Equal Voices Submission on the
Religious Discrimination Bill 2019
Exposure Draft
to the
Commonwealth
Attorney-General’s
Department

2 October 2019

By email to: FoRConsultation@ag.gov.au.

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Executive Summary

Equal Voices welcomes the introduction of federal legislation to protect against discrimination on the grounds of religion. We endorse the ‘conventional’ aspects of the discrimination legislation. We join with expert legal bodies and many other stakeholder groups in expressing serious reservations over parts of the legislation. We refer to sections and definitions that are novel, unclear and which operate to directly or indirectly undermine other domestic discrimination laws and the broader aims of promoting equality for all. We regard these sections of the legislation as inconsistent with international law. Equal Voices cannot support the Bill in its current form. In particular it holds grave reservations about the nature and scope of sections (or clauses) 8, 10 and 41. We believe all of these sections have the potential to permit harmful and otherwise unlawful discrimination under the guise of so-called ‘religious freedom’. We identify where section 10 in particular holds concerns for LGBTIQ+ people of faith and their allies. We make a number of recommendations regarding the legislative provisions. We place our discussion against the broader debates over religious exemptions by reference to government inquiries, reports, stakeholder submissions and personal accounts provided to Equal Voices. We request that the government review how this Bill will operate not only to provide protection from religious discrimination for religious bodies, but also for LGBTIQ+ people of faith and their allies.

Recommendations

Recommendations on section 10 and the Bill

1. Amend s 10 so that limitations to the rights and freedoms of others are based on principles of proportionality.
2. If recommendation (1) is rejected, amend s 10 so as to narrow the scope of the exceptions provided to religious bodies.
3. In s 10 and the Bill define religious body as a ‘body established for religious purposes’.
4. In s 10 and the Bill remove the definition of bodies corporate as a natural person.
5. In s 10 delete ‘may reasonably be regarded as in accordance with’ and replace with ‘in conformity with’ or a term to the same effect.
6. In s 10 add a provision to ensure the effect of s 10 is not to derogate from or contravene the operation of other discrimination laws.

Additional recommendations on the Bill

7. Delete s 8 (3),(4),(5) and (6).
8. Delete s 41.
9. Amend Object (1) of the Bill to reflect the aim of achieving substantive rather than formal equality.
10. Delete Object (3) of the Bill.
11. Amend the Bill so as to ensure that discrimination complaint procedures are no more difficult than is already the case for potential victims of discrimination.

12. Incorporate the duties of the ‘religious freedom’ Commissioner into an existing Commissioner position.

13. If the government decides to retain the substance of any or all of ss 8, 10 and 41, or related definitions, refer these elements of the Bill to the Australian Law Reform Commission for review.
About Equal Voices

Equal Voices is a non-denominational, national network of Australian Christians committed to the full inclusion and equality of people who are lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ+). We are the largest network of LGBTIQ+ people of faith and their allies in Australia. The organisation has branches in cities and regional areas of NSW, ACT, Queensland and Victoria. We represent the views of Christians who support the full equality of LGBTIQ+ people in our communities, including faith-based communities. We proudly supported and contributed to the successful campaign for marriage equality in 2017.2 We observe that notwithstanding the vocal support for the ‘No’ case by some institutional religious leaders, millions of self-identified Christians voted for ‘Yes’.3 We firmly believe these millions of Christians also support equality for LGBTIQ+ people in the law, and disavow discrimination because of their faith-based beliefs. Equal Voices was pleased to make submissions to the Religious Freedom Review and two recent Senate Inquiries related to religious exemptions for faith-based schools.4

Equal Voices would like to record its disappointment that the government has not adequately consulted with us in relation to this Bill as at the time of this submission.5 In the experience of Equal Voices, many of the Christian bodies with which government has consulted closely on the development of this Bill have, and continue to, marginalise LGBTIQ+ people of faith.6 We are not confident that the government has listened to the perspective of LGBTIQ+ people of faith or their allies in consultations to date. We remain open and willing to engage in dialogue with government, as we do with the religious bodies to which we belong.

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2 Equal Voices campaigned as ‘Australian Christians for Marriage Equality’.
3 If at the time of the vote Christians accounted for approximately 50-60% of the population, approximately 2 – 3 million Christians voted Yes. This is supported by polling evidence that a majority of Christians supported marriage equality; eg. ‘Same-Sex Marriage Research 2014’ Crosby|Textor (27th June 2014).
4 Equal Voices submissions referred to below include to the Religious Freedom Review (February 2018); Legal and Constitutional Affairs References Committee, Legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff (22 November 2018); Inquiry into the Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018 (21 January 2019).
5 Equal Voices has had representation at a single meeting of a large group with one Senator.
6 For example, Merritt, C. ‘Faith tank frees up debate’ The Australian (July 16 2019).
Introduction

Equal Voices welcomes an opportunity to provide feedback on the Bill. Our submission primarily focuses on section 10 of the Bill. We have not had time to address the related ‘religious freedom’ Bills. Section 10 of the Bill is as follows:

10 Religious bodies may act in accordance with their faith

(1) A religious body does not discriminate against a person under this Act by engaging, in good faith, in conduct that 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.

(2) Religious body means:

(a) an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion; or

(b) a registered charity that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion (other than a registered 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).

(3) This section applies despite anything else in this Act.

We make some recommendations on other aspects of the Bill for which, in the limited consultation period, we are unable to prepare detailed comments. We emphasise that the period and nature of consultation on such a complex piece of legislation has been too limited for many stakeholders. We note that a short timeframe works to the advantage of large institutional bodies with the resources to respond quickly and works to the disadvantage of local, grassroots community-based groups.

