunals, we endorse fully the relevant sections of Part 4 of the submissions made to this consultation by the Law Council of Australia on 2 October 2019.\(^{10}\)

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**Recommendation 1: Clause 41 should be removed.**

5. Prohibition of Indirect Discrimination: Clause 8

5.1 Employer Conduct Rules

Clause 8 prohibits indirect discrimination on the basis of religious belief or activity, largely reflecting the structure of other federal discrimination laws by providing a ‘reasonableness’ defence.

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\(^6\) *Attorney General for New South Wales v Gatsby* [2018] NSWCA 254; *Burns v Corbett* [2018] HCA 15. See, eg, *Commonwealth v Anti-Discrimination Tribunal (Tas)* (2008) 169 FCR 85, [239] (Kenny J) (determining that the Anti-Discrimination Tribunal of Tasmania was not a Chapter III Court).

\(^7\) *Sun v Collier* [2012] NSWCA 14, [281] (Leeming JA); *LNC Industries Ltd v BMW (Australia) Ltd* 151 CLR 575, 581.

\(^8\) [2018] HCA 15.

\(^9\) With perhaps one exception: Part 3A of the *Civil and Administrative Tribunal Act 2013* (NSW) was introduced in late-2018 to resolve the issue that arose in *Burns v Corbett* [2018] HCA 15, thereby allowing for the transfer of proceedings to the Local Court or District Court in New South Wales where a federal issue has arisen. However, this will still require the commencement of separate proceedings for the raising of this clause 41 defence.

Clauses 8(2)(d), (3) and (4) provide that an employer conduct rule which would restrict or prevent the expression of religious beliefs at a time other than when an employee is performing work will be prima facie unlawful for ‘relevant employers’ (only those with an annual revenue over $50 million, for reasons that are not clear), unless the rule is necessary to avoid unjustifiable financial hardship or the statement is malicious or a more serious statement of vilification.

This type of provision is not found in any other federal discrimination law. While it clearly targets an Israel Folau-type situation, this can already be, and is more appropriately, captured by the ordinary indirect discrimination prohibition in clauses 8(1) and (2) without requiring additional special provisions. Were an employer to impose a rule that restricts the expression of certain religious beliefs, this would be prima facie indirect discrimination on the basis of religious belief. The onus would then be on the employer to prove this rule was ‘reasonable’, or else it will be unlawful.

Under clauses 8(2)(d), (3) and (4), statements on the basis of religious belief would have greater protection from employer intervention than any other statement or expression. For ‘relevant employers’ it would mean that measures to protect their reputation through codes of conduct would need to be applied differently in respect of employees making statements on the basis of religious belief and employees making statements on the basis of non-religious beliefs.

For instance, a ‘relevant employer’ may impose a rule that bans employees from engaging publicly in controversial political debates. If a gay employee is restricted from publicly supporting marriage equality as a result, they could argue an indirect discrimination case under the SDA, but the employer would escape liability if they can establish the rule was ‘reasonable’. But if a religious employee is restricted from publicly opposing marriage equality under the same rule, they could argue an indirect discrimination case under the Religious Discrimination Bill, and the rule will be presumed unlawful unless the employer can prove one of the two exceptions in clauses 8(3) or (4). They are unlikely to be able to establish either of these exceptions – which are harder to prove than the general standard of ‘reasonableness’. There are, also, workability issues in how an employer can factually prove that a conduct rule is ‘necessary’ to avoid unjustifiable financial hardship, considering the very high standard required to prove necessity.

There should not be one rule on indirect discrimination on the basis of race, sex, disability and age, and another rule for indirect discrimination on the basis of religion. Employer conduct rules should be considered under the same ‘reasonableness’ test in all federal Acts. The obligation on employers to ensure a healthy and safe work environment has already been referred to in Part 4 above, and this obligation should not be undermined by a new and novel framing that makes the employer’s capacity to fulfil this obligation more difficult.

As clause 31(6) refers to employer conduct rules in assessing inherent requirements, this should also be removed.

