Law Council
OF AUSTRALIA

Religious freedom bills - second exposure drafts

Attorney-General's Department

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

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- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful to the New South Wales Bar Association, Law Institute of Victoria, Law Society of New South Wales, Law Society of South Australia, Law Society Northern Territory, the Not-for-Profit Legal Practice and Charities Committee of its Legal Practice Section, and its National Human Rights Committee and Equal Opportunity Committee for their assistance with the preparation of this submission.

Executive Summary

1. The Law Council continues to recognise that there are opportunities to consolidate and strengthen federal protections against discrimination on the basis of religion. It refers in this regard to the 2018 findings of the Expert Panel appointed to review religious freedom (t**he Expert Panel)**. While highlighting the absence of federal protections, the Expert Panel also did not accept that religious freedom was in 'imminent peril'. As such, a measured and moderate approach to law reform, which accords with established federal, state and territory anti-discrimination laws, would seem appropriate.

2. With this in mind, the Law Council considers many aspects of the Religious Discrimination Bill 2019 (**the Bill**) are unobjectionable. It also recognises certain improvements made in the Bill's second exposure draft. While the Law Council continues to oppose provisions concerning **health practitioner conduct rules** concerning conscientious objections to health services, they have been tightened to apply to a narrower range of professions ([67]-[96]). The definition of '**person'**, which previously extended to religious body corporates, has been removed and **associates** of religious individuals are now protected from religious discrimination. It is nevertheless concerned by the intention to extend the protections for 'associates' of religious individuals to body corporates. The Bill should protect natural persons, not body corporates ([97]-[103]).

3. However, the Law Council continues to hold significant concerns about the Bill due to its unorthodox features. These not only raise human rights concerns, but also complicate an already **complex** area of law. By adding multi-faceted and novel legal tests to existing legal frameworks, the Bill is likely to create an **onerous compliance burden** for the business and community sectors alike ([16]-[17]).

4. The Law Council continues to oppose clause 42, which provides that **statements of belief will not constitute unlawful discrimination** under any Commonwealth, state or territory anti-discrimination law. This extraordinary provision provides that, contrary to international human rights law, manifestation of religious belief must be privileged over other human rights such as freedom from discrimination on the grounds of sex, sexual orientation, race, disability and age. It upsets the usual balance of federal laws operating concurrently with state and territory laws, waters down long-held existing protections and provides a defence for potentially harmful and humiliating statements made in public arenas– in the workplace, on the sporting ground, and in the doctor's surgery - which would otherwise be unlawful discrimination. The provision is also procedurally unworkable and will result in delays and costs to all parties ([144]-[165]).

5. The Law Council retains its concerns regarding **departures from the well-established test for reasonableness** in indirect discrimination law for resolving tensions between rights in a way that has the least harmful effect in the circumstances (clause 8). Restrictions on relevant employers from making **employer conduct rules** concerning statements of belief outside the course of employment give undue emphasis to the manifestation of religious freedom over other rights, and employers' legitimate objectives of maintaining diversity and tolerance in the workplace. New **qualifying body conduct rules** have the same potential to override similar industry-wide objectives, including impeding legal professional bodies' own ability to regulate the profession effectively and appropriately. The Law Council also retains concerns that provisions concerning **health practitioner rules** override state and territory government policy decisions, existing directives and medical codes of conduct. They may encourage

conscientious objections to health services where none previously existed, risk leaving vulnerable Australians without health care and are likely to be complex to administer. The Law Council reiterates that the case has been not adequately made as to why the existing reasonableness test is not well adapted to weighing up the relevant circumstances in these scenarios ([33]-[96]).

6. The Law Council is concerned that new **amended interpretation provisions** are unlike those in comparable legislation. These provisions refer to whether a person of the same religion could reasonably consider whether another religious person's or body's conduct, statement of belief or conscientious objection accords with the religion's doctrines, tenets, beliefs or teachings. While recognising that courts are reluctant to trespass into matters of religious doctrine and generally afford a wide latitude in this regard, it is usually the role of the court to determine whether a person's or body's conduct conforms with such doctrine, where the resolution of conflicting rights is concerned under civil laws. The Law Council is concerned that there may be multiple 'reasonable interpretations' amongst a religion's adherents regarding precisely what accords with its doctrines, noting that some religions have large numbers of followers. This may undermine the certainty and clarity of the relevant provisions, and broaden their scope. There is no requirement that the relevant adherent be well-informed or that the interpretation be correct ([23]-[32]).

7. The Law Council is also concerned that clause 11's **general exception for religious bodies** from the Bill's prohibitions on religious discrimination remains overly broad and has, in certain respects, expanded in scope. The exception is available to wide range of bodies, such as religious schools, which may discriminate on religious grounds against staff or students, religious charities, which may similarly discriminate against local volunteers, and religious-run homeless shelters, which may preference individuals of the same faith. The exception has also been effectively expanded due to the new interpretation provisions cited above, as well as a new alternative test with a relatively low threshold for conduct to fall within the exception's scope. It appears disproportionate in light of what is needed to genuinely preserve an organisation's religious ethos, and may undermine the Bill's objects of eliminating religious discrimination. The Law Council recommends that it be substantially tightened ([104]-[127]).

8. While recognising that **religious hospitals, aged care facilities and accommodation providers** have been removed from clause 11, they have been afforded a wide new exception at subclauses 32(8)-(12) with respect to religious discrimination in employment and partnerships. As currently framed, these would permit such discrimination against staff of all levels – such as the sacking of a junior orderly or an aged care occupational therapist who is of a different faith. Such organisations employ large numbers of Australians. The Law Council queries the proportionality of the exception, and its necessity in light of the existing 'inherent' requirements employment exception ([128]-[135]). It also queries the necessity of the **religious camps and conference sites exception** with respect to religious discrimination in the provision of accommodation at subclauses 33(2)-(5), noting that many Australian children of all faiths may access such sites. Further, the Expert Panel did not accept that discrimination in the provision of goods and services was required to ensure the full enjoyment of the right to religious freedom ([136]-[143]).

9. The Law Council also reiterates its previous concerns regarding the Human Rights Legislation Amendment (Freedom of Religion) Bill 2019. It considers that amendments which are intended to clarify that the purpose of engaging in, or promoting **activities which would support a traditional view of marriage is not,**

of itself, a disqualifying purpose under charities law, remain unnecessary, broader than intended, and may result in confusion ([169]-[201]).

10. Finally, the Law Council considers that rights and freedoms should be protected in a coherent overarching legal framework that promotes the understanding that human rights are universal, indivisible, interdependent and interrelated. As such, it supports a **federal human rights act**. Australia continues to lag behind global standards in this vital respect. It also supports the adoption of **comprehensive, consolidated federal anti-discrimination legislation**, provided that this preserves and strengthens existing protections ([166]-[168]).

Introduction

Overview

11. The Law Council welcomes the opportunity to respond to the Australian Government's second exposure drafts of the: Bill; Religious Discrimination (Consequential Amendments) Bill 2019; and the HR Bill.

12. The Law Council's submission focuses primarily on the Bill. It also reiterates specific concerns previously made with respect to the HR Bill's proposed amendments to the *Charities Act 2013* (Cth) (**the Charities Act**).

13. This submission should be read in conjunction with the Law Council's earlier submission to the Attorney-General's Department of 3 October 2019, regarding the first exposure drafts of the above bills. In particular, the submission's Appendix contains an overview of Australia's relevant international human rights law obligations, and how tensions with respect to conflicting rights are resolved by reference to well-established proportionality principles. These continue to inform the Law Council's response.

14. Regarding the Bill, the Law Council notes that key amendments in the second exposure draft include welcome features. These include that:

    - provisions concerning health practitioner conduct rules, which provide that restrictions on conscientious objections by health practitioners are prima facie unreasonable for the purposes of indirect discrimination, have been tightened to at least partially respond to concerns raised by the Law Council. However, it continues to oppose these provisions; and
    - the definition of 'person' has been removed and associates of religious individuals are now protected from discrimination. It is nevertheless concerned by the intention to extend the protections for 'associates' of individuals who hold or engage in a religious belief or activity to body corporates in new clause 9, as discussed below.

15. The Law Council's significant concerns include that the second exposure draft of the Bill:

    - does not remove from the Bill provisions that, contrary to international human rights law, prefer religious belief over and above other human rights such as freedom from discrimination on the grounds of sex, sexual orientation, race, disability and age. In particular, the extraordinary clause 42 (formerly clause 41) has been retained, which provides that statements of belief will not constitute discrimination for the purposes of any Commonwealth, state or territory anti-discrimination law;

- expands the definitions of statement of belief, religious conduct for exceptions and conscientious objection beyond comparable approaches in other discrimination statutes, rather than adopting an approach which achieves greater uniformity across all discrimination statutes;
- expands the scope of the general exception available to religious bodies from the Bill's prohibition on religious discrimination; created an exception for religious hospitals, aged care and accommodation services to discriminate on the grounds of religion in the hiring of employees; and a further exception to religious-run camps or conference sites to discriminate on such grounds in the provision of accommodation; and
- with respect to indirect discrimination, maintains its unorthodox position regarding employer and health practitioner conduct rules so as to remove the ability of a court to properly resolve conflicting interests in the determination of whether indirect religious discrimination is reasonable. In particular, this ability of the court has now also been removed with respect to qualifying body conduct rules. The Law Council maintains that the standard reasonableness test is a more appropriate and established means of weighing up rights and interests in the circumstances.

Compliance burden

16. The Law Council is acutely aware that anti-discrimination legislation in Australia is already a highly complex area of law. While recognising that there is a gap to be addressed in federal protections for religious discrimination, it is concerned that the Bill is unnecessarily complex due to its unorthodox features. By adding multi-faceted and novel legal tests to the existing legal framework, the Bill is likely to create an onerous compliance burden for both the business and community sectors, by:

    (a) imposing complex new legal requirements on employers that have the potential to conflict with existing regulatory requirements arising under the *Fair Work Act 2009* (Cth) (**FWA**), occupational health and safety legislation, and Federal and State anti-discrimination laws.

        - For example, under existing laws, employers must have policies which ensure that appropriate standards of conduct are maintained in the workplace and in activities connected to the workplace (eg, conduct at Christmas parties and other work functions). By providing broad-based protections for 'statements of religious belief', the provisions of the Bill may seriously impede the ability of employers to maintain appropriate standards of conduct and to protect their employees from unlawful discrimination.

    (b) requiring the provision of expensive legal advice to ensure that employers are not susceptible to religious discrimination complaints by their employees or clients.

        - For example, existing anti-discrimination laws are based on a 'reasonableness' test in the context of indirect discrimination that requires the court to weigh all relevant matters in the balance. Under the Bill, this test is modified and complicated by a range of new criteria that differ depending on certain arbitrary factors such as the annual turnover of the business, and subjective definitions.

(c) requiring professional bodies, accreditation agencies and trade certifiers to comprehensively review their codes of conduct or qualification standards to ensure that they do not restrict or prevent a person from making a statement of belief outside of work.