Terminology

This legislative package has been termed by the government as the ‘Religious Freedom Bills’. These Bills respond to certain recommendations by an Expert Panel from their Religious Freedom Review. Equal Voices notes that the phrase ‘religious freedom’ is popular shorthand. It does not reflect the substantive meaning of the relevant rights recognised by international law. For example, Article 18 of the International Covenant on Civil and Political Rights (ICCPR) refers generally to freedom of ‘thought, conscience and religion’. The rights involved therefore go beyond ‘religious’ freedom to atheistic and non-theistic belief systems. We recognise that the Bill does provide protection for the right not to hold

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a belief\textsuperscript{10}, although we are unsure that it adequately protects other non-religious belief systems, partly because the Bill does not define religious belief and activity.\textsuperscript{11}

Equal Voices is also concerned that the phrase ‘religious freedom’ is distorted and politicised by the ‘culture wars’ which emanate from the United States. The culture war background leaves the phrase open to misunderstanding by the community. The US constitutional system is very different from our own. For example, the US constitution expressly protects positive religious rights. Large numbers of Christian form-letter submissions to the Religious Freedom Review indicated that there was no, or extremely limited, protection for religion in Australia because we lacked a US style ‘religious freedom’ law.\textsuperscript{12} This is a fundamental misunderstanding of the Australian constitutional system and the way in which the right to ‘religious freedom’ is protected in Australia. This misunderstanding has been exacerbated by calls from some religious and political leaders for positive legal protection for religion. Given the contested nature of the phrase, this submission uses the phrase ‘religious freedom’ in inverted commas and prefers alternative terms more consistent with international human rights law.

Throughout this submission we refer to section 10 as an ‘exception’. The Bill indicates, directly and indirectly, that this section is not an exception. Explanatory Note 160 states that the section is ‘not framed as an exception’. Section 10 is located in Division 2, yet Division 4 contains the exceptions and exemptions. Notwithstanding this, s 10 is in substance an exception because it excludes the operation of unlawful discrimination in Part 3. Equal Voices also notes that the Australian Human Rights Commission (the Commission) refers to s 10 as a ‘general exemption’.\textsuperscript{13} We sometimes use ‘exception’ and ‘exemption’ interchangeably where insignificant to the technical distinctions between the terms.\textsuperscript{14} We can only explain the anomaly between what the section is and what it purports to be as a response to complaints by religious bodies about the language of exceptions and exemptions. For example, a number of religious bodies have vocally protested about the impression conveyed by ‘religious exemptions’: ‘[t]his negative formulation of religious freedom (i.e., as an exemption to anti-discrimination) is easily misrepresented and maligned.’\textsuperscript{15}

Justifiable Conduct Based on Religious Beliefs

Equal Voices supports the ability of religious institutions to act in conformity with the doctrines of their particular religious beliefs and teachings. The activities of religious bodies engaged in religious observances such as religious worship and religious teaching have long been protected under a variety of exemptions and exceptions in discrimination laws. Equal Voices supports a provision in federal law

\textsuperscript{10} Section 5 of definitions, under ‘religious belief or activity’ (c) ‘not holding a religious belief’.

\textsuperscript{11} Explanatory Note 64 states that, ‘the concept of religious belief is not defined for the purposes of this Act.’ The following sentence provides little additional insight into the concept.

\textsuperscript{12} See below for discussion on the constitutional context of religious protections.

\textsuperscript{13} Australian Human Rights Commission, Religious Freedom Bills: Submission to the Attorney-General’s Department (27 September 2019) [5.3].

\textsuperscript{14} ‘Exception’ typically refers to making another part of the law inoperative (as s 10 does), while an ‘exemption’ typically refers to a defence for conduct that could otherwise be discriminatory.

\textsuperscript{15} Anglican Church Diocese of Sydney, Submission to the Religious Freedom Review (February 2018), 7. The same complaint was raised in many submissions by religious institutions to the Religious Freedom Review.
to maintain the ability of religious bodies to act in accordance with their beliefs, doctrines and teachings. We support this to the extent of its compatibility with international human rights law.

**Clear and Adaptive Principles**

It is evident that many of the day to day activities of religious bodies do not limit or restrict the rights of others. In areas where the manifestation of a religious belief may interfere with the rights of others the law should provide clear and adaptive principles to inform what kinds of conduct are and are not justifiable. The law should be clear to enable access to justice for everyone. The more convoluted, complex or unusual laws become, the less accessible they are for people or groups that lack legal resources. For this reason, as a matter of principle, Equal Voices expresses strong reservations over the parts of the Bill that lack precedent either within Australia, or internationally, or both. It notes that the Expert Panel, ‘stressed the importance of clear drafting with respect to exemptions and exceptions, noting, for example, the approach taken in newer legislation such as the *Equal Opportunity Act 2010* (Vic).’ Section 10 is in principle concerning because it lacks clarity of meaning and intent, as do ss 8 and 41.

Law should not only be clear but *adaptive* to evolving circumstances and community attitudes. The Expert Panel noted in its Report that,

> As it went about its work, the Panel heard repeatedly that religious adherence in Australia is at a critical juncture. Changing patterns of religious adherence, a loss of trust in mainstream institutions, and changing social mores are challenging the traditional role that religion has played in Australian society.

In these circumstances, Equal Voices strongly supports a principled and flexible approach to the protection of religious beliefs. A principled approach means that the law can be applied without favouritism or prejudice. On its face, some sections of the Bill appear to be directly responding to specifically Christian concerns, including s 10. We note that while a plethora of claims have been made, there has been no evidence presented that details serious harms or threats against the freedom to practice Christian faith. On the other hand, minority religions such as Islam and Judaism have independent and clear evidence of serious harms and threats. Equal Voices expresses its concern that ss 8 and 41 are addressing highly specific, unusual and sometimes mis-reported incidents that of themselves do not provide a basis for new types of legal measures.

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16 Report [1.152]
17 Expert Report [1.5].
18 For example, McIlroy, T, ‘New religious freedom laws designed for cases like Folau: AG’ *Australian Financial Review* (July 24 2019).
19 The Expert Panel report noted that the Report on Antisemitism in Australia to 30 Sept 2017 recorded 230 anti-Semitic incidents, while the Islamophobia report recorded 243 incidents of Islamophobia in the 15 months to December 2015. See [1.403 – 1.404].
20 For instance, s 8(3) and (4) appear directed towards the dispute between the rugby player, Israel Folau and Rugby Australia. At the time of writing this matter is before the Federal Court of Australia. The facts of this dispute are very particular and not obviously relevant to Christians, nor to people of faith generally. Similarly, s 41 appears to respond to a single complaint in Tasmania. That complaint was conciliated and withdrawn therefore no tribunal nor court determination is available. The facts of the complaint have been widely mis-reported and mis-represented, see Catt, P, et al, *Submission to Religious Freedom Review*.  

