



public interest
ADVOCACY CENTRE

Submission on Second Exposure Draft 'Religious Freedom' Bills

31 January 2020

About the Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit legal centre based in Sydney.

Established in 1982, PIAC tackles barriers to justice and fairness experienced by people who are vulnerable or facing disadvantage. We ensure basic rights are enjoyed across the community through legal assistance and strategic litigation, public policy development, communication and training.

Our work addresses issues such as:

- Reducing homelessness, through the Homeless Persons' Legal Service
- Access for people with disability to basic services like public transport, financial services, media and digital technologies
- Justice for Aboriginal and Torres Strait Islander people, through our Indigenous Justice Project and Indigenous Child Protection Project
- Access to affordable energy and water (the Energy and Water Consumers Advocacy Program)
- Fair use of police powers
- Rights of people in detention, including equal access to health care for asylum seekers (the Asylum Seeker Health Rights Project)
- Transitional justice
- Government accountability.

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Public Interest Advocacy Centre



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The Public Interest Advocacy Centre office is located on the land of the Gadigal of the Eora Nation.

Recommendations

Recommendation 1 – The Religious Discrimination Bill should not proceed

The Religious Discrimination Bill, released on 10 December 2019, should not proceed. The Bill should be substantially revised to address those aspects that diminish existing rights protections and privilege the rights of some over others.

Recommendation 2 – ‘Statements of belief’ should not receive special treatment

The proposed protections for ‘statements of belief’ in clause 42, which would exempt them from constituting discrimination under all Commonwealth, State and Territory anti-discrimination laws, as well as s 17(1) of Tasmania’s Anti-Discrimination Act 1998, should be removed from the Bill.

Recommendation 3 – The proposed ‘conscientious objection’ provisions should be removed

Clauses 8(6) and (7) are both unjustified and unnecessary, with the potential to cause serious harm to vulnerable members of the community. They should be removed, with the effect that the conduct of health care practitioners would be judged by the same standard of ‘reasonableness’ as applies in other cases concerning potential indirect discrimination.

Recommendation 4: The exceptions for religious organisations should be replaced

The two alternative tests for whether religious organisations are allowed to discriminate on the basis of religious belief – in clauses 11(1) and (3), and replicated elsewhere – should be replaced with a narrower test based on s 37(1)(d) of the Sex Discrimination Act 1984 (Cth) and s 52(1)(d)(ii) of the Anti-Discrimination Act 1998 (Tas): ‘A religious body does not discriminate against a person under this Act by engaging, in good faith, in conduct that conforms to the doctrines, tenets, beliefs or teachings of that religion and is necessary to avoid injury to the religious susceptibilities of that religion.’

Recommendation 5: The organisations covered by religious exceptions should be narrowed

The list of organisations covered by religious exceptions in clause 11(5) should be narrowed, with clauses 11(5)(b) and (c) deleted and replaced with ‘any other body established for religious purposes (other than a body that engages solely or primarily in commercial activities)’.

Recommendation 6: Students should only be discriminated against at enrolment

Religious schools should only be permitted to discriminate on the basis of religious belief, or lack of belief, at enrolment. Clause 11(6) should be amended to provide that ‘This section does not apply to section 19(2), relating to discrimination in education. It otherwise applies despite anything else in this Act.’

Recommendation 7: Hospitals, aged care service providers and accommodation providers should not be permitted to discriminate in employment

Hospitals, aged care service providers and accommodation providers that are operated by religious organisations should not be permitted to discriminate on the basis of religious belief, or lack of belief, in employment. Clauses 32(8) and (10) should be removed.

Recommendation 8: Religious camps and conference sites should not be permitted to discriminate in who they provide goods and services to

Religious camps and conference sites that are operated by religious organisations should not be permitted to discriminate on the basis of religious belief, or lack of belief, in the provision of goods and services. Clauses 33(2) and (4) should be removed.