- For example, under the Bill, a qualifying body may not be able to prevent a person from making a 'statement of belief' – even a statement that is harmful to others or contrary to the shared values of the profession or trade – if that statement is made otherwise than in the course of carrying out the relevant trade or engaging in the relevant occupation.

(d) Requiring employers to make subjective and complex judgments about whether an individual's belief system is in fact a religious belief for the purposes of complying with the relevant provisions proposed Bill.

- For example, the Bill introduces a 'person of the same religion' test for determining the scope of what constitutes 'in accordance with the doctrines, tenets, beliefs and teachings of the relevant religion.' It provides that a court will now need to consider whether a person of the same religion as the religious body or person could reasonably consider the act to be in accordance with the doctrines, tenets, beliefs or teachings of that religion. This is explicitly intended to give religious bodies a 'wide margin of appreciation' about how they conduct themselves in accordance with their faith, and makes it difficult for employers to anticipate the scope of key provisions of the proposed Bill.

(e) Undermining the important preventative work of equal opportunity commissioners across Australia.

- For example, clause 42 provides a federal defence which overrides claims of unlawful discrimination under Commonwealth, state and territory laws for statements of belief. Commissioners' preventative work in educating the public, and business and community sectors through training, distributing information and best practice guidance may be undermined by its introduction, as it is likely to create extensive legal uncertainty when anticipating how the new test in this clause will apply, and the precise extent to which it will invalidate existing laws.

17. These points are elaborated upon below.

Religious Discrimination Bill

Objects, Definitions

Objects

18. The Second Exposure Draft amends subclause 3(2), to state that in giving effect to the objects of the Act, regard is to be had to the 'indivisibility and universality of human rights, *and their equal status in international law*' (italics added), along with the principle that every person is free and equal in dignity and rights'. The Law Council supports this amendment.

19. However, the Law Council continues to hold concerns that certain provisions of the Bill, such as clause 42, privilege particular human rights over others and do not reflect subclause 3(2). This means that in practice, the underlying purposes set out

above will be defeated. This inconsistency underlines the need to remove such provisions.

20. In a similar vein, the Law Council continues to support the removal of paragraph 3(1)(c), which places undue weight upon ensuring that persons can make 'statements of belief' as one of the Bill's three objects. This may, with other problematic clauses in the Bill, contribute to a statutory imbalance between the protection of freedom of religion compared with a range of other human rights, noting that the Bill's provisions will be interpreted in light of its objects. While the propagation of religious beliefs is recognised as part of the right to manifest religion, it is subject to specified limitations and there is no special weight afforded to this aspect of the right above all others.

Recommendation:

- **Paragraph 3(1)(c) should be removed.**

Definitions - person

21. Several amendments contained in the Second Exposure Draft regarding definitions are discussed below in the context of relevant operative provisions.

22. The Law Council welcomes the removal of the definition of 'person', which was previously included in subclause 5(1). A key concern in its earlier submission was that the definition gave the Bill a broader scope than other Commonwealth anti-discrimination laws by extending it beyond natural persons to include body corporates, incorporated associations, 'bodies' and bodies politic. While it is pleased that this has been rectified, it is nevertheless concerned by the intention to extend the protections for 'associates' of individuals who hold or engage in a religious belief or activity to body corporates in new clause 9, as discussed below.

Courts' role in the interpretation of religious conduct

23. Previously, a test was applied at several points of the Bill as to whether certain conduct, statements or conscientious objections could be 'reasonably considered' to be in accordance with the doctrines, tenets, beliefs or teachings of a particular religion. The test now refers to whether *a person of the same religion as the religious body or person* could reasonably consider the conduct, statement of belief or conscientious objection to be in accordance with the doctrines etc of that religion.

24. Relevant provisions in this context include:

- definition of 'conscientious objection' at subclause 5(1), affecting the operation of subclauses 8(6)-(7), providing that health practitioner conduct rules (concerning health practitioners' conscientious objections to providing health services) are prima facie unreasonable for the purposes of indirect discrimination;
- The definition of a 'statement of belief' at subclause 5(1), affecting the operation of: subclauses 8(3)-8(5), providing that employer conduct rules and qualifying conduct rules are prima facie unreasonable for the purposes of indirect discrimination; and at clause 42, which provides that statements of belief do not constitute discrimination under Commonwealth, state or territory laws;

- determining whether religious bodies' conduct is in accordance with religious doctrines etc and therefore meets the threshold for the broad general exception at subclause 11(1);
- determining whether conduct by religious hospitals, care facilities and accommodation providers in discriminating in employment and partnerships is in accordance with religious doctrines etc at paragraphs 32(8)(a)-(b); and
- determining whether conduct by religious camps and conference sites permitting discrimination in the provision of accommodation is in accordance with religious doctrines etc at subclause 33(2).

25. These amendments move the relevant lens from a court assessment to an assessment by a person of the same religion as the person who is making the statement of belief, relying upon the conscientious objection or seeking the exception. Departmental notes regarding these amendments state that:

> *This recognises that religious bodies have a wide margin of appreciation about how they conduct themselves in accordance with their faith, which is not well-suited to judgment by a court. The objective test in this amendment means courts will not be involved in deciding what the doctrines of a particular religion require.*[1]

26. The Law Council recognises that courts and tribunals are generally reluctant to trespass into matters of religious doctrine and will generally afford a wide latitude in this regard. In *Hozack v The Church of Jesus Christ of Latter Day Saints*,[2] Madgwick J observed that it is not appropriate for a Court to comment on the validity of doctrines.[3]

27. However, under Commonwealth, state and territory laws, it is usually the role of the court to determine whether a person's or body's conduct conforms with such doctrine or is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion, where the resolution of conflicting rights is concerned under civil laws. The Law Council is concerned that these amendments move away from this standard approach.

28. The Law Council further notes that there may be multiple 'reasonable interpretations' amongst adherents of a religion as to what is in accordance with the doctrines, tenets, beliefs or teachings of a religion. Some religions have very large numbers of followers. This may undermine the certainty and clarity of the relevant provisions, and broaden their scope. Further, there is no requirement that the relevant religious adherent be particularly well informed or senior within the religion, or that the reasonable interpretation be correct.

29. While the above amendments may be intended to reduce the court's role in interpreting matters of religion, the Law Council notes that they may also reduce the clarity of the Bill's application, including for the businesses, employers, health providers and others who must apply it. It is a fundamental tenet of the rule of law that the law must be both readily known and available, and certain and clear.[4]

30. They may also expand the scope of affected provisions, including regarding when religious bodies may avail themselves of broad exceptions, the circumstances in

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[1] Attorney-General's Department, 'Religious freedoms legislation –Key changes from first exposure draft', 3.
[2] (1997) 79 FCR 441 (***Hozack***).
[3] *Hozack,* 460.
[4] Law Council of Australia, *Policy Statement – Rule of Law Principles*, 2.

which health practitioners may conscientiously object to providing health services, and in which statements of belief may be made.

31. Without undertaking extensive research, the Law Council is unaware of examples in other federal, state or territory anti-discrimination legislation which require the interpretation of religious conduct to be based on what a person of the same religion as the religious body or person would reasonably consider to be in accordance with its doctrines etc. For example, paragraph 37(1)(d) of the *Sex Discrimination Act 1984* (Cth) (**SDA)** provides a general exception to religious bodies for 'any other act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.'[5]

32. The Law Council considers that a similar approach should be adopted in the Bill.

Recommendation:

- **The Bill should be amended so that matters of whether conduct (including making statements of belief and conscientious objections) conforms with religious doctrines, tenets and teachings are resolved by a court, as is the usual approach under Commonwealth, state and territory laws.**

Indirect discrimination

The importance of the general reasonableness test

33. The Law Council maintains its concerns that paragraphs 8(2)(d)-(e) and subclauses 8(3)-8(9) significantly detract from the orthodox approach taken to determining reasonableness for the purposes of indirect discrimination. Under this approach, all the relevant circumstances of a case must be taken into account.[6] This is reflected in the general reasonableness test set out in subclause 8(2) (up to and including paragraph 8(2)(c)). It requires consideration of all the relevant circumstances of the case, including:

- the nature and extent of the disadvantage resulting from the imposition etc of the condition, requirement or practice;
- the feasibility of overcoming or mitigating the disadvantage; and
- whether the disadvantage is proportionate to the result sought by the person who imposes or proposes to impose, the condition, requirement or practice.

34. This list is not exhaustive and courts may take into account other matters which they deem relevant in determining reasonableness. The reasonableness test provides an established balancing mechanism by which tensions which arise regarding different rights can be resolved to the least harmful effect in the circumstances. The Law Council considers that it is impossible to prescribe in advance how every instance of indirect discrimination should be resolved by reference to what is reasonable, given that the relevant circumstances, rights and objectives will vary widely in different scenarios. It is pre-emptive and unlikely to produce a just result. For this reason, the general reasonableness test is the most appropriate and adaptable lens to apply.

[5] See also the *Age Discrimination Act 2004* (Cth), s 35.
[6] *Secretary, Department of Foreign Affairs & Trade v Styles* (1989) 23 FCR 251.

35. With this in mind, the Law Council considers that paragraph 8(2)(d), which focuses on the limitation of a person's religious belief or activity in the context of a condition, requirement or practice which is an employer conduct rule,[7] should be removed, along with new paragraph 8(2)(e), which does the same with respect to a qualifying body conduct rule.[8]

36. These paragraphs are unnecessary and inappropriate given the general reasonableness test, which is designed so that such factors are already considered. There is a risk that that they afford undue emphasis to the rights of employees or trainees to manifest their religion at the expense of others' rights.

Recommendation:

- **Paragraphs 8(2)(d) and 8(2)(e) should be removed.**

Conditions which are not reasonable relating to statements of belief

Employer conduct rules

37. The employer conduct rules provisions at subclause 8(3) and 8(5) state that it is prima facie unreasonable for a 'relevant employer' (a non-government employer with annual revenue of at least $50 million) to make an employer conduct rule which restricts an employee from making a statement of religious belief outside the course of their employment, unless:

    - the rule is necessary to avoid unjustifiable financial hardship to the employer; or
    - under subclause 8(5), the statement of belief is malicious; or would be likely to harass, threaten, seriously intimidate or vilify another person or group of persons, or promote etc a serious offence.

38. The Law Council acknowledges that that these provisions have had minor improvements in the Second Exposure Draft:

    - previously, subclause 8(3) referred to restrictions on employees 'other than at a time when the employee was performing work on behalf of the employer'. This has been amended to refer to 'other than in the course of employment'. It aligns more with existing concepts in law.[9]
    - with respect to the subclause 8(5) exceptions, amendments also define 'vilify', avoiding some of the issues outlined in the Law Council's previous submission concerning duplication, and expand the scope of the exception to include statements of belief that would 'threaten or seriously intimidate' a person.