**Recommendation 2: Clauses 8(2)(d), 8(3), 8(4) and 31(6) should be removed.**
5.2 Health Practitioner Conduct Rules

Similarly, clauses 8(5) and (6) render unlawful any rules that would require health practitioners to provide a health service to which they object on the basis of a religious belief. The breadth of these provisions could allow health practitioners to lawfully refuse to provide a range of health services – including women’s reproductive health services, reproductive health services for people with disabilities, transgender health services, and services of any kind for LGBTIQ+ patients, even when not related to a patient being a member of the LGBTIQ+ community. This limitation would further apply to any treatments which could involve the use of certain animal by-products, stem cells or treatments which had, at a research stage, involved stem cells where the use of such products or procedures are in contradiction with a doctor’s religious beliefs.

Clauses 8(5) and (6) are unique in the federal discrimination law landscape. As such, protection would only exist on the basis of religious belief or activity, and no other attribute. This means that a health practitioner who opposes abortion on the basis of a religious belief could sue for unlawful discrimination if a rule required them to provide abortion-related services, while a health practitioner who opposes abortion on the basis of a personal non-religious belief could not.

An unintended consequence of this provision is that health providers, at an organisational level, would be placed in a no-win situation where they face near-certain liability in some circumstances. For instance, an individual pharmacist could refuse to provide hormonal treatment drugs to a transgender customer on the basis of their own religious beliefs, despite them regularly providing hormonal treatment drugs to other customers and despite being asked to provide them to transgender people by the pharmacy owner. Assuming the individual pharmacist is captured by clauses 8(5) and (6), which appears likely, this would mean the pharmacy owner would face an impossible choice: require the pharmacist to provide the drugs to the transgender customer and be subject to a religious discrimination claim by the pharmacist; or allow the pharmacist to refuse to provide the drugs to the transgender customer and be subject to a gender identity discrimination claim by the customer. This would unfairly and unduly burden (particularly small) business owners with liability even when they are not at fault and have no viable alternative.

In another example a rural town may have one general practitioner who refuses to discuss or perform certain reproductive health services for a patient – for example prescribing the morning-after pill – and refuses to refer them to another doctor. Though some State or Territory laws may require the doctor to refer them onwards, the effect of clauses 8(5) and (6) could be to override those provisions. In any case, there may be limited referral options in the particular rural area, leaving the patient without recourse. On a practical level, clauses 8(5) and (6) signals to health practitioners that they are protected in such circumstances, even if some exceptions are provided in clauses 8(6)(a) and (b). Existing legal requirements that protect the rights of patients could be undermined and subject to challenge. One fundamental tenet of the rule of law is that laws need to be drafted so that people are able to comply with them; this Bill, in some cases, would not allow the pharmacy to comply with both obligations to its workers and to its customers.
On these and other adverse consequences caused by clauses 8(5) and (6), we also draw attention to and endorse fully the relevant section entitled ‘Conscientious Objection in Healthcare’ of the submissions made to this consultation by Equality Australia on 2 October 2019.\footnote{Equality Australia, \textit{Freedom From Discrimination, Not a Licence to Discriminate: Equality Australia’s Submission to the Consultation on the Exposure Drafts of the Religious Freedom Bills} (2 October 2019) ‘Conscientious Objection in Healthcare’.
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As clause 31(7) refers to employer conduct rules in assessing inherent requirements, this should also be removed.

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\textbf{Recommendation 3: Clauses 8(5), 8(6) and 31(7) should be removed.}
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\noindent\textbf{6 Religious Body Exception: Clause 10}

\noindent\textbf{6.1 Test for Religious Body Exception}

Clause 10 of the Bill provides that a religious body does not discriminate under \textit{any provision of the Bill} if they engage ‘in good faith, in conduct that may reasonably be regarded as being in accordance with’ religious doctrine, tenets, beliefs or teachings. ‘Religious body’ includes religiously affiliated educational institutions and charities, and other bodies.

