BACKGROUND

The author of this submission was a member of the Expert Panel of the Religious Freedom Review which reported its findings to the Prime Minister on 18 May 2018.

The three exposure bills released by the Attorney-General are a welcome first step in the Government’s response to the recommendations of the Expert Panel Report. In this submission I focus on the draft Religious Discrimination Bill, which is intended to give effect to Recommendations 3, 15 and 19 of the Report.

This submission is made in my personal capacity. The approach I have taken is to examine the Religious Discrimination Bill in the light of the reasoning underlying the Expert Panel’s recommendations.

EXECUTIVE SUMMARY

Consistently with Recommendation 15, the draft Religious Discrimination Bill has two central aims: firstly, 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), and secondly, to provide for appropriate exceptions and exemptions, including for religious bodies, religious schools and charities.

It is therefore vital to recognise that Recommendation 15 and the Religious Discrimination Bill only address discrimination on the basis of religious belief or activity. They are not concerned with discrimination on any other ground. Accordingly, the balance struck by the Religious Discrimination Bill in affirming that a religious body does not discriminate against a person if it engages in conduct that is in accordance with its religious doctrines (clause 10) only applies to discrimination on the basis of religious belief or activity. It has no impact on discrimination on the basis of other characteristics, such as race, sex, age, sexuality or gender.

This needs to be kept steadily in mind in any assessment of the Religious Discrimination Bill.

In summary, I make the following seven submissions:

1. The definition of religious belief or activity in clause 5(1) should be amended to ensure that the protections afforded by the Religious Discrimination Bill cannot be nullified or frustrated by excessive or disproportionate state, territory or local laws.

2. The definition of registered charities and other religious bodies in paragraphs 10(2)(b) and (c) should not impose a blanket exclusion of charities and religious bodies which engage solely or primarily in commercial activities.

3. The protection offered in clause 10(1) should be amended so that it clearly enables religious bodies to act in accordance with written and publicised policies which articulate the religious body’s assessment of how best to conduct itself in accordance
with its religious beliefs and religious mission, such as by preferring to engage employees or volunteers who adhere to the beliefs and practices of the religion.

4. Clause 10(1) should also protect religious bodies that, in the absence of a written policy, adopt a consistent course of conduct that expresses the religious body’s assessment of how best to conduct itself in accordance with its religious beliefs and religious mission.

5. The definition of ‘relevant employer’ in clause 5(1) should not adopt a blanket exclusion of government employers or employers having an annual revenue of less than $50 million.

6. The protections afforded by clauses 8(3) and 41(1) should not depend on an assessment by a secular commission or court of whether the belief ‘may reasonably be regarded as being in accordance with’ the doctrines of the religion.

7. Rather, the protections afforded by clauses 8(3) and 41(1) should depend on objective criteria concerning the content of the statement that are consistent with Australia’s obligations under the International Covenant on Civil and Political Rights.

I set out my reasons for these submissions below.

REASONS FOR SUBMISSIONS

1. The definition of religious belief or activity in clause 5(1) should be amended to ensure that the protections afforded by the Religious Discrimination Bill cannot be nullified or frustrated by excessive or disproportionate state, territory or local laws.

Many of the protections in the bill depend upon the definition of ‘religious belief or activity’ in clause 5(1). While the term needs to be defined to ensure that acts of a criminal or similarly serious nature do not receive protection, the limitation of the definition to engagement in ‘lawful religious activity’ goes too far. It will make the protections afforded by the Exposure Bill subject to any state, territory or local government law or ordinance that makes a particular activity unlawful. Such laws could include excessive restrictions on the propagation of religious beliefs in public places or disproportionate controls on the religious use of private property. As drafted, the Exposure Bill leaves open the possibility that a state, territory or local law might go too far in prohibiting certain activity, and in so doing nullify or frustrate the effect of the Commonwealth law.

2. The definition of registered charities and other religious bodies in paragraphs 10(2)(b) and (c) should not impose a blanket exclusion of charities and religious bodies which engage solely or primarily in commercial activities.