Recommendation 9: Bodies corporate should not be complainants in discrimination complaints

The ability of bodies corporate to make complaints about ‘religious discrimination’ against them should be removed. Clauses 7 and 8 should be clarified to read ‘A person discriminates against another person (‘aggrieved person’)...’ and ‘aggrieved person’ defined in clause 5 to mean only natural persons.

Recommendation 10: Provisions around associates should be clarified, including precluding bodies corporate from bringing claims of discrimination as associates

‘Association’ should be defined in clause 5 based on the definition of associate found in section 4(1) of the Disability Discrimination Act 1992 (Cth), with the phrase ‘whether as a near relative or otherwise’ removed from clause 9. Clause 9 should also be amended to read ‘This Act applies to a person (‘aggrieved person’) who has an association with a person...’ with ‘aggrieved person’ defined in clause 5 to mean only natural persons.

Recommendation 11: Specific provisions regarding statements of belief other than in the course of the employees’ employment should be removed

Clauses 8(2)(d), (3) and (5), which amend the test of reasonableness for determining indirect discrimination applying to statements of belief other than in the course of the employees’ employment, should be removed, with complainants relying on the ordinary test as established in clause 8(2)(a)-(c).

Recommendation 12: Specific provisions regarding qualifying body conduct rules should be removed

Clauses 8(2)(e), 8(4) and 8(5), which amend the test of reasonableness for determining indirect discrimination applying to qualifying body conduct rules, should be removed, with complainants relying on the ordinary test as established in clause 8(2)(a)-(c).

Recommendation 13: Provisions overriding local government by-laws should be removed

Clause 5(2) should be removed.

Recommendation 14: Further consideration of Commissioners within the AHRC

Based on Recommendation 19 of the Religious Freedom Review, the Government should not proceed with the creation of a Religious Freedom Commissioner. If this position is created, the Government should also create a Commissioner with responsibility for issues of sexual orientation, gender identity and expression, and sex characteristics.

Recommendation 15: Remove amendment to the Charities Act

Clause 4 of the Human Rights Legislation Amendment (Freedom of Religion) Bill 2019, which would amend the disqualifying purpose provisions of the Charities Act 2013, should be removed.

1. Introduction

The Public Interest Advocacy Centre is unable to support the proposed Religious Discrimination Bill. This is despite our strong support for having protection from discrimination on the basis of religious belief at the Commonwealth level. Unfortunately, however, the flaws in this Bill and its negative impact on the protection of rights across the community means that it creates more problems than it solves.

PIAC has been engaged in the issue of religious discrimination, and whether and how it should be prohibited, throughout 2018 and 2019. This includes submissions to the Government's Religious Freedom Review, to multiple Commonwealth parliamentary inquiries into possible protection against discrimination for lesbian, gay, bisexual and transgender (LGBT) students at religious schools, and in response to the First Exposure Draft 'Religious Freedom' Bills in September 2019.

Throughout these processes, PIAC has consistently called for legislative prohibitions on discrimination on the basis of having a faith, or having no faith, in a similar manner to existing anti-discrimination laws, such as the *Age Discrimination Act 2004* (Cth).

We were unable to support the First Exposure Draft Religious Discrimination Bill because it departed substantially from the standard set by other anti-discrimination Acts, proposing a range of radical and unprecedented provisions that would undermine Australia's overall anti-discrimination framework. We seek to avoid repeating our earlier submissions here and instead focus on the changes made in this second iteration.

Despite some changes from the First Exposure Draft to the Second, major problems remain – and indeed some problems have been made worse.

We noted in our submission on the First Exposure Draft that the Bill's novel provisions and complicated drafting introduce unnecessary complexity and will make it harder for people to enforce their rights and harder for people, including small businesses, to ensure compliance with the law.

The Bill is now even more complex and uncertain in its operation. It has moved further away from other discrimination legislation, adopting additional novel features that depart from established principle. The need for voluminous Explanatory Notes and the ambiguity that persists despite them further highlights the problem.