Clause 10(1) requires only a very loose connection between the conduct in question and religious belief. Equivalent religious body exceptions under existing federal discrimination laws require that conduct ‘conforms to’ religious doctrine or ‘is necessary to avoid injury to’ religious susceptibilities.\footnote{Sex Discrimination Act 1984 (Cth) s 37; Age Discrimination Act 2004 (Cth) s 35. No such religious exceptions exist in the Racial Discrimination Act 1975 (Cth) or the Disability Discrimination Act 1992 (Cth).} By contrast, the clause 10(1) test is merely whether the conduct ‘may reasonably be regarded as being in accordance with’ religious doctrine. This test should be amended to reflect equivalent standards set by other federal discrimination laws.

\begin{center}
\textbf{Recommendation 4: Clause 10(1) should be amended to read: ‘A religious body does not discriminate against a person under this Act by engaging, in good faith, in conduct that conforms to the doctrines, tenets, beliefs or teachings of the religion in relation to which the religious body is conducted.’}
\end{center}

\noindent\textbf{6.2 Scope of Religious School Exception}

Clause 10(2)(a) applies this religious body exception to \textit{all} conduct engaged in by religious educational institutions. For instance, a student may join a religious school in Year 1 and at the time be of the same religious faith. Halfway through Year 12, that student may decide they do not identify strongly with that religious faith anymore. Clauses 10(1) and (2)(a) would allow the school to expel that student on the basis that they do not share the same religious beliefs as required by the school, assuming this conforms with the school’s religious beliefs (which appears likely). By contrast, equivalent provisions in Tasmanian, Queensland, Northern Territory and
Australian Capital Territory laws allow schools to discriminate on the ground of religion only at the time of admission, and not after a student is enrolled in a school.13

Further, it appears that clause 10(2)(a) could be used to exclude LGBTIQ+ students from religious schools. Take the example of a religious school finding out that one of its students has engaged in sexual activity with a person of the same sex. If there is a religious belief to which the school adheres that same-sex sexual activity is wrongful or sinful, the school could argue that this sexual activity means the student is not adhering to the religious beliefs of the school. Therefore, the school could argue that expulsion of the student conforms to religious beliefs in relation to which the school is conducted; the discrimination is therefore on the basis of the student’s (different) religious belief. A similar example could occur if a student comes out as transgender.

The current scope of clause 10(2)(a) would therefore drastically undercut the current Australian Law Reform Commission (ALRC) inquiry into religious educational institution exceptions contained in the Sex Discrimination Act 1984 (Cth) (SDA).14 One key term of reference for that review is the consideration of what reforms should be made in order to ‘limit or remove altogether (if practicable) religious exemptions to prohibitions on discrimination, while also guaranteeing the right of religious institutions to conduct their affairs in a way consistent with their religious ethos’.15 The federal government has repeatedly stated publicly that it wants to, and will, remove existing exemptions which allow religious schools to expel gay students.16 If clause 10(2)(a) becomes law in its current form, then even if relevant religious school exceptions are removed from the SDA, such that religious schools are not permitted to discriminate against students on the basis of sexual orientation or gender identity, religious schools will be granted a separate ‘back-door’ right under the Religious Discrimination Bill to implicitly discriminate against students on the basis of sexual orientation or gender identity, by explicitly discriminating against them on the basis of religious belief. Not only would this defeat the purpose of the ALRC inquiry and its eventual outcomes, but this could create procedural difficulties where an applicant lodges a discrimination claim under both the SDA and the Religious Discrimination Bill and the respondent raises a defence under only the Religious Discrimination Bill. Though clause 10 applies only to the provisions of the Bill, it is unclear how this conflict between two federal discrimination laws would be resolved as such a unique scenario has rarely been previously considered.

Religiously affiliated educational institutions are already dealt with by other relevant exceptions in the Bill: for example, under clause 31(2) religious discrimination is permitted in employment

13 Anti-Discrimination Act 1998 (Tas) ss 51A(2), (3); Anti-Discrimination Act 1991 (Qld) s 41(a); Discrimination Act 1991 (ACT) s 46; Anti-Discrimination Act 1992 (NT) s 30(2).
15 Ibid.
where, because of religious belief or lack thereof, a person is unable to carry out the inherent requirements of the job. This would already allow religious schools to employ applicants of the same faith for roles in which faith is inherently relevant.