Many charitable and welfare organisations which are intrinsically religious in their purpose and ethos operate commercially to the extent that they charge fees for services or receive payment for goods, but they usually do so on a not-for-profit basis and entirely for religiously motivated reasons. Their goal is to provide goods or services to needy members of the public, often on a highly discounted basis. In order to provide their goods and services in the most cost-effective manner possible, they frequently rely on the
generosity of religiously motivated donors and volunteers, but they also sometimes find it necessary to engage paid employees and professionals in order to maintain high standards of service to the people in their care. As religious organisations, they want their goods and services to be offered to members of the public by volunteers, employees and professionals who wholeheartedly embody their deepest religious beliefs and motivations.

The definition of registered charities and other religious bodies in paragraphs 10(2)(b) and (c) would exclude these sorts of religiously motivated organisations from the same protections that are offered to religious educational institutions under clause 10(1) of the draft bill. The definition of registered charities and other religious bodies should be accordingly amended, at least so that the protection extends to charities and other religious bodies that operate on a not-for-profit basis.

Such an amendment to the Exposure Bill would be consistent with the finding of the Expert Panel when it observed that there is a ‘qualitative difference’ between for-profit organisations and faith-based organisations that provide services on a not-for-profit basis. Observing that ‘faith-based organisations have an extraordinary capacity to mobilise unpaid contributions’, the Panel noted ‘the extraordinary contribution of volunteers in not-for-profit organisations to the public benefit’ and ‘the commitment of many of the persons participating in those organisations for reasons of faith’.

Such an amendment to the Exposure Bill would also help to ensure greater conformity of the proposed law with Australia’s obligation under Article 18(3) of the International Covenant on Civil and Political Rights to ensure that freedom to manifest religion or belief ‘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’. Noting these requirements, the Expert Panel recommended that when drafting laws that would limit the human right to freedom of religion regard should be had to the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights. Those principles state that limitations on rights must, among other things, pursue a legitimate aim only in a manner that is ‘proportionate to that aim’ and which uses ‘no more restrictive means than are required for the achievement of the purpose of the limitation’. In my submission, excluding registered charities and other religious bodies from the protection of clause 10(1) solely on the basis

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1 See Explanatory Notes, paras [170]-[175].
3 International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), Art 18 (emphasis added).
that they engage solely or primarily in commercial activities would be inconsistent with these principles.

3. The protection offered in clause 10(1) should be amended so that it clearly enables religious bodies to act in accordance with written and publicised policies which articulate the religious body’s assessment of how best to conduct itself in accordance with its religious beliefs and religious mission, such as by preferring to engage employees or volunteers who adhere to the beliefs and practices of the religion.

The essential problem in clause 10(1) is the gap that may exist between religious doctrines on one hand and employment policies and decisions on the other. Religious doctrines typically concern theological propositions, ecclesiastical principles, religious rituals and codes of moral conduct. Employment policies are concerned with much more mundane matters such as employment criteria and the particular duties expected of employees when undertaking specific tasks within an organisation.

For example, some religious schools require that all their staff—maths teachers, administrators and gardeners alike—adhere to the religion and conduct themselves in accordance with it, while others merely prefer to appoint such staff wherever possible, while yet others are willing to appoint staff who do not adhere to the religion to particular positions that do not involve a teaching role, or to a role that does not involve specifically religious instruction, provided that they do not openly or actively undermine the religious ethos or mission of the school. Indeed, two schools could adhere to the same doctrinal standards as a matter of theology, but could adopt different policies in relation to the employment of staff. The current wording of clause 10(1) does not make clear that all these kinds of schools will be protected. Yet in the submissions received by the Religious Freedom Review it was notable that all of the religious schools—no matter what their particular policies might be—supported the freedom of all religious schools to determine their own distinct policies in relation to the religious beliefs and practices of their staff in order to maintain the particular religious ethos and mission of the school.

For these reasons, the Religious Freedom Review recommended, in relation to the Sex Discrimination Act, that religious schools be able to discriminate in relation to the employment of staff provided the discrimination is (a) founded in the precepts of the religion; (b) the school has a publicly available policy; and (c) the school provides a copy of the policy to employees and prospective employees. Among other things, this recommendation recognised the importance of the school having a clear set of publicly available policies in terms of which it consistently operates. It also recognised that a gap potentially exists between the theological doctrines on which the school is founded and the day-to-day policy stances and employment decisions that have to be developed by

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each school in order to enable it to operate—a gap which may be filled through the
development of carefully framed employment policies that reflect a considered judgment
about the best way for the school to pursue its religious mission in accordance with its
religious beliefs.