39. However, the Law Council does not support subclause 8(3). It does not exist in another Australian jurisdiction. It is unorthodox as 'reasonableness' in the context of indirect discrimination requires the court to weigh all relevant matters in the balance, whereas subclause 8(3) narrowly circumscribes what is reasonable. It has been drafted to apply to the circumstances of one case, which is best resolved through the application of subclause 8(2). That provision allows the employee's freedom of

[7] An employer conduct rule is a condition, requirement of practice that is imposed, or proposed to be imposed, by an employer on its employees or prospective employees that relates to standards of dress, appearance or behaviour of those employees: clause 5(1).
[8] A qualifying conduct rule is a condition, requirement of practice that is imposed, or proposed to be imposed, by a qualifying body on persons seeking or holding an authorisation from the qualifying body that relates to standards of behaviour from those persons: clause 5(1).
[9] Eg, *Comcare v PVYW* [2013] HCA 41; *Drake & Bird v BHP Coal Pty Ltd* [2019] FWC 7444; *Bowker and Others v DP World Melbourne Limited T/A DP World and Other [*2014] FWCFB 9227 (19 December 2014).

belief and expression to be considered and appropriately weighed against other rights and interests.

40. On the basis of subclause 8(3), a code of conduct prohibiting employees of large employers from making offensive or humiliating comments on social media or in public (including to large audiences) outside of the course of their employment could be unlawful discrimination.

Over-emphasis on certain rights at the expense of others

41. Subclause 8(3) is problematic as, other than in the narrow circumstances envisaged by the exceptions discussed below, it removes the requirement to consider the potential harm done to others' rights, and the need to maintain tolerance and diversity in large Australian workplaces generally. This may place individuals who are subject to potentially offensive and harmful statements based on religious beliefs, such as women, adherents of minority religions, people with disability or the LGBTI+ community, in a position of further vulnerability.

42. Subclause 8(3) does not enable full consideration of the range of applicable rights – such as the best interests of the child, or the right to equality and non-discrimination of other groups, compared with the right to freedom of expression and manifestation of religious belief – and offers no mechanism to assess whether the statement/s of belief were necessary, reasonable and proportionate in the circumstances. Instead, the right to make statements of belief is privileged over other rights. This does not accord with a 'universal, indivisible, interdependent and interrelated'[10] approach to human rights, or the Bill's objects at subclause 3(2).

43. There remains insufficient recognition that under the *International Covenant on Civil and Political Rights*[11] (**the ICCPR**), the right to manifest religion may be subject to certain limitations, such as where it is necessary to protect public safety, order, health, or morals or others' fundamental rights and freedoms. Similarly, the exercise of the right to freedom of expression 'carries with it special duties and responsibilities', and may also be limited for similar purposes.[12]

Interpretation

44. The definition of 'statement of belief' must be made in good faith. As flagged above, it has been amended in the Second Exposure Draft so that it must be 'of a belief that a *person of the same religion as the first person* could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of that religion',[13] rather than of a belief that 'could reasonably be regarded' etc.

45. As discussed, there may be multiple reasonable interpretations amongst religious adherents of what is in accordance with the religion's doctrines, noting that some religions have large numbers of followers. This may undermine the certainty and clarity of the relevant provisions, and broaden their scope. There is no requirement that the relevant religious adherent be particularly well informed or senior in the religion, or that the interpretation, while reasonable, be correct. For employers, this may prove difficult to apply in practice.

[10] Vienna Declaration and Programme of Action, as adopted by the World Conference on Human Rights in Vienna on 25 June 1993, [5].
[11] Opened for signature 19December 1966, 999 UNTS 171 (entered into force 23 March 1976).
[12] ICCPR, arts 18(3) and 19(3). For a discussion of relevant international obligations in this regard, see the Appendix to the Law Council of Australia, *Religious Freedoms* Bills submission(ICPR dated 3 October 2019.
[13] Bill, cl 5(1).

Exception based on hardship to employer

46. The 'unjustifiable financial hardship' remains a high threshold for the employer to establish, noting that the burden of proof rests on the employer.[14] The Law Council remains concerned at its ambiguity and the practical difficulties involved in establishing this threshold, particularly as 'unjustifiable financial hardship' will be assessed against the capacity of a business with revenue of at least $50 million.

47. The provision fails to acknowledge that an employer may wish to restrict an employee from making statements of belief out of work for reasons other than avoiding financial hardship, such as to promote a harmonious, tolerant workplace. An employer may also legitimately wish to restrict the statements of its employees because of the social messaging and reputation it is attempting to promote, such as through diversity campaigns during the Olympic Games. It may be difficult to establish 'unjustifiable financial hardship' if an employee made public statements that undermined such a campaign.

48. It also means that the extent of protections for persons against harm, and conversely the extent of employee freedoms, essentially depends on commercially-driven circumstances.

Curtailment of ordinary reasonableness test

49. Ordinarily, factors which might be weighed under subclause 8(2) in determining whether the statements were reasonable in the circumstances might include:

- the precise nature of the statement, and the way in which it was made;
- the level of seniority of the employee, and the degree to which they are likely to be seen as speaking for the employer – a CEO, compared to a receptionist;
- the manner in which they were made – eg on Facebook to a small group of followers, compared to a media statement made to an audience of millions;
- the nature of the employer's business, workplace and its customer base;
- the employer's obligations to uphold a safe and harmonious workplace respecting the rights of employees;
- broader rights of employees and the public eg to non-discrimination and equality; and
- the likely harm done to employees, customers, and the employer's reputation as a result of the statement.

50. However, consideration of such factors will be largely excluded as a result of subclause 8(3).

Arbitrary application

51. Subclause 8(3) also remains arbitrary. Under these provisions, employees of large businesses could more freely make statements of belief outside of working hours, compared to employees of small or Government employers.

52. The $50 million threshold for a 'relevant employer' may capture private universities and even some private schools, such as Wesley College in Melbourne.[15] Under the

[14] The Bill, cl 8(7).

[15] Wesley College reportedly has an annual income of $100.4 million Inga Ting, Alex Palmer and Nathanael Scott, 'Rich school, poor school: Australia's great education divide', ABC (online), 13 August 2019,

Bill, teachers in such schools may be permitted to make public statements of belief outside the course of employment that may be likely to harm students' wellbeing.

53. The provision is also arbitrary in that large employers will more freely be able to restrict employees from making other kinds of statements, such as political statements or statements which humiliate or harm others and are fuelled by non-religious beliefs, outside the course of employment.

High and complex threshold for excluding statements

54. As noted, subclause 8(5) has been amended, so that a statement of belief may be restricted if it 'threatens or seriously intimidates' another person or group. A definition of 'vilify' has also been added at subclause 5(1), which refers to inciting hatred or violence.[16]

55. However, subclause 8(5) remains a high threshold for statements to be excluded from the scope of subclause 8(3). It means that large employers will not be able to restrict employees from making public statements of belief outside of the course of employment which merely offend, humiliate, insult or intimidate others.

56. There will also remain complexities in determining what falls within the terminology of 'malicious', 'harass', and 'inciting hatred or violence', posing difficulties for employers and employees alike.

Further complexity

57. The proposed provisions add significant and unnecessary legal complexity to the orthodox reasonableness test and give rise to practical challenges for large employers, many of which will have existing codes of conduct in place to manage diversity, tolerance and reputational issues. They may also create challenges for compliance and enforcement bodies.

58. For the above reasons, the Law Council does not support the inclusion of subclauses 8(3) and 8(5) of the Bill. The proposed provisions at subclauses 8(1) and 8(2), up to and including paragraph 8(2)(c), provide sufficient and appropriate protection on these matters.

Qualifying body conduct rules

59. The Second Exposure Draft includes a new subclause 8(4) providing that a qualifying body conduct rule that would have the effect of restricting or preventing a person from making a statement of belief other than in the course of the person practising in the profession, carrying on the relevant trade or engaging in the relevant occupation, is prima facie unreasonable.

60. The only exceptions are where compliance with the rule is an 'essential requirement' of the profession, trade or occupation,[17] or the circumstances outlined in subclause 8(5) apply. That is, the statement of belief must be malicious; be likely to harass, threaten, seriously intimidate or vilify another person or group of persons; or promote etc a serious offence.

<https://www.abc.net.au/news/2019-08-13/rich-school-poor-school-australias-great-education-divide/11383384>.

[16]

[17] Religious Discrimination Bill 2019 (Second Exposure Draft), cl 8(4).

61. This may affect legal professional bodies' own ability to regulate the legal profession effectively. For instance, the Australian Solicitors' Conduct Rules (**ASCR**)[18] provide a common set of well-established professional obligations and ethical principles for Australian solicitors when dealing with their clients, the courts, their fellow legal practitioners, regulators and other persons. The ASCR are intended to assist solicitors to act ethically and in accordance with principles of professional conduct. A breach of the rules is '… *capable of constituting unsatisfactory professional conduct or professional misconduct, and may give rise to disciplinary action by the relevant regulatory authority* …'.[19] They have been adopted in South Australia, Queensland, Victoria, New South Wales and the Australian Capital Territory, and include the rule that:

> *A solicitor must not engage in conduct, in the course of practice or otherwise, which demonstrates that the solicitor is not a fit and proper person to practise law, or which is likely to a material degree to:*
>
> - *be prejudicial to, or diminish the public confidence in, the administration of justice; or*
> - *bring the profession into disrepute.*[20]

62. This rule addresses the important public policy reasons for preserving public confidence in the legal profession and the administration of justice. Conduct that undermines such public confidence both discourages compliance with the legal system and restricts access to justice. A general public that is distrustful of lawyers and the legal system is less likely to seek redress.

63. The Law Council supports freedom of religion, and the right to manifest religious expression. In most instances, it considers that statements of belief made by practitioners would be reasonable.

64. However, in rare instances, statements of belief which are, for example, publicly made by a senior member of the profession which have the effect of seriously denigrating another group may bring the legal profession into disrepute and raise questions about its fairness in delivering justice. Some individuals may be dissuaded from accessing the justice system, with alarming consequences.

65. Under subclause 8(4), legal professional bodies may be unable to rely upon the above rule to curb such behaviour. It may be difficult to prove that the application of the rule in these circumstances was an 'essential requirement' of the legal profession, particularly where the statement was made outside of the course of legal practice. The Explanatory Notes reinforce that 'whether a requirement is essential is a high standard that is determined objectively'.[21] It may also be unlikely that such statements meet the high thresholds contained in subclause 8(5).

66. It is important that legal professional bodies maintain the ability to regulate such conduct by the legal profession appropriately, effectively and reasonably. On this basis, the Law Council does not support subclause 8(4) (or 8(5)). The established reasonableness test in subclause 8(2) is an appropriate mechanism by which the relevant rights and legitimate interests, and the application of the qualifying body conduct rules, can be weighed in the circumstances.

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[18] Law Council of Australia, Australian Solicitors Conduct Rules (2015).
[19] Ibid, rule 2.
[20] Ibid, rule 5(1).
[21] Explanatory Notes, 20.

Health practitioner conduct rules

67. A 'health practitioner conduct rule' is a condition, requirement or practice: imposed or proposed to be imposed, on a health practitioner; that relates to their provision of, or participation in a particular kind of health service; that would have the effect of restricting or preventing the practitioner from conscientiously objecting to providing or participating in that kind of health service.[22] A conscientious objection must be one which a person of the same religion as the health practitioner could reasonably consider the refusal to provide, or participate in, that kind of health service as being in accordance with the doctrines etc of the religion.[23]

68. Currently, several states and territories have legislated in limited areas to permit conscientious objection, such as with respect to abortion or voluntary assisted dying. Where laws have not been enacted, health directives and medical codes of conduct are highly relevant.