To the extent that religious schools should be permitted to preference students of the same faith, this should only apply at the stage of admission and not at any later stage, owing to the disproportionately adverse effect this will have on students in later years of schooling. As such, clause 10 should be amended to ensure the religious school exception applies only at the stage of admission; this can be done by drawing on clause 18 of the Bill, which already separates the prohibition on discrimination in education into: (i) the stage of admission to the school (clause 18(1)) and; (ii) post-admission (clause 18(2)). Clause 10 should not apply to clause 18(2), thereby maintaining the prohibition on post-admission discrimination in regard to students.

**Recommendation 5: Clause 10(3) should be removed, and replaced with the following:  
‘Nothing in this section affects the operation of section 18(2) of this Act.’**

### 6.3 Scope of Religious Charity Exception

Clause 10(2)(b) applies to religiously affiliated charities. As per the explanatory notes, charities will be considered religious charities regardless of whether they ‘have the charitable purpose of advancing religion’.\(^\text{17}\) As long as they are ‘conducted in accordance with a particular religion’, then they will be religious charities even if their purposes are ‘advancing health or advancing social or public welfare’.\(^\text{19}\) Various Australian charities, many of which are large and provide a vast array of public services and benefits, would be caught by this definition. Clause 10 would allow them to discriminate widely, in ways that non-religious charities could not. This would exacerbate what is already an uneven playing field in the various industries and markets in which the not-for-profit sector compete.

Take an example of a soup kitchen affiliated to one particular religion. This provision would allow the soup kitchen to require that any volunteer helping serve bowls of soup is of the same religion. It would also allow the soup kitchen to refuse to serve soup to any persons who are of a different religious faith, or of no religious faith, or to require recipients to participate in religious activities in order to receive soup. Similarly, a homeless shelter could refuse to provide shelter to a person who did not have the same religious beliefs as the shelter.

Religiously affiliated charities are already captured by other relevant exceptions in the Bill: the governing rules of charities, and conduct engaged in to give effect to such rules, are exempt under clause 28; religious discrimination is permitted in employment where, because of religious belief or lack thereof, a person is unable to carry out the inherent requirements of the job under clause 31(2). The latter would, too, allow religious charities to employ applicants of the same faith for roles in which faith is relevant: for instance, leadership roles.

\(^{17}\) Explanatory Notes, Religious Discrimination Bill 2019 (Cth) [169].

\(^{18}\) Ibid.
While there may be merit to applying this exception to those charities that are expressly established for a religious purpose, there appears to be no basis to extending this exception to charities with a mere religious affiliation or connection, where their main purpose is to provide public goods, services or facilities such as food or shelter, and where they are often publicly-funded in order to carry out these purposes.

**Recommendation 6**: Clause 10(2)(b) should be amended to read: ‘a registered charity that is conducted for the charitable purpose of advancing the doctrines, tenets, beliefs or teachings of a particular religion (other than a registered charity that engages solely or primarily in commercial activities); or’

**6.4 Other Bodies and Commercial Activity**

Clause 10(2)(c) excludes from the definition of ‘religious body’ those bodies which engage in activities that are ‘solely or primarily’ commercial. The scope of ‘commercial activity’ as provided in clause 10(2)(c) is unclear, as ‘commercial activity’ is not defined. While the explanatory notes suggest that religious hospitals and aged care providers would fall outside the definition of ‘religious bodies’ as they ‘provide services to the public on a commercial basis’, we do not accept that this interpretation is readily available on a strict interpretation of clause 10(2)(c). Thus, the Bill should be amended to clarify the definition contained in the Bill itself, by providing that ‘other bodies’ are only ‘religious bodies’ where they are conducted for the purpose of advancing religious doctrine, and by providing that this clause 10 exception does not apply to conduct connected with commercial activities. Though core religious activities can rightly fall within the clause 10 exception, commercial activities with a religious connection should remain subject to the same prohibitions on discrimination that are imposed on commercial activities without a religious connection.

**Recommendation 7**: Clause 10(2)(c) should be amended to read: ‘any other body that is conducted for the purpose of advancing the doctrines, tenets, beliefs or teachings of a particular religion’ (other than a body that engages solely or primarily in commercial activities).’

**Recommendation 8**: A new clause 10(4) should be added, to read: ‘This section does not apply to conduct that is connected with commercial activities.’

**7 Other Concerns**

Several other provisions of the Bill cause serious concern and require further consideration.