Enabling religious schools and other religious bodies to adopt publicly available
employment policies will help to avoid the problems that arose in Christian Youth Camps
Ltd v Cobaw Community Health Services Ltd,9 where the Tribunal at first instance and the
Court of Appeal disagreed with the Christian organisation’s own assessment of what its
doctrine required.10

Justice Sarah Derrington, who as President of the Australian Law Reform Commission
has carriage of a reference from the Attorney-General on the implementation of several
recommendations of the Expert Panel, has proposed a similar solution. She has suggested
that the religious freedom exceptions contained in the Sex Discrimination Act could be
replaced by a positive right of religious organisations to act in accordance with written
and publicised policies which articulate each organisation’s assessment of how best to
conduct itself in accordance with its religious beliefs and religious mission, including in
its employment decisions. Such an approach builds on the relevant recommendation of
the Religious Freedom Review in a way that addresses the problem of the ‘gap’ between
religious doctrine and mundane employment policies and decisions of religious
organisations. The same approach could suitably be applied to the religious freedom
provisions of any antidiscrimination law, including clause 10(1) of the Exposure Bill.11

4. **Clause 10(1) should also protect religious bodies that, in the absence of a written
   policy, adopt a consistent course of conduct that expresses the religious body’s
   assessment of how best to conduct itself in accordance with its religious beliefs and
   religious mission.**

One further matter that became evident to me as a member of the Expert Panel is that
there are some religious groups in our society, especially minorities, who are not very

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9 Cobaw Community Health Services v Christian Youth Camps Ltd [2010] VCAT 1613; Christian Youth Camps
Ltd v Cobaw Community Health Services Ltd (2014) 50 VR 256 (Maxwell P and Neave JA, Redlich JA
dissenting). Leave to appeal to the High Court was refused: Christian Youth Camps Limited v Cobaw
Community Health Services Limited [2014] HCATrans 289.


11 Further clarification could be achieved by inserting into the definitions clause a provision that specifies the
   kinds of conduct that will meet the requirements of clause 10(1). The definitions clause could clarify that such
   conduct will include decisions to employ or engage a particular person, or allocate particular duties or
   responsibilities to that person, on the ground that the person adheres to or conducts himself or herself in
   accordance with the religious beliefs of the organisation; as well as decisions not to employ or engage a
   particular person, or to terminate the employment or engagement of a particular person, or not to allocate
   particular duties or responsibilities to a particular person, on the ground that the person does not—or no
   longer—adheres to or conducts himself or herself in accordance with the religious doctrines of the organisation.
   A helpful precedent for this kind of provision is found in the Fair Work Act 2009 (Cth) s 355.
aware of their rights and obligations under Australian law. While I hold the view that the protection of clause 10(1) should extend to religious bodies that adopt written employment policies that accord with their religious beliefs, such a requirement could cause injustice to small or minority groups that cannot afford the expense of quality legal advice. To meet such a possibility, clause 10(1) should also protect religious bodies which, in the absence of a written or publicised policy, adopt a consistent course of conduct that expresses the religious body’s assessment of how best to conduct themselves in accordance with their religious beliefs and religious mission.

5. **The definition of ‘relevant employer’ in clause 5(1) should not adopt a blanket exclusion of government employers or employers having an annual revenue of less than $50 million.**

The protections offered by clause 8(3) apply only to relevant employers as defined in clause 5(1). While the two criteria applied in the definition have the merit of involving ‘bright line’ distinctions that are relatively easily applied, there are two problems.

The first problem is that it is difficult to identify a justification of the minimum revenue requirement that is consistent with Australia’s obligations under Article 18(3) of the International Covenant on Civil and Political Rights. As emphasised in the *Siracusa Principles*, limitations on the human right to freedom of religion must not only be proportionate and necessary, they must also be based on one of the justifying grounds recognised in the Covenant. However, no such justification is offered in the Explanatory Notes and it is difficult to see how the exclusion of employers having a revenue of less than $50 million could have any relationship to the protection of ‘public safety, order, health, or morals, or the fundamental rights and freedoms of others’, let alone be a measure that is a ‘necessary’, ‘proportionate’ and ‘least restrictive’ means to securing such goals. Distinguishing between employers on the basis of their annual revenue has no rational relationship to any of these goals.