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Given that Australian society has, and continues to change, Equal Voices believes that law should be adaptive so that it remains relevant, understandable and models best practice. We note that many of the religious exceptions and exemptions within discrimination laws were enacted when those laws were first passed, in some cases over 40 years ago. We note that these exemptions cover areas of activity and attributes that are indisputably inconsistent with mainstream community views.\(^{21}\) For instance, under some discrimination laws, religious bodies are afforded an exemption to discriminate on the grounds of race, disability, status as a carer and age.\(^{22}\) Religious exemptions cover discrimination at work, in the provision of accommodation and some goods and services.\(^{23}\)

Some of these exemptions may be justifiable, but many in the community would be surprised that religious bodies are afforded such broad exemptions from laws that the rest of society are required to observe. It is often extremely difficult to amend these exemptions to reflect changing attitudes in society. This generates increasingly fractious public debates. In our view laws that are too rigid ultimately benefit no one. They lead to misunderstanding and distrust between the wider community and religious bodies and individuals. For this reason, we urge the government to re-consider whether statutory exceptions of the kind that s 10 represents are desirable. We urge the government to consider the more adaptive and principled proportionality approach to limitations on rights.\(^{24}\)

### Proportionality Approach

The proportionality approach has been recommended by discrimination law experts and practitioners in previous inquiries and consultations since 2012.\(^{25}\) The Australian Law Reform Commission (ALRC)


\(^{22}\) The following examples are drawn from Discrimination Law Experts, *Submission to The Expert Panel on Religious Freedom Inquiry: Religious Freedom Review* (14 February 2018). NSW, the ACT, NT, Queensland, Tasmania, Victoria and Western Australia permit racial and disability discrimination ‘in the ordination, appointment, training and education of priests, ministers of religion or members of a religious order’. NSW allows age discrimination ‘for any other act or practice of such a [religious] body if the discrimination conforms with doctrine and is necessary to avoid injuring susceptibilities.’ The Northern Territory allows age discrimination, ‘for anything done by a religious body if it is done as part of a religious observance or practice.’ *italics added* Apart from Commonwealth-funded aged care services, the Sex Discrimination Act allows discrimination on the basis of family responsibilities, ‘in relation to acts or religious practices if the practice conforms to the religion’s doctrine and the discrimination is necessary to avoid injurious susceptibilities.’ The same type of provision applies in the ACT, NSW, NT, Queensland, Victoria and Western Australia. The reason these exceptions are less problematic than they appear at face value is the standard of connection required between the conduct and doctrines, a standard that we say is significantly weakened by s 10.

\(^{23}\) Ibid. The Sex Discrimination Act allows a religious body to discriminate on the basis of all attributes in the provision of accommodation. Queensland, the Northern Territory and Victoria allow a religious body to do the same ‘if the discrimination is in accordance with the body’s doctrine or is necessary to avoid offending the religious sensibilities of people of that religion.’ Victoria permits religious bodies and schools to discriminate in the provision of goods and services on the basis of a number of attributes ‘if the discrimination conforms with the doctrines, beliefs or principles of the religion or it is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion.’


commended the strengths of proportionality in its review of traditional rights and freedoms. Its 2015 report noted that,

Proportionality has been called the ‘most important doctrinal tool in constitutional rights law around the world for decades’ and ‘the orienting idea in contemporary human rights law and scholarship.’

A number of leading expert and stakeholder bodies recommended this approach in submissions to the Religious Freedom Review. Proportionality is becoming increasingly established in the Australian legal system. It has the distinct advantage of having a vast wealth of international jurisprudence to draw upon in order to guide and educate the community and lawyers as to how to balance rights in conflict. In recent years the High Court has also incorporated proportionality in its decisions involving limitations on rights. Finally, we also note that the Attorney-General’s speech pointed to the necessity of a proportional approach in relation to exceptions in discrimination law, stating that,

All Discrimination Acts have to contain what are considered to be reasonable and proportionately fair exceptions.

This is consistent with one of the leading commentaries on the ICCPR which observes that, ‘despite the differently worded permissible limitations, most ICCPR rights may be limited by proportionate laws designed to protect a countervailing community benefit, such as public order, or to protect the conflicting right of another person.’

Faux Bill of Rights

In submissions to the Religious Freedom Review, a number of large religious bodies made submissions calling for stand-alone positive legal protection for religion. We welcome assurances from the Attorney-General, Christian Porter, that the government is ruling out such a law. Government should continue to reject this proposal. It is novel, un-tested and inherently un-principled as a means for dealing with the protection of religious and other rights.

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26 Ibid [2.78].
27 Ibid [2.65] [footnotes omitted].
28 The Expert Panel was ‘not convinced’ about the need for a general limitations clause but it added, ‘nonetheless [we] could see the potential benefits of such provisions. Accordingly, it encourages jurisdictions to consider the use of such provisions as they modernise the exceptions in their discrimination laws.’ [1.134]
29 See the discussion in Traditional Rights [2.65] and following.
33 Submissions include those by Christian Schools Australia and Adventist Schools Australia; the Anglican Diocese of Sydney; the Assembly of Canonical Orthodox Bishops; the Baptist Churches of NSW & ACT; the Lutheran Church of Australia; the Salvation Army.
34 Karp, P, ‘Coalition to rule out conservative demands for ‘religious freedom’ law’ The Guardian Australia (5 June 2019).
Equal Voices holds that demands for stand-alone positive rights for religion misconceive the nature of rights protection in this country. Rights to religious belief and activity are generally preserved in Australian law as ‘negative’ or ‘residual’. Citing Tomlinson et al, the Australian Law Reform Commission explained this as follows,