**7.1 Constitutional Law Concerns**

We endorse fully the submissions made to this consultation by Associate Professor Luke Beck on 27 September 2019 in regard to the following concerns over the constitutionality of the Bill:

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19 Explanatory Notes, Religious Discrimination Bill 2019 (Cth) [174].
a. That the definition of ‘statement of belief’ appears to be inconsistent with international human rights law, including the _International Covenant on Civil and Political Rights (ICCPR)_;\(^{20}\)

b. That the definition of ‘statement of belief’ gives rise to constitutional difficulties, as the ‘main constitutional’ basis for the Bill is the external affairs power in section 51(xxix) of the _Commonwealth Constitution_ and key provisions of the Bill are inconsistent with relevant international law obligations;\(^{21}\)

c. That the singling out of Tasmanian law by clause 41(1)(b) of the Bill gives rise to constitutional difficulties, owing to section 117 of the _Commonwealth Constitution_ which grants immunity against any law that discriminates against Australians based on State residency;\(^{22}\) and

d. That, as noted above, clause 41 causes constitutional difficulties for the operation of State and Territory tribunal systems.\(^{23}\)

We also note that Article 18 of the _ICCPR_ distinguishes between the right to have or adopt a religion and the freedom to manifest that religion or belief ‘either individually or in community with others and in public or private…[in regard to] belief in worship, observance, practice and teaching.’ The right to manifest one’s religion or beliefs ‘may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.’ This Bill appears to take the opposite approach by prioritising freedom of religion over other fundamental rights protected by the _ICCPR_, including the right to be protected against discrimination (see the discussion in Part 4, above).

**Recommendation 9: Further consideration should be given to constitutional law concerns regarding the Religious Discrimination Bill before its tabling, to ensure its validity.**

### 7.2 Scope of Definitions

Clause 5 has a number of definitions which lack sufficient clarity. This could cause considerable inconsistency and problems with their interpretation. In particular, we note the definitions of ‘religious belief’ and ‘statement of belief’.

The term ‘religious belief’ is effectively undefined. Given a ‘religious belief’ does not have to be a belief that accords to any known doctrines or tenets of a religion, a wide range of beliefs could be caught by this definition. This is particularly apparent given that non-belief is included as part of the definition. The Bill also does not appear to provide protection to persons who ‘are’ or ‘of’ a certain religious tradition but do not specifically ‘hold’ a religious belief. For example, the Bill appears to provide no protection to persons who would consider themselves ‘lapsed’.

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\(^{21}\) Ibid 6.

\(^{22}\) Ibid 10-12.

\(^{23}\) Ibid 12-13.
Catholics. Such a person may still consider themselves Catholic despite not holding or considering themselves ever to have ‘held’ a specific ‘religious belief’. The term ‘lawful religious activity’ in the definition of ‘religious belief or activity’ is also undefined in clause 5.

Further, the definition of ‘statement of belief’ in clause 5 lacks clarity. This is particularly so given that the definition of ‘religious belief’ in clause 5 includes ‘not holding a religious belief’, while the definition of ‘statement of belief’ in clause 5 only includes persons who do not hold religious beliefs when they make a statement ‘about religion’. This prioritises the protection of religiously-related statements over all other statements, and in doing so provides asymmetrical, and additional, protection to those of religious faith over those not of religious faith.

Further, the Bill also appears to provide greater protection to persons whose religion has ‘doctrines, tenets, beliefs or teachings’ by providing protections for statements of belief connected to ‘doctrines, tenets, beliefs or teachings’. In a pluralist society, there may be those who have religious faith which does not traditionally have these particular features, and by operation of these definitions the Bill would appear to grant greater protection to some religious beliefs or practices over others.

Clauses 6(a), (b) and (c), which extend the meaning of the relevant discriminatory ‘ground’, also appear to present challenges as to the breadth and coverage of the Bill. Given the pluralistic nature of Australian society there are no singular or specific ‘characteristics’ of persons that hold a religious faith but instead these ‘characteristics’ may be based on the particular religious or non-religious beliefs that a person may have. The practical ramification of this is that it will be difficult for duty-bearers to be able to ascertain which characteristics are associated with religious beliefs and which are not. Where there is such complexity for duty-bearers, there is also complexity for rights-holders who will need to establish that the conduct is within scope of the protection under the Bill.