69. Under subclause 8(6), if a state or territory law allows a health practitioner to conscientiously object to providing or participating in a particular kind of health service because of their religious belief or activity, a 'health practitioner conduct rule' that is inconsistent with that law is not reasonable.

70. Under subclause 8(7), if subclause 8(6) does not apply, a health practitioner rule is not reasonable unless compliance with the rule is necessary to avoid an unjustifiable adverse impact on:

    - the ability of the person imposing, or proposing to impose, the rule to provide the health service; or
    - the health of any person who would otherwise be provided with the health service by the health practitioner.

71. With certain narrow exceptions, the effect of these provisions is that it will be unreasonable, and therefore unlawful discrimination, for an employer of a health practitioner to require that practitioner to provide a service to which they conscientiously object on religious grounds.

72. The Law Council welcomes certain improvements in the Bill's second exposure draft regarding these provisions. The list of health professions which are 'health services'[24] has been substantially narrowed.

73. There are also notes to subclauses 8(6) and 8(7) indicating that they are directed towards facilitating a health practitioner's conscientious objection to 'providing or participating in a particular kind of health service'. These state that the provisions do 'not have the effect of allowing a health practitioner to provide a particular kind of health service, or health services generally, to particular people or groups of people. For example, 'the refusal to prescribe contraception to single women may constitute discrimination under the SDA'.

74. However, the Law Council does not support subclauses 8(6) and 8(7). Its concerns include the following.

[22] The Bill, cl 5(1).
[23] Ibid.
[24] Ibid.

Unorthodox provisions, lack of necessity and breadth

75. The provisions remain unorthodox, and their necessity unclear, particularly given the existing reasonableness test. With respect to subclause 8(6), if a state or territory law provides for conscientious objections by a health practitioner, the actions of a health service to override this law would already appear to be unreasonable under subclause 8(2) and therefore indirect discrimination. The Law Council is not aware of concerns that health services are requiring health practitioners to act in a manner which conflicts with their religious views.

76. State and territory laws which have been enacted in this area have tended to narrowly focus on issues such as abortion or voluntary assisted dying. While the range of health practitioners has been narrowed, the Bill still has a wider ambit than those laws, covering any health service provided by the medical, midwifery, nursing, pharmacy and psychology health professions. These professions provide fundamental health services which underpin the health and wellbeing of diverse groups of Australians.

77. There is also a lack of objective evidence of the incidence of conscientious objection in professions other than the medical and nursing professions. In particular, the Law Council is not aware of any evidence of conscientious objections by midwives, pharmacists and psychologists. The danger of including professions where there is no history of such objection is that this may have the perverse effect of encouraging objection to the provision of health services.

Override of state and territory lawmaking and policy decisions

78. Subclause 8(7) applies if there is no applicable state or territory law which allows conscientious objection. Currently, several states and territories have either not legislated on these issues, or have only legislated in limited areas. Their governments may have elected not to enact such laws, in order to maximise access to rural health services. Indeed, they may have determined that matters of conscientious objection be left to the relevant profession or health service to negotiate on a case by case basis.

79. Subclause 8(7) impinges on such decisions by providing that health practitioner conduct rules are prima facie not reasonable and constitute unlawful discrimination. The Bill may operate to override state or territory government decisions designed to ensure patients' health care needs are not compromised as a result of the religious views of health practitioners.

Undermining codes of conduct and lack of referral to other treatment

80. In situations and jurisdictions where laws do not apply, contracts between health services and health practitioners are particularly relevant, along with any Departmental health directives and professional codes of conduct.

81. For instance, the Medical Board of Australia's *Good medical practice: a code of conduct for doctors in Australia*[25] (**the Code**) is a recognised 'Code' under sections 35 and 39 of the *Health Practitioner Regulation National Law (NSW) No 86a*. The Code states that good patient care includes referring a patient to another

[25] Medical Board of Australia, *Good medical practice: a code of conduct for doctors in Australia* (2014), <https://www.medicalboard.gov.au/Codes-Guidelines-Policies/Code-of-conduct.aspx>.

practitioner, treating patients with respect, and not using the practitioner's moral or religious views to deny access to legal medical help.[26]

82. Subclause 8(7) undermines the balanced and nuanced approach taken by the Code towards situations in which a practitioner's rights conflict with a patient's right to health, which seeks to minimise harm and uphold human dignity.

83. It is particularly concerning that subclause 8(7) does not include any requirements to refer a patient to an alternative provider. In relevant state and territory laws, a referral requirement to another health practitioner is a common feature.[27] This may leave vulnerable patients without access to prompt alternative healthcare. The Law Council considers that the correct place for a referral requirement is in state law, including state policy or disciplinary obligation (such as under the Code).

84. There are also questions about the ability to apply aspects of health directives and professional codes of conduct in light of the Bill. For example, where a health directive or code of conduct required a medical practitioner to take every reasonable step to direct the patient to an equivalent practitioner who does not have such an objection, there may be a reasonable argument that this provision may not satisfy subclause 8(7) because it does not constitute an 'unjustifiable adverse impact' on the health of the patient, or the ability to provide the service. As a result, it may be unreasonable indirect discrimination and unlawful.

Narrow exceptions

85. A health practitioner conduct rule which restricts conscientious objection can only do so where there is an 'unjustifiable adverse impact' on either the provision of the health service or on the health of the patient.

86. In relation to the health of the patient, the Explanatory Notes state that where non-compliance with a rule could result in the death or serious injury of a person seeking the health service, this would clearly amount to an unjustifiable adverse impact. Other types of risks or impacts to patient health may also amount to unjustifiable adverse impact.[28] It 'is not intended that this provision would allow health practitioners to exercise conscientious objection in a manner which directly affects the patient, causes disruption to patient care or intentionally impedes patients' access to care'.[29]

87. However, the Law Council remains concerned that the 'unjustifiable adverse impact' threshold will be interpreted narrowly in practice. Even where there are no obvious imminent risks, the resulting delay in accessing treatment, information, or medicines may nevertheless place a person at a serious risk of longer-term declining health.

88. The Explanatory Notes further highlight the example of the refusal by a sole medical practitioner in a small rural community to provide contraception as possibly amounting to unjustifiable adverse impact, as the women involved may be unable to access alternative health care without significant travel and cost.[30]

89. However, all health services are unlikely to fall within the exception only by the fact of their remoteness. It would rest on the service provider administering the rule to explain the particular effect that a conscientious objection would have on a local

[26] Ibid.
[27] Eg *Termination of Pregnancy Act 2018* (Qld), s 8(3).
[28] Explanatory Notes, [185].
[29] Ibid, [184].
[30] Ibid, [148].

remote population or patient. A centrally based service administrator in an urban area, who oversees the work of many health practitioners nationally, may be unaware of a particular remote community's circumstances or the specific effect of any loss of service provision. The risk is that patients in remote communities, who have fewer health services, and are generally poorer, in worse health and less able to access transport than their urban counterparts, miss out. In this context, the Northern Territory Law Society (**NTLS**) has highlighted that the Bill could disproportionately impact Territorians as NT remote communities often only have one or two health providers. As most members of remote communities in the NT are Aboriginal peoples, Aboriginal Territorians may be significantly impacted.

Impact on vulnerable patients

90. Particular groups may be at a greater risk where health practitioners conscientiously object to providing health services and treatments, as certain services which may trigger religious sensitivities are likely to benefit these groups. As well as rural and remote Australians, these include women (particularly unmarried women and girls) and LGBTI+ groups. It is well understood that several of these groups' health is disproportionately at risk.[31]

91. Health practitioners engage with people at often vulnerable stages of their lives – such as for an abortion or IVF. As a result of a service refusal, a person may be less likely to seek treatment, which could lead to the failure to screen, diagnose or treat important medical problems.

92. The Bill is intended to enable conscientious objection to a 'particular kind of health service', while preventing discrimination against individuals or groups of people. However, the risk remains that this may still allow practitioners to refuse to provide specific types of services which acutely or only impact on people from particular groups. For example, a doctor may conscientiously object to provide the morning after pill, which has only a narrow window of only a few days before it becomes ineffective, with its greatest effectiveness in the first 24 hours. Teenage girls, rural and poorer women may be most affected, as they may be unable to access alternative prescriptions in the time available. They may have little time or ability to contact the service provider to seek a reversal of the refusal. Again, the provider may not be best placed to judge the adverse impact of a refusal at the local level and whether it is 'justifiable'.

93. Additionally, there are certain kinds of health services which are only accessed by particular groups, such as gender assignment surgery or gender hormone therapy. There may be confusion over whether, in these circumstances, a conscientious objection should be characterised as to a particular service, person or group Such a conscientious objection would be protected by clause 8 but when exercised may also contravene the relevant provisions of the SDA. The Bill does not resolve this difficulty.

94. As noted above, the definition of 'conscientious objection' now rests whether a person of the same religion could reasonably consider the refusal to provide the

[31] Eg Australian Institute of Health and Welfare, 'Rural and remote health' (May 2017), <https://www.aihw.gov.au/reports/rural-health/rural-remote-health/contents/rural-health>; Women's Health Australia, Rural, remote and regional differences in women's health: Findings from the Australian Longitudinal Study on Women's Health: Final Report prepared for the Department of Health (2011); Department of Health, 'Lesbian, gay, bisexual, transgender and intersex people' (May 2013), <https://www1.health.gov.au/internet/publications/publishing.nsf/Content/mental-pubs-n-recovgde-toc~mental-pubs-n-recovgde-10~mental-pubs-n-recovgde-10-les>.

service as being in accordance with the doctrines, etc of the religion. The Law Council is concerned that this is problematic for the reasons outlined above.

95. For the above reasons, the Law Council does not support subclauses 8(6) and 8(7). It remains unclear why the existing reasonableness test in subclause 8(2) is insufficient to deal with the above matters.

96. Should the provisions discussed above be removed, it will also be necessary to remove the note to subclause 8(8) (regarding the burden of proof for relevant subclauses), subclause 8(9) (references to 'employees' in clause 8); and subclauses 32(6) and (7) (intersection of employer conduct rules and health conduct rules with the 'inherent requirements' exception).

Recommendations:

- **Paragraphs 8(2)(d) and (e), and subclauses 8(3), (4), (5), (6), and (7) be removed.**
- **Consequently, the following also be removed:**
  - **Note to subclause 8(8);**
  - **subclause 8(9); and**
  - **clauses 32(6) and (7).**

Extension of Bill to associates

97. New clause 9 states that:

> *This Act applies to a person who has an association (whether as a near relative or otherwise) with an individual who holds or engages in a religious belief or activity in the same way as it applies to a person who holds or engages in a religious belief or activity.*

98. The example provided in the note to clause 9 is that it is unlawful, under section 14, for an employer to discriminate against an employee on the ground of religious belief or activity of the employee's spouse.