> The traditional doctrine in English law is that Parliament is sovereign. However, individuals may say or do whatever they please provided they do not transgress the substantive law or infringe the legal rights of others. Furthermore, public authorities including the Crown may do nothing but that which they are authorized to do by some rule of common law (including the royal prerogative) or statute and, in particular, may not interfere with the liberties of individuals without statutory authority. Where public authorities are not authorized to interfere with the individual, the individual has liberties. It is in this sense that such liberties are residual rather than fundamental and positive in their nature: they consist of what remains after taking account of all the legal restraints that impinge upon an individual.35

It is open to the federal government to enact legislation designed to protect rights in a positive manner. Three sub-federal Australian jurisdictions have already done so: the Australian Capital Territory, Victoria and, most recently, Queensland.36 Australia remains the only liberal democracy without such legislation at a national level, either in statutory or constitutional form. Comparable jurisdictions that have long had such legislation include the United Kingdom and New Zealand.37 Equal Voices has previously recommended a statutory charter of rights as a means to enhance the protection of religious belief and activity.38 Equal Voices strongly rejects proposals to enact a ‘faux’ Bill of rights that selectively protects religion. It would give religiously-based rights a privileged status in law and operate prejudicially against other rights. The proposal is also contrary to axioms of international law including the indivisibility of human rights. Equal Voices is unaware of any jurisdiction that has mixed a residual rights system in combination with selectively enacted positive rights. With no international precedent or guidance, such a regime would generate enormous uncertainty and division within the community.

Irrespective of whether a federal charter of rights is enacted, it remains open to the government to adopt the principles of proportionality in discrimination law. This can be achieved through the incorporation of a ‘general limitations’ clause in this Bill and indeed across other federal discrimination laws.

**Recommendation: Amend s 10 so that limitations to the rights and freedoms of others are based on principles of proportionality.**

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36 **Human Rights Act 2004 (ACT); Victorian Charter of Rights and Responsibilities Act 2006 (Vic); Human Rights Act 2019 (Qld).**
37 **New Zealand Bill of Rights Act 1990; Human Rights Act 1998 (UK).**
38 Submission to the Religious Freedom Review.
Reducing the Scope of the s 10 Exception

If the government is not open to considering a general limitations clause then the scope of the exception must be reviewed. In its submission the Australian Human Rights Commission (the Commission) observes that the Bill is,

...overly broad in defining who may be a victim of religious discrimination and, arguably, too narrow in defining who may be found to have engaged in discrimination.39

This observation is particularly apposite for s 10. In a submission to the Religious Freedom Review, a group of the nation’s leading discrimination law experts highlighted the problems with an overly broad exception, which,

...fails to evaluate how central or important the belief is to the religion, how and to what extent any proposed action would infringe it, and how much harm might be done by defeating a discrimination claim in the particular facts of a case.40

Equal Voices makes four proposals for how the section can provide for a more balanced and reasonable approach to the rights of others. If implemented, each of which will provide a more justifiable approach in cases where religious and other rights may interfere.

Recommendation: If recommendation (1) is rejected, amend s 10 so as to narrow the scope of the exceptions provided to religious bodies.

Definition of Religious Body

Section 10(2) defines ‘religious body’ in the following terms:

a) an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion;

b) a registered charity that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion;

c) any other body that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion.

We commend the government for partly restricting the scope of ‘religious bodies’ in s 10(2)(c) by reference to ‘commercial activities’. However, ‘commercial activities’ is not defined in the Bill. Its meaning is also clouded by the inclusion of educational institutions in s 10(2)(a) when most such bodies primarily engage in commercial activities, and the inclusion of registered charities in s 10(2)(b) where they may engage in a mix of commercial and non-commercial activities for different reasons. The potential scope of ‘religious bodies’ is concerning as it activates an extremely broad exception.

Our concern arises from the experiences of LGBTIQ+ people in bodies that fall within the definition of section 10 as it stands. Equal Voices has previously submitted a number of accounts of harmful

39 Religious Freedom Bills, at [10].
discrimination in faith-based educational bodies, where religious exemptions already apply under the Sex Discrimination Act.\textsuperscript{41} We do not want to see bodies that already receive exemptions to discriminate reinforced under a ‘religious freedom’ law. We further note that the nature of exemptions in the Sex Discrimination Act is subject to a separate review. Section 10 appears to pre-empt the findings of that review.

We are aware that religious bodies calling for positive religious rights have asserted that they do not discriminate and do not seek to do so.\textsuperscript{42} Equal Voices, among many other groups, has previously submitted evidence of discrimination within religious bodies that fall within the scope of s 10.\textsuperscript{43} This has been in the form of personal accounts, empirical studies and authoritative reports. We believe that conduct that may be lawful ‘religious freedom’ under section 10 could in certain circumstance amount to harmful discrimination. We draw attention to his Honour, Redlich JA’s observations on the nature of discrimination in ‘CYC v Cobaw’\textsuperscript{44},

\begin{quote}

The aims of Cobaw…are to raise awareness of homophobia in rural areas, and create connections with isolated, at risk young people. These are critically important objectives which advance recognition of the right of the individual not to be discriminated against on the grounds of his or her sexual orientation. The intrinsic value of these objectives includes recognition that such discrimination has the effect of diminishing the self-worth and personal dignity of those with such an attribute, and that adverse psychological effects and social and economic disadvantage are an inevitable consequence of such discrimination.\textsuperscript{45}
\end{quote}

In submissions to the Religious Freedom Review and others, some religious bodies argue that victims of discriminatory treatment can resolve the matter by simply ‘going elsewhere’. The Anglican Diocese of Sydney submitted that,

\begin{quote}
The nature of our pluralistic and market-driven society should be sufficient to ensure that there will always be alternative service providers who have no religious or other conscientious objections to performing that act or service.\textsuperscript{46}
\end{quote}

Such suggestions may be termed ‘marketplace choice’ balancing.\textsuperscript{47} It is relevant because s 10 provides its exception to bodies that do or may operate in the commercial sphere. The marketplace choice approach underestimates the seriousness of discrimination, as outlined by His Honour above. It also

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\textsuperscript{41} Refer to Equal Voices submission to ‘Legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff’ (22 November 2018). We also note that unlawful religious discrimination was found to have occurred by a Christian school in \textit{Arora v Melton Christian College (Human Rights) [2017] VCAT 1507} (19 September 2017).