Further, clause 6(c) suggests that discrimination occurs based on the ground of the religious belief or activity that a person has or engages in. However, due to the broad definition of ‘religious belief or activity’ contained in clause 5, clause 6(c) appears to cover an individual’s specific understanding or interpretation of their own religious belief and activity not necessarily related to any underpinning doctrine or tenet or teaching and not necessarily followed by any other individual. Again, this would make compliance for any duty-bearer challenging.

Clause 7 of the Bill appears not to provide protection from discrimination on the basis that someone is ‘of’ a certain religion – i.e., in circumstances where the discrimination is not because the person ‘holds’ a religious belief but instead is ‘of’ a certain religion. For example, clause 7 does not appear to provide protection from discrimination where a person holds negative views about a religion which are not associated with the holding of a religious belief or activity.

**Recommendation 10: Further consideration should be given to the practical effects of the definitions of ‘religious belief or activity’ and ‘statement of belief’ in clause 5, and of related provisions in clauses 6 and 7, and amendments proposed to ensure equal protection for those who do not hold religious beliefs.**
7.3 Extension of Bill to Corporations

We endorse fully the submissions made to this consultation by the Australian Human Rights Commission (AHRC) on 27 September 2019 in regard to concerns over the extension of this Bill to allow corporations to allege religious discrimination.\(^{24}\) We note that human rights are designed to protect innately human characteristics, and all existing federal discrimination laws allow only natural persons to bring a claim of discrimination. Corporations and other organisations should not be permitted to bring a claim of religious discrimination.

**Recommendation 11:** The definition of ‘person’ should be removed from clause 5 and the Explanatory Notes to the Religious Discrimination Bill should be amended to make clear that a complaint of discrimination on the ground of religious belief or activity may only be made by or on behalf of a natural person.

7.4 Creation of a Freedom of Religion Commissioner

We endorse fully the submissions made to this consultation by the Public Interest Advocacy Centre (PIAC) on 30 September 2019 in regard to concerns over the creation of a Freedom of Religion Commissioner.\(^{25}\) We reiterate that the federal government’s Religious Freedom Review did not recommend the creation of this role, and instead recommended that the AHRC take a leading role in the protection of freedom of religion through its existing commissioner model. We endorse PIAC’s submission that there is a much stronger case for the creation of a Commissioner for Sexual Orientation, Gender Identity and Expression, and Sex Characteristics (SOGIESC Commissioner).

**Recommendation 12:** Further consideration should be given to the necessity of a Religious Freedom Commissioner, and to the creation of a Sexual Orientation, Gender Identity and Expression, and Sex Characteristics (SOGIESC) Commissioner.

7.5 Accessibility of Consultation

ADLEG is aware of a number of concerns that have been raised concerning the accessibility of the consultation process for people with disabilities. These concerns include the lack of accessible format materials for people with cognitive impairments, and the lack of audio format for consultation materials. These issues may have excluded people with disabilities from this consultation process and, as a result, made the process discriminatory. This warrants an extension of time taken for consultation, in order to ensure fair and non-discriminatory participation.

**Recommendation 13:** Further time should be allowed for consultation on the Religious Discrimination Bill and the related religious freedom Bills to allow fair and non-discriminatory participation for people with disabilities.


7.6 Amendment of Objects Clauses

The Human Rights Legislation Amendment (Freedom of Religion) Bill amends the objects clauses of all four existing federal discrimination laws to include reference to the importance of ‘all’ human rights. The explanatory notes provide that this will ensure freedom of religion, among other rights, is given appropriate regard in discrimination law.\(^{26}\) It is unclear why this is necessary, or its intended substantive effect, and why this should be inserted for the express purpose of having regard to freedom of religion without explicitly referencing other relevant rights.

Recommendation 14: Further consideration should be given to the practical effects of amending, under the Human Rights Legislation Amendment (Freedom of Religion) Bill, the objects clauses of the four existing federal discrimination laws.

\(^{26}\) Explanatory Notes, Religious Discrimination Bill 2019 (Cth) [33].