The second problem concerns the blanket exclusion of government employers. As with the revenue distinction, it is difficult to see how the criterion could have any relationship to the justifying grounds of limitation required by Article 18(3) of the International Covenant on Civil and Political Rights, let alone meet the requirement that such limitation be a ‘necessary’, ‘proportionate’ and ‘least restrictive’ means to securing such goals. Moreover, the inclusion of such a blanket limitation on the protective effect of clause 8(3) is to adopt a criterion that differs considerably from the standard that was upheld by the High Court in *Comcare v Banerji* [2019] HCA 23. There the High Court specifically accepted that the Australian Public Service can require civil servants to be ‘apolitical’ or politically neutral in their conduct and speech. It is reasonable to require government employees to act in a manner that maintains the political integrity of the public service, but it is difficult to see any principled reason why this should extend to controlling what civil servants say in their own time about religious matters generally. Such a blanket

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12 *Siracusa Principles*, A10(a).
restriction may raise questions of constitutionality under section 116 of the Constitution as well as the implied freedom of political communication (insofar as religious speech can also be political speech for the purposes of the implied freedom).\textsuperscript{13}

6. The protections afforded by clauses 8(3) and 41(1) should not depend on an assessment by a secular commission or court of whether the belief ‘may reasonably be regarded as being in accordance with’ the doctrines of the religion.

The protections afforded by clauses 8(3) and 41(1) depend on the definition of ‘statement of belief’ in clause 5(1), which definition requires, among other things, that the belief ‘may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion’. This poses problems similar to those that arise under clause 10(1). As with clause 10, there is a potential gap between the ‘religious belief’ of the individual and the doctrines of ‘the religion’. Two individuals may adhere to the same religion, but have conscientiously different views about what they should say publicly, and how they should say it. Indeed, much of the debate within religious circles about the Israel Folau case has concerned exactly that question.

The protection accorded to a person in respect of statements of belief should not depend on assessments made by a secular commission or court as to whether the relevant belief ‘may reasonably be regarded as being in accordance with’ the doctrines of a particular religion. Otherwise, the provision will potentially give rise to the problem that arose in \textit{OV & OW v Members of the Board of Wesley Mission Council} (2010) 79 NSWLR 606, where opinion differed as to which religion, denomination or branch thereof was the relevant ‘religion’.

\textsuperscript{14} The definition of ‘statement of belief’ should be amended, or at least the Explanatory Memorandum should make clear, that it is the \textit{particular} religious denomination or religious body of which individual is a member, or the \textit{particular} religious belief to which the individual adheres, that is relevant.

7. Rather, the protections afforded by clauses 8(3) and 41(1) should depend on objective criteria concerning the content of the statement that are consistent with Australia’s obligations under the International Covenant on Civil and Political Rights.

There are three respects in which the drafting of clauses 8(3), 8(4) and 41(2) do not appear to comply with Australia’s obligations under the International Covenant on Civil and Political Rights.

The first problem is that clause 8(3) provides that the protection will not be available if compliance with the rule of conduct imposed on the employee ‘is necessary to avoid


\textsuperscript{14} \textit{OV & OW v QZ} (No 2) [2008] NSWADT 115; \textit{Members of the Board of the Wesley Mission Council v OV & OW} (No 2) [2009] NSWADTAP 57; \textit{OV & OW v Members of the Board of Wesley Mission Council} (2010) 79 NSWLR 606.
unjustifiable financial hardship to the employer’. It has been correctly pointed out in public discussion of the Exposure Bill that such a provision may have the consequence of enabling third party sponsors to place an employer under financial pressure to control an employee’s free speech—as appears to have happened in Israel Folau’s case—and that the same kind of pressure or coercion could be exerted through orchestrated social media boycotts—as appears to have occurred in the similarly well-known Coopers Brewery case. As presently drafted, clause 8(3) would thus serve to promote private sources of discrimination against an individual, which cannot be in the public interest. To allow this to occur risks contravention of Article 18(3) of the International Covenant on Civil and Political Rights, which requires that restrictions on freedom of religion must not be imposed for discriminatory purposes or applied in a discriminatory manner.\footnote{Human Rights Committee, \textit{General Comment 22: The Right to Freedom of Thought, Conscience and Religion} (Art 18), 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (30 July 1993) para [8].}