\textsuperscript{42} Give examples of subs...

\textsuperscript{43} Other faith groups with submissions to the Religious Freedom Review citing discrimination included Rainbow Catholics InterAgency for Ministry; Heads of Anglicare Australia Member Agencies in South Australia; Uniting Church of Australia; Rev Peter Catt et al (Anglican leaders).

\textsuperscript{44} \textit{Christian Youth Camps v Cobaw} [2014] VSCA 75.

\textsuperscript{45} \textit{Christian Youth Camps v Cobaw} [2014] VSCA 75 at 440.

\textsuperscript{46} Ibid, 23.

\textsuperscript{47} A typical example of this is a comment by Reverend Meller, a national representative of the Presbyterian church. When queried about an incident of discrimination in a religious school, Rev Meller responded that, ‘...the private school is in the marketplace. If a child doesn’t like that experience, they can go somewhere else.’ Hansard, Legal and Constitutional Affairs References Committee, \textit{Sex Discrimination Amendment (Removing Discrimination Against Students) bill 2018} (Thursday, 7 February 2019), 46.
\end{flushright}
fails to adequately grapple with the complexities of choices individuals face when suffering
discrimination. Young people, the elderly, those from disadvantaged socio-economic backgrounds,
those with disabilities or living in isolated locations may not have reasonable or even remotely
practical alternatives. Marketplace choice arguably has a poor record at best of promoting the Objects
of this Bill. That is, if an open marketplace was capable of effectively resolving discriminatory
treatment, why would legal regulation outlawing it be required and why would the area of
employment be subject to such frequent complaints of discrimination?

For the above reasons, if large and powerful religious bodies receive wide-ranging exceptions of the
type in s 10, they should be defined in the section as ‘established for religious purposes’. This means
their activities must have an essential and clearly identifiable religious character. It is insufficiently
vague for any conduct to be capable of being characterised as having a religious purpose. Dixon J
explained the distinction in *Roman Catholic Archbishop of Melbourne v Lawlor* as follows,

In order to be charitable the purposes themselves must be religious; it is not enough that an
activity or pursuit in itself secular is actuated or inspired by a religious motive or injunction:
the purpose must involve the spread or strengthening of spiritual teaching within a wide
sense, the maintenance of the doctrines upon which it rests, the observances that promote
and manifest it.49

It is true that religion can permeate each and every aspect of life and that religion itself may not draw
a sharp line between ‘public’ and ‘private’ spheres of activity. But where the law regulates religion,
including in civil law, it must do so cognisant of community norms. As the Expert Panel recommended,

Those jurisdictions that retain [religious] exceptions or exemptions in their anti-discrimination
laws for religious bodies...should review them, having regard to community expectations.51

**Recommendation: In s10 and the Bill define religious body as a ‘body established for religious
purposes’**.

**Definition of Body Corporate**

The Bill provides that ‘bodies corporate’ receive protection as if they were ‘natural persons’. In
relation to s 10, the Explanatory Notes state,

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

The Bill also defines ‘person’ in s 5 as the ‘meaning affected by the *Acts Interpretation Act 1901*, and
in a related Note that a ‘person’ in that Act may ‘include a religious body or other religious institution’.

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48 With reference to present activities rather than something long past.
49 (1934) 51 CLR 1.
50 For example, Christian teaching regards all aspects of life as within the scope of ‘worship’ in its broadest
sense, see Romans 12:1-2; 1 Corinthians 10:31.

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Equal Voices Submission
The Commission describes this definition as ‘unusual’. It states that it is difficult to understand how a corporation could have a religious or any other belief.\footnote{Submission [54].}

Equal Voices notes that while the Bill attributes the human quality of religious belief and activity to bodies corporate, the law does not attribute analogous characteristics of natural persons to bodies corporate. Bodies corporate are not given attributes of a sex, gender identity, sexuality, disability, race, socio-economic status, and so on. Furthermore, Equal Voices notes that international human rights law takes it as axiomatic that \textit{human} rights are held by \textit{human beings}.\footnote{Article 1 of the Universal Declaration of Human Rights states, ‘All \textit{human beings} are born free and equal in dignity and rights.’ [italics added]} Equal Voices fails to understand why this definition is necessary given that the law offers other ways to deal with the issue of representation of a body, such as through an ‘aggrieved party’.\footnote{The Commission gives examples of cases it has run on this basis, ibid [57].}

On its face the definition appears to be not only novel but also highly selective. It appears that the Bill seeks to give favourable legal status to religious institutions over other kinds. This appears to undermine the principle of equality before the law. If entities are normatively accorded rights in the same way as individuals, even those individuals who are members of the entity, the interests of a \textit{non-human entity} are accorded equal or even greater weight.

An example of possible religious discrimination involves a teacher, Janey\footnote{A pseudonym to protect the identity of the victim.}, in a Christian school in 2017. The school is a member of the peak body, Christian Schools Australia. The school expected teaching staff to model a ‘Christ-like’ character in dealing with students. Janey was and remains an active Christian. She took her responsibility to model Christ-like behaviour seriously. In her class Janey became aware of bullying of same-sex attracted students by fellow students. She responded in accordance with her Christian beliefs and school policies: she sought to protect students from being bullied. As a result, Janey reported incidents to her superiors. It became evident that the reports were being ignored or suppressed by the school’s leadership. At this period during the marriage postal debate, the school leadership was particularly vocal in expressing criticism of same-sex relationships. Meanwhile the bullying escalated and ultimately led to attempts to self-harm. As Janey continued to press for support she was warned by a fellow staff member not to keep ‘stepping out of line’ by pursuing the matter. Prior to these events Janey had an expectation that her contract was ongoing. By year’s end the school announced a funding cut that would lead to one position being cut, which was Janey’s. Yet the same role was filled at the start of the following year after Janey’s departure.