We therefore urge the Government not to proceed with this Bill. We set out a range of changes that, together, would result in the Bill achieving its apparent purpose of prohibiting discrimination on the basis of religion without undermining existing rights protections and privileging the rights of some over others.

We also urge the Government to publish all submissions received as part of this process to assist and inform the public debate on these issues.

Recommendation 1 – The Religious Discrimination Bill should not proceed

The Religious Discrimination Bill, released on 10 December 2019, should not proceed. The Bill should be substantially revised to address those aspects that diminish existing rights protections and privilege the rights of some over others.

2. Personal and private dimensions to the right to freedom of religion, conscience and belief

An important element of the right to freedom of thought, conscience, religion or belief that has been overlooked in the discussions surrounding the Religious Discrimination Bill and in its drafting, is the right not to disclose one's religious beliefs.

Reporting on the elimination of all forms of religious intolerance, the Special Rapporteur on Freedom of Religion or Belief has observed that 'while individuals have the right to publicly manifest their religious or belief orientation alone or together with others, they also have the right to keep their convictions to themselves'.¹

For many in Australia this may seem a matter of common sense. When engaged in public life, such as seeking access to publicly available services, being required to answer the question 'what is your religion?' seems unnecessary, inappropriate and an invasion of privacy.

However, this Bill makes it a question that can be asked in a very broad range of circumstances, unrelated to religious observance or inherently religious activity. This is an inevitable consequence of permitting religious organisations to discriminate on the basis of religion in the many ways contemplated by the Bill.

PIAC suggests that such an approach is inconsistent with community standards and expectations. It is also inconsistent with the content of the human right upon which this Bill purports to be based.

A homeless person seeking food at a soup kitchen, a young person seeking support at a drop-in centre, a parent seeking care for their infant child, a computer technician applying for work at a school, a cleaner applying for a job at an aged-care centre, someone seeking aged-care services in their home: upon what basis should the religion of these people be relevant? And yet, this Bill not only allows them to be asked 'what is your religion?', but makes the answer one that can determine their access to services or employment. This is wrong in principle and, in practice, may serve to create and highlight division in our community.

3. Major problems with the Religious Discrimination Bill

In this section we concentrate on three of the biggest concerns with the Religious Discrimination Bill. These are:

- Clause 42: 'Statements of Belief'

¹ Special Rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt, *Elimination of all forms of religious intolerance*, 2 August 2016, https://www.ohchr.org/Documents/Issues/Religion/A-71-269_en.pdf (accessed 31 January 2020), para. 15.

- Clauses 8(6) and (7): ‘Conscientious Objection’, and
- Clause 11 (and related clauses): ‘Religious Exceptions’

3.1 Clause 42: ‘Statements of Belief’

As with its predecessor, clause 41 in the First Exposure Draft Religious Discrimination Bill, PIAC opposes clause 42 in its entirety.

The proposed section is unprecedented, not required to protect people of faith from discrimination and undermines the protection of others from discrimination.

Despite minor changes, clause 42 will still exempt certain ‘statements of belief’ from all Commonwealth, State and Territory anti-discrimination protections (including adverse action protections under the *Fair Work Act 2009* (Cth)), s 17(1) of Tasmania’s *Anti-Discrimination Act 1998*, and any other law prescribed by the regulations.

In practice, this will permit a wide range of otherwise discriminatory comments to be made against people from different groups. The examples we cited in our previous submission remain relevant, meaning clause 42 would operate to bar claims by:

- a single mother who, when dropping their child off at day-care, is told by a worker that they are sinful for denying the child a father;
- a transgender person who is told by a person providing goods or services, that their gender identity is not real, or ‘against the laws of God’;
- a woman who is told by a manager that women should submit to their husbands; or
- a student with a disability being told by a teacher that their disability is a trial imposed by God.

In fact, clause 42 may extend protection to an even broader range of comments than clause 41 did, because of changes to the definition of ‘statement of belief’ in clause 5.