99. This addition is generally welcome, noting that the *Racial Discrimination Act 1975* (Cth) (**RDA**) and *Disability Discrimination Act 1992* (Cth) (**DDA)** also include specific provisions concerning associates.[32]

100. The Law Council is nevertheless concerned by the intention to extend the protections for 'associates' of religious individuals to body corporates. This is evident from the Explanatory Notes, which state that:

> *... this Act only protects a person – including a natural person or body corporate – from discrimination on the basis of their association with a natural person who holds or engages in a religious belief or activity.*
>
> *This clause does not purport to protect corporations from discrimination on the basis of their association with other corporations. For example, a corporation would be protected against discrimination in relation with a*

[32] Eg, RDA, s 11; DDA, s 7, although constitutional limitations exist regarding reliance on the DDA's association provisions, under which section 7 can only be relied upon in circumstances that engage another head of power other than the eternal affairs constitutional head of power: Neil Rees, Simon Rice and Dominique Allen, *Australian anti-discrimination & equal opportunity law* (3rd ed, The Federation Press, 2018), 515-516.

natural person, such as their CEO. However, a corporation would not be protected due to their association with another body corporate, such as a supplier.[33]

101. This approach is inconsistent with the ICCPR and other United Nations human rights treaties, which protect the rights and dignity of individuals and in some cases groups of individuals,[34] rather than corporates or governments. While the human right to manifest religious belief may be enjoyed either by individuals or in community with others,[35] the United Nations Human Rights Committee has outlined that the beneficiaries of the rights recognised by the ICCPR are individuals,[36] and complaints under the ICCPR may only be brought by individuals.

102. The Law Council considers that that the Bill should protect natural persons, not body corporates. The intention that the protections in the Bill should be extended to body corporates as associates, as opposed to natural persons, is unusual. It does not appear to have been recommended by the Expert Panel or supported by the ICPR, or accord well with the Bill's objects regarding the 'indivisibility and universality of human rights'. It could result in an uneven landscape of rights protection in which the rights of natural persons based on certain attributes are weighed against those of potentially large corporations. In this context, the Law Council notes that Catholic Healthcare reports that its 2017-2018 revenue and income was just over $290 million.[37]

103. Currently, it is possible under section 46P of the AHRC, for a complaint to be lodged with the AHRC alleging unlawful discrimination under the primary ant-discrimination acts by a 'person aggrieved'. Cases have recognised that it is possible, although not automatic, for a 'person aggrieved' to be a body corporate acting on behalf of its members.[38] However, this does not extend anti-discrimination law protections of the primary legislation to body corporates in their own right. The Law Council considers that this is the correct approach.

Recommendation:

- **Clause 9 should state that the Act applies to a natural person who has an association (whether as a near relative or otherwise) with an individual who holds or engages in a religious belief or activity in the same way as it applies to a person who holds or engages in a religious belief or activity.**

[33] Explanatory Notes, [203]-[204].
[34] Eg ICCPR, art 27.
[35] ICCPR, art 18(1).
[36] Human Rights Committee (**HRC**), *General comment no 31 [80]*, *The Nature of the general legal obligation imposed on States Parties to the Covenant,* 80th sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004), [9]. The HRC has, however, recognised that these rights may have a communal element and has dealt with claims lodged by members of a religious order, that protected their collective interest and are entitled to have their Order registered as a juridical entity: HRC, *Views*: *Communication No 1249/2004*, 85th sess, UN Doc CCPR/C/85/D/1249/2004 (21 October 2005) (*Sister Immaculate Joseph v Sri Lanka*). See also *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief,* GA Res 36/55, UNGAOR, 36th sess, UN Doc A/36/684, art 6.
[37] Catholic Healthcare, *Annual Review 2017-2018*, 19.
[38] Eg, *Access for All Alliance (Hervey Bay) Inc v Hervey Bay City Council* (2007) 162 FCR 313 (*Hervey*)

Religious bodies – conduct that is not discrimination

Religious Bodies – general exception

104. The exception at clause 11 (formerly clause 10) of the Bill provides a broad-based exception for a religious body to a claim of religious discrimination for religious conduct.

105. In its previous submission, the Law Council raised concerns that this clause was significantly broader than the usual forms of exception which apply in Commonwealth, state and territory anti-discrimination laws, on the basis that it:

- applied a lower threshold for conduct to fall within the exception – in particular, it altered the usual requirement in general exceptions for some form of *compulsion* on a religious body to act in a certain manner (for example, conduct which is 'necessary' to avoid injury to the religious susceptibilities of adherents, or 'conforms' with the doctrines etc of the religion) to a more permissive basis for the exception; and
- applied to a broader range of religious bodies than usual (beyond those which are established for religious purposes).

106. On this basis, the Law Council was concerned that the framing of the test was disproportionately broad. It recommended that it be narrowed in line with comparable provisions, such as the SDA's paragraph 37(1)(d).

107. However, in the second exposure draft of the Bill, aspects of the clause have been further expanded, as discussed below. The current version provides that a 'religious body' (described below) does not discriminate against a person under the Act by engaging, in good faith, in conduct:

- that a person of the same religion as the religious body could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of that religion (subclause 11(1)); or
- to avoid injury to the religious susceptibilities of adherents of the same religion as the religious body (new subclause 11(3)).

108. Further amendments clarify that such conduct may include giving preference to persons of the same religion as the religious body.[39]

Interpretation

109. As discussed above, subclause 11(1) is now framed to include conduct that 'a person of the same religion as the religious body could reasonably consider to be in accordance with the doctrines, etc of that religion'. The problems identified above at paragraphs [23]-[32] are applicable in this context.

110. In contrast, the comparable sections 37(1)(d) of the SDA and 35 of the *Age Discrimination Act 2004* (Cth) (**ADA**) require such assessments of a person's conduct to be made by a court (and are more tightly framed, as discussed below). The Law Council considers that a similar approach should be adopted in the Bill.

[39] Subclauses 11(2) and (4).

Scope of test

111. The Law Council previously identified that subclause 11(1) applied a lower threshold for conduct to come within the exception than comparable Commonwealth, state and territory legislation.

112. New subclause 11(3) expands the test for conduct that might fall within the general exception by providing that alternatively, 'religious bodies do not discriminate by engaging, in good faith, in conduct to avoid injury to the religious susceptibilities of adherents of their faith'. The Explanatory Notes state that this reflects paragraph 351(2)(c) of the FWA and aligns with the tests in the religious exceptions in the ADA and SDA.[40]

113. The Law Council notes that the exception in paragraph 351(2)(c) of the FWA, which permits discriminatory adverse action to be taken against a staff member of an institution which is conducted in accordance with religious doctrines, is more limited in its application. Section 38 of the SDA similarly provides a more limited exception for religious educational institutions[41] with respect to staff and students. Rather than creating an exception from the SDA's general prohibitions, it is targeted towards specific prohibitions.[42] Section 38 is more limited in terms of the range of bodies to which it applies, and the scope of conduct covered.

114. The more comparable general exceptions for religious bodies exist in paragraph 37(1)(d) of the SDA,[43] and section 35 of the ADA.[44] These include tighter wording than subclauses 11(1) or 11(3) and apply to:

> *…an act or practice of a body established for religious purposes that:*
>
> - *conforms to the doctrines, tenets or beliefs of that religion; or*
> - *is necessary to avoid injury to the religious sensitivities of adherents of that religion.*

115. Clause 11 provides a general exception to religious bodies for a wide range of conduct which would otherwise constitute religious discrimination under the Bill. The Law Council considers that the tighter wording in 37(1)(d) of the SDA, and section 35, is therefore appropriate, having regard to the Bill's stated object of 'eliminating, as far as possible' discrimination against persons on the ground of religious belief or activity in a range of areas of public life.

Definition of religious body

116. Under these amendments, the definition of religious body under in subclause 11(5) remains wide, and in certain instances has been expanded. It now includes:

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

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[40] Explanatory Notes, 31.
[41] An educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed: SDA, s 38.
[42] On discrimination in offering employment, dismissing an employee; barring a contract worker from work and on discrimination against students in education: SDA: s 14(1)(a)(b); s 14(2)(c); s 16(b); s 21.
[43] Which removes relevant conduct from being considered under the range of prohibitions in Divisions 1 (discrimination in work) and 2 (discrimination in other areas) of the SDA in their entirety.
[44] Which removes relevant conduct from being considered under Part 1 (unlawful age discrimination).

(b) a registered public benevolent institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion; 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);

but does not include an institution that is a hospital or aged care facility, or that solely or primarily provides accommodation.

117. The definition of 'religious body' has been changed in two respects. These amendments now exclude an institution that is a hospital, aged care facility or accommodation provider. These bodies are now dealt with separately under the new subclause 33(8)-(12) which concern a general staffing exception, discussed below.

118. In addition, paragraph 11(5)(b) deletes the previous reference to a 'registered charity' and inserts in its place a reference to a 'registered public benevolent institution'. In summary,[45] this change has the effect that a 'religious body' entitled to the exception from the Bill's anti-discrimination provisions (in certain circumstances) will include a registered public benevolent institution that is also a registered charity and is conducted in accordance with religious doctrines etc.

119. A public benevolent institution is a charitable institution with a main purpose of providing benevolent relief to people in need.[46] It is benevolent if it is organised, promoted or conducted for the relief of poverty or distress.[47] Examples of public benevolent institutions include organisations providing crisis accommodation to the homeless or people experiencing family violence, organisations that raise funds in order to channel the funds to specific benevolent programs operated by another organisation via a collaborative arrangement, disability services organisations, and disability services organisations.[48]

120. The Explanatory Notes state that:

> *Religious public benevolent institutions are explicitly included as religious bodies given their unique status as a subtype of charity whose main purpose is to relieve poverty or distress. This purpose of providing relief is commonly inspired by religious faith, and therefore a large number of these institutions are conducted in accordance with religious doctrines. This provision will therefore ensure that these institutions are free to fulfil their purpose of benevolent relief while maintaining their religious ethos.*[49]

121. In addition, subclause 11(c) provides that a religious body includes 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. This includes a potentially wide range of bodies, provided that they are not engaged solely or primarily in commercial purposes, including religious charities

[45] Considered with the definitions of 'registered public benevolent institution' and 'registered charity' under section 5(1) of the Bill.
[46] Australian Charities and Not-For-Profits Commission, *Commissioner's Interpretation Statement: Public Benevolent Institutions*, CIS 2016/03, 2.
[47] *Perpetual Trustee Co Ltd v Commissioner of Taxation* (1931) 45 CLR 224.
[48] Australian Charities and Not-For-Profits Commission, *Commissioner's Interpretation Statement: Public Benevolent Institutions*, CIS 2016/03, 18.
[49] Explanatory Notes, 28.

with other charitable purposes. It may be difficult for such bodies, particularly charities, to determine whether they are 'engaged solely or primarily in commercial purposes'.

122. The primary objection to subclause 11(5) as a whole is that it extends the protection to discriminate on religious grounds to a large number of organisations which are not strictly engaged in providing religious services (such as mass, weddings, funerals, baptisms etc). It would include the broad number of organisations run by religions such as clothes and second hand goods charities (such as those run by St Vincent de Paul), health bodies which are not hospitals, advocacy organisations, youth support organisations and disability services.