Among the issues here is the recognition of Janey’s right to hold a religious belief, which at many levels aligns with the school’s doctrines, tenets and teaching. Her conduct was in accordance with the school’s faith-based values and policies. Yet under s 10 Janey’s religious rights seem invisible because she is not a body corporate.

Individuals such as Janey are frequently in a position of powerlessness relative to an institution. The interests of institutions do not always serve to protect the interests of individuals within their orbit. A
queer Christian employee of a religious body shared their experience of working within religious bodies as follows:

LGBTI+ people are everywhere, contributing happily and with happiness from their church employers, but we are so hidden and vulnerable that we can’t easily show this. Any ‘protective’ legislation will both drive people out in some circumstances, or deeper underground, and make this process of becoming visible, safe and more healthy, much more difficult.56

There is a serious risk that the effect of attributing rights in this manner prioritises the interests of religious bodies over and above individuals. The potential for religious institutions to fail to protect the rights of individuals have also been acknowledged by religious leaders themselves. In evidence to the Royal Commission into Institutional Responses to Child Sexual Abuse Catholic Archbishop Coleridge made the following point,

If I could put it in these terms, they were invariably company men, and that had both good and bad aspects about it, I suspect, but they were more interested in the institution than in the individual...So they [religious leaders] had this passionate, lifelong commitment to the defence and promotion of the institution, and it made them blind to individuals.57

The recent evidence from the Royal Commission and evidence provided by Equal Voices to previous inquiries indicates that religious institutions have a powerful ability to exercise rights to the detriment of individual persons and their rights.58 Furthermore, the Royal Commission noted that the unusual nature of religious institutions could provide ‘heightened risks’, including that they often operate with ‘closed governance’ and ‘complicated legal structures’.59

The ‘closed governance’ of religious bodies can become especially problematic where doctrines are in tension with conflicting external norms or standards. Once again, the Royal Commission offers sharp insight into this difficulty. Evidence from Catholic Archbishop Timothy Costelloe observed that his own religious institution had operated as ‘a law unto itself’. He explained that this arose from a ‘profound cultural presupposition, perhaps, about the uniqueness of the Church…the untouchability of the Church, that it didn’t have to answer to anybody else…I would see it as a fundamental cultural issue.’60

Equal Voices draws attention to how the cultural issues which Archbishop Costelloe highlighted present special difficulty for transgender persons within faith-based communities. By reason of their interpretation of doctrine, some religious bodies deny the medical, scientific evidence about the nature of gender identity and expression. Some religious bodies regard transgender persons as psychiatrically ill, or sinners who need to repent, or ‘anti-religious activists’ notwithstanding their

56 Personal story submitted to Equal Voices for this consultation.
58 The Religious Freedom Report notes, ‘the failure of some religious and other institutions to protect children from sexual abuse, as detailed through the Royal Commission into Institutional Responses to Child Sexual Abuse, cast a long shadow over the Panel’s deliberations.’ [1.21]
60 Ibid, 486.
faith. This mirrors historical responses by religious bodies to lesbian, gay and bisexual people which has facilitated profound discrimination and harm. Some of these bodies operate school systems that must deal with minors who have diverse gender experiences. Equal Voices is concerned that the law not add to the difficulties facing these young people and their families within religious bodies by providing them a religious exemption to lawfully disregard mainstream medical and scientific advice.

Equal Voices makes clear that it generally supports the ability of religious bodies to operate in accordance with their beliefs and values. We support this up until the point where individuals within the reach of those bodies are no longer safe. We recognise that individuals may choose what type of body they wish to belong to and that such freedom of choice is an important value in a pluralistic society. An individual's freedom to choose the type of religious body they are involved in is strengthened, not compromised, when institutions are safe, open and accountable for all.

For the reasons above, Equal Voices supports the definition of ‘person’ as a natural person in accordance with international human rights norms.

**Recommendation: In s 10 and the Bill remove the definition of bodies corporate as a natural person.**

### The Conduct Standard

Section 10 (1) provides that conduct by religious bodies is not discrimination if it ‘may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings’ of the body. This appears to be a much laxer standard than equivalent provisions in other religious exemptions. Equal Voices observes that the standard normally applied in order to justify the benefit of an exemption typically employs language such as ‘necessary’ or ‘in accordance with’. Equal Voices believes that it is vital that the type of conduct excepted from discrimination law be subject to a standard no lower than that of comparable laws. We recommend a standard to the effect of ‘in conformity with’, or ‘necessary to conform with’ or similar.

In respect of this, we draw attention to the following considerations:

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62 For example, see *Preventing Harm, Promoting Justice: Conversion Therapy, Religion and LGBT People in Australia* (Human Rights Law Centre, 2017); *Resilient Individuals: Sexual Orientation, Gender Identity and Intersex Rights – National Consultation Report* (Australian Human Rights Commission, 2015).

63 Although such freedom is often limited by circumstances, such as location, age and cultural-ethnic-family factors, see further discussion below.

64 For example: *Sex Discrimination Act 1984* s 38(3)(1),(3): ‘conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed’; *Equal Opportunity Act 2010* (Vic) s82(2)(a): ‘conforms with the doctrines, beliefs or principles of the religion’; *s 83(3)(a): ‘conformity with the doctrines, beliefs or principles of the religion’; *Anti-Discrimination Act 1998* (Tas) s 51(2): ‘conducted in accordance with the tenets, beliefs, teachings, principles or practices of a particular religion’; *Anti-Discrimination Act 1991* (Qld), ‘in accordance with the doctrine of the religion’;
i. The Expert Panel recommended that exceptions or exemptions should ‘have regard to community expectations’.  

ii. Aside from submissions from the beneficiaries of the exemptions Equal Voices cannot find evidence from expert or stakeholder submissions to the Religious Freedom Review that broader exemptions are warranted.

iii. From a faith-based perspective, Equal Voices notes that the inter-relation between religious beliefs and their manifestation has infinite variations. The Bill should guard against unintended consequences arising from too remote a nexus between the manifestation of a belief and the belief itself.

iv. A standard that is well-known in other laws and jurisprudence is likely to promote community certainty and harmony.