Previously, statements were required to be ‘of a belief that may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion.’ However, under the Second Exposure Draft, statements need only be ‘of a belief that a person of the same religion could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of that religion.’

This test is exceptionally broad. It requires only that one other person of the same religion *could* reasonably consider the view to be in accordance with the doctrines etc of the religion. This is an entirely novel test in discrimination law. It is unclear why or in what ways the previous test of reasonableness was inadequate. The intention of the change therefore appears to protect statements that are objectively unreasonable and not, in fact, founded in the generally accepted doctrines etc of a religion: the change is otherwise unnecessary.

There have also been minor changes in sub-clause 42(2), which provides that this clause would not protect statements of belief that are:

- malicious

- that would, or is likely to, harass, seriously intimidate or vilify another person or group of persons, or
- involves counselling, promoting, encouraging or urging conduct that would constitute a serious offence.

The inclusion of the qualifier ‘seriously’ before intimidate is significant and concerning. It makes clear that this provision protects statements that are intimidating, allowing more otherwise discriminatory statements than the previous iteration.

Likewise, the inclusion of a definition of vilify in clause 5 – ‘in relation to a person or group of persons, means incite hatred or violence towards the person or group’ – sets a very high bar compared to the definition of vilification under state and territory anti-discrimination legislation, including the *Anti-Discrimination Act 1977* (NSW).²

This confirms that the clause aims to protect a range of discriminatory statements that incite serious contempt and severe ridicule – as well as those that are offensive, insulting, demeaning and degrading.

Overall, clause 42 will have the practical effect of subjecting women, LGBTI people, people with disability, single parents, people in de facto relationships, divorced people and from minority faiths to comments that undermine their ability to participate equally in all areas of public life, from workplaces to schools and universities, health care, aged care and other community services, to shops, cafes and restaurants. It must be removed from the Bill so that all people are free to go about their lives free from the fear of discrimination.

We note that the Constitutional, and therefore procedural, problem with clause 42 has also not been remedied. The concerns highlighted in our earlier submission about the damage that this Bill will do to the established framework of protection from discrimination in Australia remain unchanged.

We also query the statement in the Explanatory Notes that clause 42 does not affect the operation of s 18C of the *Racial Discrimination Act 1975* (Cth). It is not clear that this is, in fact, the case.

The term ‘discrimination’ is not defined in the Bill, nor in the *Racial Discrimination Act*. While the term ‘discrimination’ is used in the headings in the *Racial Discrimination Act*, it is not otherwise used in the operative provisions of that Act, which rather identify certain conduct as being ‘unlawful’. Under the *Australian Human Rights Commission Act 1986* (Cth), ‘unlawful discrimination’ is defined as meaning ‘any acts, omissions or practices that are unlawful’ under the various Commonwealth anti-discrimination Acts, including those under part IIA of the *Racial Discrimination Act*.

This uncertainty should be resolved. It also highlights the dangers inherent in this Bill’s novelty and unnecessary complexity.

² S20C(1) of the *Anti-Discrimination Act 1977* (NSW) prohibits racial vilification in the following way: ‘It is unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group.’

Recommendation 2 – ‘Statements of belief’ should not receive special treatment

The proposed protections for ‘statements of belief’ in clause 42, which would exempt them from constituting discrimination under all Commonwealth, State and Territory anti-discrimination laws, as well as s 17(1) of Tasmania’s Anti-Discrimination Act 1998, should be removed from the Bill.

3.2 Clauses 8(6) and (7): ‘Conscientious Objection’

Clauses 8(6) and (7) (replacing clauses 8(5) and (6) from the First Exposure Draft) continue to skew the ordinary test of reasonableness for the purpose of determining indirect discrimination. Specifically, they seek to limit the imposition of ‘health practitioner conduct rules’, namely rules applying to health practitioners relating to the provision of services that would restrict conscientious objection on religious grounds.