123. The Law Council continues to be concerned at the breadth of the definition of 'religious body', particularly when considered alongside the relatively loosely framed test described above. By comparison, the general exceptions at paragraph 37(1)(d) of the SDA and section 35 of the ADA are afforded to 'bodies established for religious purposes', which significantly confines their scope.

Effect

124. As a result of the above features, clause 11 may except from the Bill's prohibition on religious discrimination:

- a religious university which sacks a cleaner for having a different faith – noting that there is no distinction made in the Bill between the need to employ senior personnel or chaplains who may be genuinely required to uphold an religious body's ethos, compared to junior employees or those for whom such considerations are irrelevant;
- the rejection of a volunteer by a religious-run charity for a second-hand shop on the basis that she lacked the same faith;
- a religious-run homeless or family violence shelter which preferences individuals of the same religion over people in need who are agnostic or atheist; and
- a religious school which expels a student who entered in early primary school but has now relinquished his faith in his secondary school years.

125. In the last example, the Law Council adds that the Attorney-General has recently referred to the Australian Law Reform Commission the question of how to limit or remove religious exceptions to prohibitions on discrimination, emphasising the need to protect the rights of children in particular to be free from discrimination in education. It would appear pre-emptive and incongruous to pass legislation which provides religious educational institutions with a broad-ranging ability to discriminate on the basis of religion against children under this Bill while that inquiry takes place.

126. Overall, clause 11 still fails to balance tensions between the right to be treated equally regardless of religious beliefs and practices, and religious freedoms. It does not permit discrimination on the ground of religious beliefs only 'as far as is necessary'. The Law Council queries whether the clause is reasonable, proportionate and necessary as currently drafted. It undermines the Bill's intentions of promoting a tolerant, diverse and inclusive Australia, by providing that many religious bodies, including those who engage daily with, serve, teach or employ a broad cross-section of the public, are exempt from its prohibitions for a wide range of conduct.

127. While recognising the legitimate need for a general exception for religious bodies, the Law Council considers that clause 11 should be significantly narrowed and aligned with paragraph 37(1)(d) of the SDA and section 35 of the ADA. This would bring it into line with comparable general Commonwealth exceptions, and ensure that it has a much more limited scope in its application to acts or practices of bodies 'established for religious purposes'. It would also bring a higher threshold of 'injury or compulsion' into the test, in accordance with the usual practice for such exception.

Recommendation:

- **Clause 11 should be amended, in line with paragraph 37(1)(d) of the SDA and section 35 of the ADA, to apply to:**

  any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

Religious hospitals, aged care and accommodation providers – staffing exception

128. Subclauses 32(8)-(12) provide a new exception for religious hospitals, aged care facilities and accommodation providers with respect to discrimination concerning employment and partnerships. Subclause 32(8) provides that it is not unlawful for a person to discriminate on religious grounds with respect to employment or partnerships[50] if

    (a) either:

        - the first person establishes, directs, controls or administers a hospital or aged care facility that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion; or

        - the first person solely or primarily provides accommodation in accordance with the doctrines etc of the religion; *and*

    (b) the first person engages in good faith, in conduct that a person of the same religion as the first person could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of the religion.

129. Subclause 32(10) provides a similar exception if the first person engages, in good faith, in conduct to avoid injury to the religious susceptibilities of adherents of the same religion as the first person.

130. In both instances, the exempted conduct includes giving preference to persons of the same religion.[51]

131. The interpretation issues raised above at paragraphs 13 to 22 with respect to amendments which curtail the objective role of the court in interpreting matters of faith apply again with respect to paragraph 32(8)(b).

132. As with clause 11, the Law Council recognises that while it may be necessary to preserve the religious ethos of a religious hospital, aged care facility or

[50] Under the prohibitions contained in the Bill, cls 14 and 15.
[51] Bill, cls 32(9) and (11).

accommodation provider by ensuring that senior staff or a chaplain is of a particular religion, this exception could apply to a very wide range of staff, including people in junior roles. This might involve discriminating against, for example, hospital orderlies or occupational therapists, whose religious views should be considered irrelevant to their ability to perform their role effectively.

133. Religious hospitals and aged care providers are large employers in Australia. According to Catholic Health Australia, the total number of employees in the Catholic health and aged care sector is 83,300.[52] Further, 80 hospitals, 10,000 hospital beds and more than 25,000 aged care beds are currently operated by different bodies of the Catholic Church within Australia. These providers may also receive substantial taxpayer funds. This raises questions about whether blanket exceptions from the Bill's protections to discriminate against staff are appropriate.

134. On this basis, the Law Council questions whether, if the Bill's purpose is to promote religious tolerance and diversity, such a broad-based exception for staff would be necessary and proportionate. It is difficult to reconcile with the Bill's objects, which include eliminating discrimination on the ground of religious belief or activity in a range of areas of public life.[53]

135. These clauses should also be considered carefully in light of the existing 'inherent requirements' exception in subclause 32(2). This provides an exception from the Bill's prohibition on religious-based discrimination in employment where an employee is unable to carry out the inherent requirements of the employment. This may present a more reasonable and proportionate solution when an employee of a religious hospital, aged care or accommodation provider is genuinely required to be of a particular faith to perform their duties.

Recommendation:

- **The Law Council recommends that subclauses 32(8)-(12) be deleted.**

Religious camps and conference sites accommodation exception

136. Subclause 33(2) provides a new exception which provides that section 22 (prohibiting discrimination in accommodation) does not make it unlawful for a person to discriminate on religious grounds if:

    (a) the first person establishes, directs, controls or administers a camp or conference site that provides accommodation and is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion; and

    (b) the first person engages, in good faith, in conduct that a person of the same religion could reasonably consider to be in accordance with the doctrines etc of the religion; and

    (c) the conduct is in accordance with a publicly available policy issued by the person.

137. Under subclause 33(4), a similar exception applies where the 'first person engages, in good faith, in conduct to avoid injury to the religious susceptibilities of adherents of the same religion as the first person'.[54] A publicly available policy must also exist.

[52] Of which a subset will be hospital and aged care staff: Catholic Health Australia, 'The Sector' (undated).
[53] Bill, cl 3(1)(a).
[54] Cl 33(4).

138. Exempted conduct under both tests includes giving preference to persons of the same faith.[55]

139. The Explanatory Notes state that:

> *These provisions recognise the longstanding and unique role of religious camps, such as youth camps, and conference sites, such as religious retreats, and that they are distinguished from other types of entities that provide facilities to the general public. These provisions recognise the importance of ensuring that religious camps and conference sites are able to provide accommodation in accordance with their religious beliefs, including by determining to whom and the manner in which that accommodation is provided. This will ensure that such providers are not compelled to provide accommodation in a manner inconsistent with their religious belief, and are able to maintain the religious ethos of their facilities.*

140. The Law Council notes that there is no requirement that the camp or conference be owned by a body established for religious purposes, only that it is 'conducted in accordance with the doctrines, tenets, beliefs or teachings of a religion'. Therefore, it appears that any religious person who hires out camp or conference facilities for commercial purposes may fall within the exception, which may allow them bar persons of other religions from accessing these facilities, provided that the other requirements listed above are met.

141. Religious camps and conference sites are hired out to the public for commercial purposes. Large numbers of religious conference and camp sites are available in this regard: while the Law Council has not been able to find comparable figures for other religious camps and conference sites, Christian Venues Association notes that it is the peak body for over 190 Christian conference, camp, retreat and outdoor activity providers in Australia. Its members' sites total more than 24,000 beds and serve over 1,500,000 guests annually.[56] This suggests that a wide range of Australians, most likely including schoolchildren, rely on accessing these facilities.

142. Relevantly, the Expert Panel considered arguments that people of faith should be able to refuse to provide goods and services if doing so would be contrary to their persona religious beliefs. It was put that such a right is necessary to fully recognise freedom of religion under international law.[57] However, the Expert Panel rejected these arguments, remarking that:

> *The Panel does not accept arguments that a right to discriminate in the provision of goods and services is required or proportionate to ensure the free and full enjoyment of Australians' rights to freedom of religion under international law. Rather, the Panel is of the view that allowing businesses and individuals to discriminate in the provision of goods and services would unnecessarily encroach on other human rights, and may cause significant harm to vulnerable groups in the community.*[58]

143. While the Expert Panel was primarily considering examples of goods and services provided to LGBTI+ groups, these conclusions also appear relevant to discrimination in the provision of a commercial camp or conference site made on

[55] Cls 33(3) and 33(5).
[56] Christian Values Association, 'A Little About Us'.
[57] Expert Panel, *Religious Freedom Review* report (2018), 48-49.
[58] Ibid, 49.

religious grounds. A child of a particular faith, for example, may be humiliated by being excluded from attending a camp alongside his or her friends of a different faith. In the Law Council's view, the justification of adding this exception has not been made out. It seems to encroach well into public life and appears unorthodox.

Recommendation:

- **The Law Council recommends that subclauses 33(2)-(5) be deleted.**

Statements of belief do not constitute discrimination

144. Clause 42 (formerly clause 41) concerning statements of belief has been substantively amended as follows:

> *(1) A statement of belief, in and of itself, does not:*
>
> *(a) constitute discrimination for the purposes of any anti-discrimination law (within the meaning of the Fair Work Act 2009); or*
>
> *(b) contravene subsection 17(1) of the Anti-Discrimination Act 1998 (Tas.);*[59] *or*
>
> *(c) contravene a provision of a law prescribed by the regulations for the purposes of this paragraph.*
>
> *(2) Subsection (1) does not apply to a statement of belief:*
>
> *(a) that is malicious; or*
>
> *(b) that would, or is likely to, harass, threaten, seriously intimidate or vilify another person or group of persons; or*
>
> *(c) that is covered by paragraph 28(1)(b).*
>
> *Note: Paragraph 28(1)(b) covers expressions of religious belief that a reasonable person, having regard to all the circumstances, would conclude counsel, promote, encourage or urge conduct that would constitute a serious offence.*

Amendments

145. The Law Council acknowledges that the Bill contains some minor amendments that a statement of belief 'in and of itself' does not constitute discrimination etc, as well as altering the narrow exceptions available. However, amendments to the 'statement of belief' definition are likely to expand the scope of clause 42.

146. The inclusion of the words 'in and of itself' in subclause 42(1) arguably narrows the effect of the defence.

[59] Subsection 17(1) of the *Anti-Discrimination Act 1998 (Tas)* states that a person must not engage in any conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of an attribute referred to in section 16(e), (a), (b), (c), (d), (ea), (eb) and (k), (f), (fa), (g), (h), (i) or (j) in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed.

147. The defence will remain fully available where a discriminatory course of conduct in a workplace, for example, consists of a number of statements of religious belief. In this case, subclause 42(1) provides a defence to an allegation of discriminatory conduct under any federal or state/territory discrimination law. That is, an oral statement that 'the Koran says that a woman's word is worth half that of a man's' which is repeated multiple times would appear to attract the protection offered by subclause 42(1). That is, subclause 42(1) provides a complete defence where the discriminatory conduct is comprised entirely of such statements. The inclusion of such a defence will place a major limitation on well-established federal, state and territory protections against sex discrimination in the workplace.