A stronger standard serves to the benefit of the section in two ways. The nexus between conduct and related religious belief should be clearly apparent. Citing leading commentary on the application of ICCPR Art 18(3) by the Human Rights Committee, it observed that,

...if interpreted broadly, ‘practice’ of a religion or belief could be taken to mean every action or omission motivated by religion or belief, which would ‘open the floodgates to abuse of this right’. The author concludes that religious practice may thus be said to be ‘only that conduct obviously related to a religious conviction.

A stronger standard should also minimise arbitrary recourse to religious beliefs for otherwise unjustifiable conduct. Recent discrimination cases illustrate that representatives of religious bodies have acted inconsistently, or arbitrarily, in the application of their beliefs to conduct. In ‘Cobaw v CYC’ the respondent relied upon a religious exemption as a defence. This exemption requires that the action ‘conforms with the doctrines of the religion’, which we note is stricter than in s 10 of the Bill. The relevant doctrines were that sexual relations outside marriage are sinful. In this case the conduct was a refusal by the campsite to accept a booking by Cobaw. Cobaw was a health service supporting vulnerable same-sex attracted young people. The tribunal found on the evidence that,

...no attempt was made on booking or arrival to ascertain the sexual orientation or marital status of attendees, to segregate accommodation to prevent anyone other than married couples from engaging in sexual activity, or to impose any requirement on attendees to conform with Christian Brethren beliefs about God’s will in respect of sex and marriage whilst at the adventure resort.

In another case, the president of a branch (or ‘conference’) of the St Vincent de Paul Society was forced to resign for not being Catholic. She subsequently made a complaint of discrimination which was upheld. The tribunal found the treatment was an arbitrary application of religious doctrines. The tribunal Member stated, 

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65 Recommendation 1.
66 Expert Panel report [1.52], italics added. 
68 Under the Equal Opportunity Act 1995 (Vic) s 75.
69 Cobaw v CYC at 322.
70 Walsh v St Vincent de Paul Society (No.2) [2008] QADT 32. (Walsh) As a side note, the complainant identified as a Christian.
To this may be added the facts – undisputed by the Respondent [the Catholic leadership] – that the Respondent knew that the Claimant was not a Catholic; with this knowledge welcomed her as a member and saw her elected as president...and allowed her to work without challenge for years as a conference president.\footnote{Walsh at 124.}

If the standard in s 10 were applied to either of these cases we think a court is more likely to find such conduct as within the scope of the exception. If correct, this means patently inconsistent or arbitrary conduct could be permitted under the test. We do not believe this respects the gravity of religiously-based conduct, its potential to affect others and the need to justify actions that interfere with the rights and freedoms of others. The standard should promote a nexus that is apparent and non-arbitrary.

**Recommendation:** In s10 delete ‘may reasonably be regarded as in accordance with’ and replace with ‘in conformity with’ or a term to the same effect.

**Provision to Safeguard Other Discrimination Laws**

Broadly speaking, discrimination law serves to protect rights to equality and non-discrimination.\footnote{ICCPR Arts 3, 26.} This includes the right to equality and non-discrimination for people with or without a religious belief. We commend the government for those parts of the law that uphold this right. We note that Commonwealth legislation must be ‘appropriate and adapted to implementing the treaty.’\footnote{Victoria v Commonwealth (1996) 187 CLR 486.} With this in mind we express our grave concern that one section of the Bill expressly overrides other discrimination law, namely s 41. The presence of s 41 leads to a broader concern that other sections of the Bill may allow for weakening or subverting other discrimination protections. In this light we are concerned with the broad scope of s 10.

Equal Voices observes that the Explanatory Notes state that the section is only intended to operate with respect to the attribute of religion:

[162] 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...which discriminates against persons on the basis of other protected attributes (such as age, sex, disability or race).

Despite this, it is unclear whether the Bill itself may permit other attributes to be implicated indirectly in discriminatory conduct as a result of the operation of s 10. For example, a religious body could require members, service recipients or facility users to adhere to policies of male headship. Policies promoting male headship fall most heavily on women, thereby facilitating discrimination on the grounds of sex. In order to avoid doubt, Equal Voices recommends that s 10 include an express statement that its operation is not intended to limit or derogate from other protections available under other discrimination laws.
Recommendation: In s10 add a provision to ensure the effect of s 10 is not to derogate from or contravene the operation of other discrimination laws.

Other Recommendations on the Bill

The limited period for consultation means that this submission will not be able to address Equal Voices’ additional concerns regarding this Bill. We make the following recommendations with brief notes on each.

Recommendation: Delete s 8 (3),(4),(5) and (6).

Equal Voices regards these clauses as unnecessary, unclear and open to unintended consequences. In particular, we regard these clauses could permit unjustifiable interference with access to medical care for LGBTIQ+ people. We recommend that the government give close attention to submissions on this section by the LGBTIQ+ community and mainstream medical authorities.

Recommendation: Delete s 41.

Equal Voices regards this clause as unnecessary and an unjustifiable override of state-based discrimination law. We consider the clause unnecessary for several reasons: its origin appears to lie in a single complaint that did not reach a tribunal, therefore there was no independent finding of fact or law. The complaint itself has been widely mis-represented and / or mis-reported which has clouded the nature of the issue. The clause arbitrarily and selectively focuses on Christian concerns; there is no equivalent recognition in the Bill of concerns of a more serious and / or widespread nature among minority faiths.  