The second problem is that clause 8(3) allows limitations to be imposed on employees in relation to statements of belief (whether religious or non-religious) which cannot be justified under either Article 18(3) or 19(3) of the International Covenant. Article 19(3), like Article 18(3), provides that freedom of expression can only be restricted by measures that are ‘necessary’: (a) ‘for respect of the rights or reputations of others’ or (b) ‘for the protection of national security or of public order (ordre public), or of public health or morals’. However, the avoidance of ‘unjustifiable financial hardship to the employer’ referred to in clause 8(3) is not one of the particular grounds of limitation referred to in either Article 18(3) or 19(3). The Human Rights Committee has been very clear that restrictions on the human right to freedom of expression must only be imposed on the basis of the grounds set out in Article 19(3).\footnote{Human Rights Committee, \textit{General Comment 34: Freedoms of Opinion and Expression} (Art 19), 102nd sess, UN Doc CCPR/C/GC/34 (12 September 2011) para [22].}

The third problem is that clauses 8(4) and 41(2) provide that the protection in clauses 8(3) and 41(1) do not apply to statements of belief that would or are likely to ‘harass, vilify or incite hatred or violence against another person or group of persons’. However, Article 20(2) of the International Covenant, which carefully specifies the particular kinds of ‘hate speech’ that may be prohibited consistently with the protection of freedom of expression in Article 19, is expressly limited to ‘advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence’. The use of undefined terms such as ‘harass’ and especially ‘vilify’ in clause 8(4) would enable an employer (perhaps under financial pressure from a donor or due to an orchestrated boycott) to restrict the freedom of expression and freedom of religion of an employee on grounds that go far beyond the closely defined language of Article 20(2) of the International Covenant. Further, the use of these undefined terms in clause 41(2) would expose a person who made such a statement of belief to a discrimination complaint under Commonwealth, state or territory law, again without reference to the strict requirements for the limitation
of freedom of religion and freedom of expression under Articles 18(3), 19(3) and 20(2) of the International Covenant.

An Expert Workshop convened by the UN High Commissioner for Human Rights concluded in its 2013 report that Article 20(2) deliberately establishes a ‘high threshold’ for the restriction of free speech because ‘as a matter of fundamental principle, limitation of speech must remain an exception’.\(^\text{17}\) The UN Expert Report stated that, read together, Articles 19 and 20(2) require that any restriction of hate speech must be ‘clearly and narrowly defined’, the ‘least intrusive’ means to achieving the objective, ‘not overly broad’, ‘proportionate’, and must accord closely with the precise language of article 20(2).\(^\text{18}\) Further, the UN Expert Report expressed concern about the use of ‘increasingly vague’ terms to define hate speech offences and the development of ‘new categories of restrictions’, and noted that the ‘broader the definition … the more it opens the door for arbitrary application of the laws’. The Report also reflected on the relationship between freedom of religion and freedom of speech in the following terms:

> The freedom to exercise … one’s religion or belief cannot exist if … freedom of expression is not respected, as free public discourse depends on respect for the diversity of convictions which people may have. Likewise, freedom of expression is essential to creating an environment in which constructive discussion about religious matters [can] be held. Indeed, free and critical thinking in open debate is the soundest way to probe whether religious interpretations adhere to or distort the original values that underpin religious belief.

There is reason to be concerned that Australia would be in breach of its international obligations to protect freedom of expression and freedom of religion through the use of undefined terms such as ‘harass’ and especially ‘vilify’. The drafting of clauses 8(4) and 41(2) should be changed so they accord with the precise language of Article 20(2) of the International Covenant.

Thank you for the opportunity to make this submission. I am available to expand on it in person, if that would be of assistance.

Sincerely,

Nicholas Aroney
Professor of Constitutional Law
The University of Queensland
2 October 2019

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\(^{17}\) *Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence*, A/HRC/22/17/Add.4, Appendix (2013).

\(^{18}\) *Rabat Plan* [18], [21]. Similar observations about Articles 19 and 20.2 have been made by the UN Human Rights Committee in its General Comments on the ICCPR and in its Reports assessing the compliance of particular countries with the ICCPR, including its 2009 Report on Australia. Australia entered a reservation in relation to its obligations under Article 20, but this reservation relates to its obligation to prohibit hate speech under that article. This does not affect its obligation to protect freedom of expression under Article 19.