148. However, where the workplace conduct comprises religious statements (as above) *together with* a demotion or a sacking of the woman concerned, then the words 'in and of itself' would appear to have the effect of not excluding the religious statement from the impugned conduct. That is, the subclause would not provide a defence to a religious statement where combined with other unlawful conduct.

149. As with subclause 8(5) above regarding employer conduct rules, the exceptions at subclause 42(2) have been amended, so that clause 42 will not provide a defence to a statement of belief which 'threatens or seriously intimidates' another person or group of persons. A definition of 'vilify' has also been added at subclause 5(1), which refers to inciting hatred or violence. These are improvements in the Law Council's view.

150. However, subclause 42(2) remains a very high threshold for statements to be excluded from the scope of subclause 42. It means that statements of belief which merely offend, humiliate, insult, intimidate or otherwise harm others which formerly amounted to discrimination under existing Commonwealth, state and territory laws, or contravened subsection 17(1) of the *Anti-Discrimination Act 1998* (Tas) (**the Tasmanian Act**) will no longer do so.

151. A further important amendment occurs as result of the new definition of 'statement of belief' under clause 5(1) the Bill. As discussed at paragraphs 13-22, previously a statement of belief must be 'of a belief that may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion' in question. The amended version states that the statement must be 'of a belief that a *person of the same religion* as the first person could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of that religion'. These amendments, which are opposed, are discussed at length above.

152. As mentioned, the Law Council is concerned about these amendments.

153. There may be multiple 'reasonable interpretations' amongst adherents of a religion as to what is in accordance with its doctrines, etc. This may undermine the certainty and clarity of the relevant provisions, and broaden their scope. Again, there is no requirement that the relevant religious adherent be well informed or senior within the religion, or that the reasonable interpretation be correct.

154. With respect to clause 42, the amended definition of statement of belief at subclause 5(1) may expand the circumstances in which statements regarding religious beliefs, including those which objectively do not accord with the doctrines, tenets, beliefs or teachings of the relevant religion, can 'trump' other rights such as freedom from discrimination on the grounds of race, sex, sexual orientation, disability and age.

Law Council view

155. The Law Council maintains its conclusion that clause 42 should be omitted. Its view is that reforms to Australia's anti-discrimination framework should preserve or enhance – rather than weaken – existing protections against discrimination and promote substantive equality. By expressly overriding existing Commonwealth, state and territory discrimination laws, the Bill prioritises freedom of religion at the expense of existing anti-discrimination provisions. It extends a positive right to discriminate and denigrate based on religious beliefs, and prevents discrimination claims from being brought.

156. As raised in the Law Council's previous submission, clause 42 is highly unusual in that it seeks to override existing anti-discrimination laws at the Commonwealth, state and territory level. This does not appear in other Commonwealth anti-discrimination laws which are generally intended to operate concurrently with state and territory laws.[60] Clause 42 stands alone in this respect.

157. Clause 42 does not reflect that the rights to manifest religion or to freedom of expression are subject to limitation particularly with respect to the rights of others.[61] It also has the potential to impact social cohesion and reinforce stigma for those who are already marginalised in the community.

158. It is important to note that the clause 42 defence is not restricted to religious bodies or to recognised representatives of a religion. It is a defence available to any person against whom a bona fide complaint of discrimination, on any prohibited ground, has been made. It applies across the board in the areas in which other forms of discrimination are prohibited: in employment, in education, in the provision of goods and services, in accommodation, in club membership, in sport and local government.[62]

159. As such, clause 42 is unlikely to facilitate an inclusive, tolerant and safe environment in a range of public arenas – sporting, education, health, workplace, and goods and services. This is likely to undermine considerable efforts over time which have been made to foster such environments. It is also likely to involve significant complexities for relevant organisations - employers, sporting clubs and associations, small businesses - to administer in practice, having regard to the caveats placed by subclause 42(2).

Procedurally unworkable

160. In addition to the above substantive concerns regarding clause 42, the Law Council retains its concerns regarding the procedural difficulties for anti-discrimination complaints raised by this clause. As raised previously, protection from discrimination is provided through a combination of federal, state and territory laws. Discrimination complaints are overwhelmingly heard and determined in state and territory tribunals, rather than through the federal court system. The primary reason is that each of the state and territory tribunals currently operates on a 'no costs' basis in the area of discrimination law.[63]

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[60] Eg SDA, s 10.
[61] ICCPR, arts 18(3) and 19(3).
[62] See Part 4 of the *Equal Opportunity Act 2010* (Vic) for an orthodox approach to the areas in which discrimination is prohibited.
[63] *Civil and Administrative Tribunal Act 2013 No 2* (NSW) s 60(1); *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 109(1); *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 100; *State Administrative*

161. In several states and territories, such as New South Wales and Victoria, the tribunal which hears anti-discrimination complaints is not a Chapter III court and cannot exercise Federal jurisdiction or determine a question of federal law.[64]

162. Clause 42 of the Bill provides a federal defence to a complaint of unlawful discrimination made under state or territory legislation. The determination of such a defence is plainly a question of federal law.

163. The tribunal tasked with adjudicating discrimination complaints in New South Wales and Victoria, and no doubt several other states and territories, will not be able to determine the federal defence. The defence will need to be determined by a Chapter III Court, usually a Supreme Court or the Federal Court.

164. This gives rise to real practical difficulties. First, the defence would need to be raised for determination by separate proceedings in the state or territory Supreme Court or the Federal Court. Second, while any defence might be resolved in such a Court the relevant Court would not be able to determine the substantive complaint because it will not have jurisdiction to do so.[65] Third, if the defence is rejected by the Court or is only successful for part of the claim, it will need to return to the relevant tribunal for hearing and determination. Fourth, both parties will have to bear the additional costs and delay of such litigation, making such litigation unworkable and expensive.

Conclusion

165. In summary, clause 42 should not be enacted because:

- it is contrary to well-established principles of international law, in that it prioritises the protection of freedom of religious expression over well-recognised human rights such as the right not to be discriminated on the grounds of race, sex, sexual orientation, disability, or age in a manner which allows a disproportionate limitation on the enjoyment of those rights;[66]
- the provision reduces current protections against discrimination in federal, state and territory discrimination statutes; and
- the provision is unworkable as it will draw both the complainant and the respondent into secondary litigation, causing further delay and cost to both parties.

Recommendation:

- **The Law Council recommends that clause 42 be deleted.**

Need for a federal human rights act and consolidated anti-discrimination laws

166. The Law Council considers that rights and freedoms should be protected in a coherent legal framework. Any option for reform in this area should promote the understanding that human rights are 'universal, indivisible, interdependent and

Tribunal Act 2004 (WA) s 87(1); *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 57(1); *Anti-Discrimination Act 1998* (Tas) s 95; *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 48(1); *Northern Territory Civil and Administrative Tribunal Act 2014* (NT) s 131.

[64] Eg, *Attorney General for New South Wales v Gatsby* [2018] NSWCA 254 at [281] (Leeming JA); *Burns v Corbett* [2018] HCA 15.

[65] NSW Act ss 93A–93C; Victorian Act s 134; Qld Act ss 174A–174C; WA Act, s 107; SA Act s 95B, s 95D, s 96; Tasmanian Act ss 12, 13; *Human Rights Commission Act 1995* (ACT) s 53A; NT Act s 86.

[66] The rights protected by article 26 of the ICCPR are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

interrelated'.[67] The Law Council considers it is preferable to embed freedom of religion in a comprehensive and coherent framework of substantial rights protection, which recognises that limitations on rights[68] must be necessary, and proportionate to the specific need, in order to be justified and permissible. This is best achieved through a federal human rights act.[69] In the absence of such an act, legislation which places an undue emphasis on giving effect to a single freedom may risk unjustifiably limiting the rights of others.

167. As discussed, Australia has a highly complex system of anti-discrimination protections at the state, territory and federal level. The Bill is likely, as flagged to increase the complexity of Australia's anti-discrimination framework, noting that it operates differently from existing federal anti-discrimination laws in several respects.

168. As an overarching solution to this complexity, the Law Council's preferred approach is that federal anti-discrimination laws should be consolidated into a single, comprehensive enactment, to ensure adequate and effective substantive and procedural protection against all forms of discrimination on all the prohibited grounds, including religion.[70] However, the process of consolidation must preserve or enhance existing protections against discrimination and improve the regime's ability to promote substantive equality, as well as removing the regulatory burden on business.[71]

Recommendations:

- **That a federal human rights act be adopted.**
- **That comprehensive, consolidated federal anti-discrimination legislation be adopted which preserves and strengthens existing protections, improves the regime's ability to promote substantive equality and removes regulatory burdens on business.**

Human Rights Legislation Amendment (Freedom of Religion) Bill 2019

169. The HR Bill is intended to respond to three recommendations made by the Expert Panel:

- **Recommendation 3** – that the Commonwealth, state and territory governments should consider the use of objects, purposes and other interpretative clauses in anti-discrimination legislation to reflect the equal status in international law of all human rights, including freedom of religion;
- **Recommendation 4** – that the Commonwealth should amend section 11 of the Charities Act to clarify that advocacy of a 'traditional' view of marriage would not, of itself, amount to a 'disqualifying purpose'; and
- **Recommendation 12** – that the Commonwealth should progress legislative amendments to make it clear that religious schools are not required to make

[67] Vienna Declaration and Programme of Action, as adopted by the World Conference on Human Rights in Vienna on 25 June 1993, [5].
[68] Other than rights which are absolute, as discussed below.
[69] See HRC, *Concluding observations on the sixth periodic report of Australia*, 102nd sess, UN Doc CCPR/C/AUS/CO/6 (9 November 2017), [5]-[6].
[70] As recognised by the HRC, Ibid, [18].
[71] Law Council of Australia, *Policy Statement: Consolidation of Commonwealth Anti-Discrimination Laws* (2011).

available their facilities, or to provide goods or services, for any marriage, provided that the refusal:

(a) conforms to the doctrines, tenets or beliefs of the religion of the body; or

(b) is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

170. Due to resource and time constraints, the response below focuses on Recommendation 4 and the HR Bill's provisions concerning section 11 of the Charities Act.

171. Despite the Law Council's concerns raised in its previous submission regarding these amendments, they have bee unamended in the Second Exposure Draft. The Law Council's position is replicated in full below. It strongly encourages the Australian Government to consider these carefully.

Proposed amendment to section 11 of the Charities Act

172. The exposure draft of the HR Bill includes in schedule 1 proposed amendments to the Charities Act. If the HR Bill were enacted, section 11 of the Charities Act would read as follows (with the proposed amendments underlined):

11. Disqualifying Purpose

(1) In this Act:

Disqualifying Purpose means:

The purpose of engaging in, or promoting, activities that are unlawful or contrary to public policy; or

Example: Public policy incudes the rule of law, the constitutional system of Government of the Commonwealth, the safety of the general public and National security;

Note: Activities are not contrary to public policy merely because they are contrary to Government policy.

The purpose of promoting or opposing a political party or a candidate for political office.

Example: Paragraph (b) does not apply to the purpose of distributing information, or advancing debate, about the policies of political parties or candidates for political office (such as by assessing, critiquing, comparing or ranking those policies).