Equal Voices is particularly concerned about the potential impact this clause could have in fostering a culture of harassment, vilification and abuse directed towards the LGBTIQ+ community. This is notwithstanding s 41(2), which sets a high threshold for victims of such abuse to be able to seek recourse. Equal Voices hears many reports of verbal harassment of LGBTIQ+ persons in the name of religion. Many are everyday occurrences that do not rise to the level of being a reportable offence. The following account from a member of Equal Voices reveals the tenor of this climate of abuse:

Today I was having coffee with another gay Christian friend in [suburb] and a man on the table next to us interrupted to ask about our views on “L, G, B transgender”... to which he replied that is was all a fad, and “you mustn’t be reading the same bible and singing the same hymns”. He talked over me, and cut me off and laughed with a man on another table who shouted “Amen”. I was forced to walk out of a lovely conversation with my friend and out of the cafe because I couldn’t stand hearing these harmful words, and I left in tears.

We note that the Religious Freedom Review received a large number of submissions detailing experiences of abuse and vilification directed against the LGBTIQ+ community, often in the context of

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74 The Expert Panel noted that members of minority faiths were ‘particularly likely’ to be singled out for abuse, often in connection with identifiable religious appearance. See the report [1.369, 1.370, 1.371]. Equal Voices disagrees with suggestions that widely reported incidents involving Christians are representative of the concerns of other faith traditions.
relational dimensions of mercy and justice that inhibit people from realising their potential. We believe that a substantive approach is superior and recommend the Objects of the Bill be amended to reflect it.

**Recommendation: Amend Object (1) of the Bill to reflect the aim of achieving substantive rather than formal equality.**

Equal Voices notes that Object (1) of the Bill has the aim to provide ‘equality before the law’. We note that this language reflects a view known as ‘formal equality’. Formal equality may be distinguished from ‘substantive equality’ in that the latter takes account of the relative positions of each individual. The former treats everyone alike regardless of circumstances. From a Christian perspective we find a formalistic approach to equality to be inadequate and capable of permitting or even fostering injustice. It lacks the transformative dimensions of mercy and justice that inhibit people from realising their potential. We believe that a substantive approach is superior and recommend the Objects of the Bill be amended to reflect it.

**Recommendation: Delete Object (3) of the Bill.**

Following from our recommendation on s 41, we recommend that Object (3) be deleted.

**Recommendation: Amend the Bill so as to ensure that discrimination complaint procedures are no more difficult than is already the case for potential victims of discrimination.**

Equal Voices is concerned by the view of legal experts that the structure of this Bill will frustrate the ability of victims of discrimination to seek a remedy.75 We believe that discrimination law should be more, not less, accessible for all sections of the community. We recognise that discriminators are often in positions of relative power, while victims are often relatively powerless. Access to justice for all means ensuring the procedures involved are as simple, inexpensive and supportive as possible.

**Recommendation: Incorporate the duties of a ‘religious freedom’ Commissioner into an existing Commissioner position.**

Equal Voices notes that the Australian Human Rights Commission deals with complaints of discrimination on the ground of religion under the Fair Work Act. The Commission’s submission notes that in the five years to 30 June 2019 there were a total of 58 complaints raised in relation to religious discrimination in employment. This compares against an average of around 2,000 complaints per annum on the grounds of each of the other attributes.76 In light of this, we suggest that even given new legislation, that the government not create a whole new position for a case load that appears, on its face, to be insignificant. The government could set a review period for the position and then consider a stand-alone Commissioner based on evidence-based need.

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75 Beckett, Simeon, ‘Key protection in religious discrimination Bill is fatally flawed’, *Sydney Morning Herald* (September 18, 2019).

76 Reference and note that this includes all areas of activity. Even at a state level, where most states have religious discrimination protections, the numbers of complaints are limited. The Expert Panel report identified a total of 125 religious discrimination complaints across all jurisdictions in 2016-17. (pp97-98) It should be borne in mind that state-based human rights bodies handle the majority of discrimination complaints. In Victoria which has discrimination protection on the grounds of religion, the Victorian Equal Opportunity and Human Rights Commission reports that complaints on the ground of religion comprise about 2.4% of the total, or about 60 per annum.
Recommendation: If the government decides to retain the substance of any or all of ss 8, 10 and 41, or related definitions, refer these elements of the Bill to the Australian Law Reform Commission for review.

This submission has argued for significant changes to ss 8, 10 and 41. Should the government retain the substance of these clauses we recommend that these clauses be referred for review by the Australian Law Reform Commission.

Conclusion

Equal Voices is a religious body. We wholeheartedly support the right not to be discriminated against on account of religious belief, thought and conscience. We also support the right of religious bodies to operate in accordance with their doctrines, tenets and beliefs, as indeed we ourselves do. We celebrate the fact that so many religious bodies operate in inclusive, non-discriminatory ways. We accept that society must allow for differences of views on fundamental values and beliefs. At the same time, we believe the law has a role in deterring conduct that causes objective detriment, which unlawful discrimination often constitutes. We urge the government to find a path towards providing religious bodies with the necessary legal protections to avoid discrimination, while not providing a licence for some to engage in discrimination.

During the marriage postal survey Equal Voices, campaigning as Australian Christians for Marriage Equality, or AC4ME, received hundreds of heartfelt messages of support from the community. This is one:

Hi there. I don’t even know how to begin to thank you for this [Facebook] page...I’m almost ashamed to admit (as a fully-grown woman) how brutal this public debate has been on me. I have cried on more occasions than I thought possible, and felt more alienated than I did coming out as a young person back in 1994. This postal vote has shown me Christians acting in the most unchristian of ways and it gets in. I have two small children born to a same sex relationship and they are amazing little people that have also been profoundly affected by this debate. I can’t tell you how humiliating it is to be the brunt of a popularity vote...But seeing this [AC4ME] ad pop up in my news feed a few days, and seeing again another story shared by one of your members, I am reminded that not all people of faith want to do me harm. (19 September, 2017)

The path forward through these ‘religious freedom’ debates requires that we listen to each other’s voices on more equal terms. We respectfully request that government engage in more substantive consultation with a wider range of stakeholders. We urge that proposals be grounded in independent, robust evidence and that any legislative measures achieve support from a broad cross-section across the community prior to their introduction into Parliament.