Note: The purpose of promoting or opposing a change to any matter established by Law, policy or practice in the Commonwealth, a State, a Territory or another country may be a charitable purpose (see paragraph (1) of the definition of Charitable Purpose in subsection 12(1)).

(2) <u>To avoid doubt, the purpose of engaging in, or promoting, activities that support a view of marriage as a union of a man and</u>

woman to the exclusion of all others, voluntarily entered into for life, is not, of itself, a disqualifying purpose.

Summary of Law Council's position

173. The Law Council is very strongly of the view that this amendment should not be made for the following reasons:

- it does not reflect the recommendation;
- is not restricted or directly tied to religious freedoms and is significantly broader than it is intended to be;
- no amendment is necessary – it is stated 'to avoid doubt' but there is no legal doubt as to the issue raised and conversely the inclusion of the provision will have the effect of raising doubt where there was none;
- it is likely to 'open the floodgates' for lobbying for further amendments by advocacy bodies wishing for similar special treatment;
- it is a response to a moment in time based on a concern arising from an issue outside and not applicable in Australia, which does not make good legislation for the short or long term. Such concern is appropriately dealt with through guidance by the regulator;
- as a result of the drafting, it does not achieve the clarification its insertion is intended to provide; and
- it will create confusion and have unintended consequences as the meaning of the provision is not clear.

The amendment does not reflect the recommendation

174. The Explanatory Notes for this proposed amendment refers (in paragraph 41) to the Expert Panel Report which noted concerns raised by faith-based charities as to possible ambiguity around whether advocacy of a traditional view of marriage could constitute a disqualifying purpose.

175. The recommendation to amend the Charities Act was to give certainty to faith-based charities by clarifying that supporting a view of traditional marriage as part of their activities in advancing religion would not, of itself, result in loss of charity registration.

176. However, the proposed amendment:

- is not limited to faith-based charities pursuing a charitable purpose of advancing religion and having as one of its purposes, or an incidental or ancillary purpose, promoting a view of traditional marriage as consistent with its religious doctrines;
- could apply to a charity with its only purpose being the support of a view of traditional marriage with no religious beliefs; and
- covers activities done in support of a view of traditional marriage which are unlawful or contrary to public policy (discussed below).

177. The Expert Panel Report makes it clear[72] that the recommendation arose from concerns of faith-based organisations. The faith-based organisations were concerned largely as a result of overseas examples. The Expert Panel stated that:

[72] Expert Panel Report, from [1.187] onwards.

> *The Panel does not consider charities for a religious purpose, which continue to advocate their religious views, including a traditional view of marriage, to be at risk of losing their charitable status under Australian law. The Panel was reluctant to draw too many inferences from overseas experiences which turned on different legislation and specific facts in those cases. However, the Panel can see a benefit to assist certainty, and could see no particular harm, in an amendment similar to that suggested by the acting Commissioner of the ACNC to put the immediate issue raised by the legislation of the same sex marriage beyond doubt.*[73]

178. As can be seen, the Panel was clearly considering charities for advancing religion which advocated their religious views including a traditional view of marriage.

179. However, the proposed amendment goes well beyond addressing the concerns raised in the Expert Panel Report and the recommendation, when considered in the context of the statements in that report.

> *In particular, the Panel recommends an amendment 'similar to that suggested by the Acting Commissioner of the ACNC'.*
>
> *The amendment suggested by Murray Baird, the then Acting Commissioner of the ACNC, in a letter dated 24 November 2017 was:*
>
> > *'However, one way to address the concerns that have been raised may be to provide in the amending legislation that nothing in the legislation adversely affects an entity's charitable status by reason only that the entity holds or expresses a position on marriage after the enactment of the legislation that, if held or expressed prior to the enactment of the legislation would have had such an effect.'*

180. This suggested amendment is targeted specifically to addressing the concern that the enactment of the Same Sex Marriage Act could result in advocating for traditional marriage somehow becoming unlawful or contrary to public policy and is significantly narrower than the proposed subsection 11(2) as it is limited to:

- the charitable status of charities that have currently recognised charitable purposes within the meaning of section 12 for the public benefit;
- holding or expressing a position on marriage; and
- activities which, before the change to the definition of 'marriage', did not amount to a disqualifying purpose, remaining activities which do not amount to a disqualifying purpose.

The amendment is unnecessary

181. The Expert Panel considered that under the existing legal framework, mere advocacy of a position contrary to government policy (such as a traditional view of marriage) did not meet the threshold of a disqualifying purpose.[74] The Government has accepted this view as noted in the Explanatory Notes.

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[73] Ibid, [1.220].

[74] The concerns raised by faith-based charities directly relate to the change of government policy in relation to the definition of marriage. Relevantly, the Note to section 11 states that 'Activities are not contrary to public policy merely because they are contrary to government policy'. Further, the Example to section 11 states that

182. The Law Council concurs that advocacy supporting a traditional view of marriage by faith-based charities will not be a disqualifying purpose unless the activities undertaken in support of the view are unlawful or contrary to public policy.

183. On this basis no amendment is required. The ACNC can assist any charities with concerns as to advocacy and has a number of resources on its website relating to advocacy and the meaning of disqualifying purpose. Further, if sufficient concern exists in relation to this particular issue, the ACNC could publish a Commissioner's Interpretation Statement to provide comfort and clarity to faith-based charities. It is more appropriate to respond to a moment in time concern in this manner, rather than through a legislative change which raises a number of interpretation issues discussed in this submission.

184. The recommendation made by the Expert Panel was not made on the basis that the amendment was *necessary*, but upon the basis that there 'was benefit to assist certainty' and that the Panel 'could see no particular harm' in the amendment. In our submission, certainty can be achieved through ACNC guidance, and there is in fact particular harm in the amendment (as explained in this submission), which the Expert Panel may not have had the opportunity to receive feedback on, or consider in more detail.

Lack of clarity arising from difficulties in drafting

185. In addition to the drafting not reflecting the recommendation, the following difficulties arise from this drafting:

- it appears to allow any type of activity including unlawful or extreme activities done in support of a view of traditional marriage;
- it creates uncertainty as to pursuit of advocacy on other views; and
- it appears to create a new charitable purpose.

Has the unintended effect of allowing unlawful activities

186. Subsection 11 (2) applies to *all* activities done in support of a view of traditional marriage. This allows activities which are unlawful or contrary to public policy, eg incites violence against people or property, contrary to the reason for the inclusion of section 11 and the meaning of 'disqualifying purpose'. This is not an intended outcome.

187. The Explanatory Notes to the Bill state unlawful activities would constitute another purpose such to make them a disqualifying purpose, but this is not how paragraph (2) is drafted nor how purpose is determined. Whether activities form a separate purpose is determined on a case by case basis requiring assessment of a number of criteria. As such, if a charity had a purpose of engaging in illegal activities that support a view of traditional marriage, the drafting of paragraph (2) would mean that this purpose would no longer be a disqualifying purpose, and therefore be allowed.

188. As such, the statement in paragraph 43 of the Explanatory Notes that engaging in or promoting activities that support a traditional view of marriage, in conjunction with

'Public policy includes the rule of law, the constitutional system of government of the Commonwealth, the safety of the general public and national security'. These examples serve to illustrate that a very high threshold must be reached before an activity could be said to be contrary to public policy. That is, the activity must be something that undermines the very framework of Australia's democratic system or threatens public safety.

another disqualifying purpose, will constitute a disqualifying purpose, is not supported in the drafting of paragraph (2).

Creates uncertainty where there was none

189. The proposed amendment suggests that without the new provision, activities that support a view of traditional marriage are or could be activities that are unlawful or contrary to public policy. As set out above, there is no need for including this clarification in the Charities Act because the current legal position is that a faith-based charity would not have a disqualifying purpose by advocating for a traditional view of marriage (unless the activities it engages in or promotes are themselves unlawful or contrary to public policy). The words 'For the avoidance of doubt' suggest there could sensibly be doubt, where there is none.

190. The danger of including a discrete area for legislative 'clarification' is that it may be argued that without its inclusion, those activities would have constituted a disqualifying purpose. In other words, albeit that the provision is included 'to avoid doubt', the fact of its inclusion implies that doubt exists.

191. The consequence of this is that other similar views, which have not received legislative clarification in the Charities Act, may, as a result be argued to be disqualifying purposes. As such, there will now be a doubt as to whether activities undertaken by faith-based charities to advocate against lawful abortion, or euthanasia (for example) result in a disqualifying purpose.

Implies the existence of a new charitable purpose

192. The drafting can be read as implying an organisation with the sole purpose of engaging in or promoting activities (whatever those activities are) which support a view of traditional marriage, must already satisfy the requirement that the purposes are charitable purposes and are for the public benefit. This is not an intended outcome as the amendment is meant to apply to faith-based charities which as part of their religious purposes pursue activities supporting a view of traditional marriage.

193. Subsection 11(2) does not refer to the principle purpose of the charity being advancing religion and the purpose of supporting a view of traditional marriage being an ancillary or incidental purpose, which is the context the recommendation was made. There is no recommendation that entities without a religious basis or other charitable purpose in section 12 should be charities if they have a purpose of supporting a view of traditional marriage. The drafting of paragraph (2) creates uncertainty by giving rise to this possible interpretation.

194. All entities will need to be assessed as to their purposes, public benefit and whether the means of achieving the purpose is a disqualifying purpose.

Drafting not clear

195. The insertion of the words 'To avoid doubt' and 'of itself' may be intended to address or overcome some or all of the above drafting difficulties, but these words do not achieve this.

196. The New Zealand case of *Re Greenpeace of New Zealand Inc*[75] (***Greenpeace***) provides a good illustration of the interpretation issues that can arise in relation to a legislative provision that is included in order 'to avoid doubt'. The drafting of

[75] [2014] NZSC 105.

subsection 5(3) of the *Charities Act 2005* (NZ) was considered in this case, and instead of providing clarity, resulted in two differing interpretations.

- In summary, the drafting of proposed subsection 11(2):
- does not clarify the issue as intended; and
- has serious unintended consequences.

197. it should not be adopted for these reasons.

Other clarifications in the future

198. It is difficult to understand, if clarification is needed, why clarification is required only for this issue. This amendment has arisen from a moment in time where the Same Sex Marriage Bill was being debated at the same time a court case was decided in New Zealand which resulted in some unfounded concerns by faith-based charities in Australia. This immediate reaction to insert a provision so specific to the issue, does not make good legislation for the short or long term.

199. It seems possible that charities advocating for changes in laws or policies on numerous issues, whether faith-based or otherwise, will be justified in also seeking 'clarification'. These might include those against abortion or euthanasia; environmental organisations against coal mines; organisations against wind farms; organisations against certain farming practices or the live export of livestock, to name but a few.

200. As such, the inclusion of subsection 11(2) may 'open the floodgates' and result in charities seeking legislative clarification on numerous other issues.

201. For these reasons, the Law Council strongly recommends that the proposed amendment to section 11 of the Charities Act is not made.

Recommendation:

- **Items 3 and 4 of Schedule 1 of the HR Bill, proposing amendments to section 11 of the Charities Act, should be removed.**