There have been several changes to these provisions from the First Draft. PIAC welcomes the narrowing of the list of health practitioners who would be able to utilise these provisions, with the following health practices being removed:

- Aboriginal and Torres Strait Islander health practice
- Dental
- Medical radiation practice
- Occupational therapy
- Optometry
- Physiotherapy and
- Podiatry.

However, despite these omissions, the provisions remain available to those practising in the following professions:

- Medical;
- Midwifery;
- Nursing;
- Pharmacy; and
- Psychology.

This is likely to capture the majority of everyday patient interactions with the health care system and these provisions therefore continue to have serious consequences for the provision of healthcare across Australia.

PIAC also welcomes the inclusion of a note, under both clause 8(6) and (7), to clarify that these provisions are not intended to allow health care practitioners to refuse or deny services to categories of people (in what would be a form of direct discrimination).³ This deals, in part, with one of our criticisms of these provisions in our submission on the First Exposure Draft.

³ ‘This provision does not have the effect of allowing a health practitioner to decline to provide a particular kind of health service, or health services generally, to particular people or groups of people. For example, refusal to prescribe contraception to single women may constitute discrimination under the *Sex Discrimination Act 1984*.’

However, this leaves open indirect discrimination where a health practitioner refuses to provide a type of service that is used predominantly, or even exclusively, by a particular group. For example, it would allow:

- Doctors and pharmacists to refuse to provide hormone treatments, such as puberty blockers, even where this would have a disproportionate impact on trans and gender diverse people;
- Doctors and pharmacists to refuse to provide certain types of reproductive and sexual health services, even where this would have a disproportionate impact on women; and
- Doctors and pharmacists to refuse to provide PEP and/or PrEP in relation to HIV, even where this would have a disproportionate impact on gay, bisexual and other men who have sex with men.

This was confirmed by the Attorney-General in a report in the *Sydney Morning Herald*:⁴

Mr Porter used the example of a GP who did not want to ‘engage in hormone therapies’ for a trans person. ‘That’s fine, but you have to exercise that in a consistent way, so you don’t engage in the procedure at all.’

The practical outcome is the same for the patient – being denied access to essential health care, based on the health practitioner’s personal religious beliefs.

Indeed, in some ways the services that a health practitioner is able to refuse to provide may be broader in the Second Exposure Draft. This is because clause 8(6) has been amended to cover both providing ‘or participating in a particular kind of’ health service – which appears to protect the ability not just to refuse to provide the service, but also to refuse to refer the patient to another health care practitioner who would be able to.

PIAC remains of the view that clauses 8(6) and (7) are unjustified and should be deleted. They risk having a deleterious impact on the health of vulnerable groups within the community, such as trans and gender diverse people. Such situations of potential indirect discrimination should be judged applying an ordinary test of ‘reasonableness’ to the conduct of the health practitioner. The case for applying a special test has simply not been made out.

Recommendation 3 – The proposed ‘conscientious objection’ provisions should be removed

Clauses 8(6) and (7) are both unjustified and unnecessary, with the potential to cause serious harm to vulnerable members of the community. They should be removed, with the effect that the conduct of health care practitioners would be judged by the same standard of ‘reasonableness’ as applies in other cases concerning potential indirect discrimination.

3.3 Clause 11 (and related clauses): ‘Religious Exceptions’

The third major area of concern with the Second Exposure Draft Religious Discrimination Bill is the scope of the general ‘religious exception’ in clause 11 (previously clause 10), and related clauses (including clauses 32 and 33).

⁴ ‘Rules for doctors, pharmacists tightened in new religious discrimination bill’, *Sydney Morning Herald*, 10 December 2019.

There are two significant problems with these provisions: the exceptionally broad and novel test that has been drafted, and the extensive range of organisations that are covered.

(a) The test for religious exceptions

PIAC expressed serious concern about the proposed test in clause 10 of the First Exposure Draft Bill, in particular that it was more generous than the already broad religious exceptions contained in other Commonwealth anti-discrimination legislation (including the *Sex Discrimination Act 1984*). We identified that it would permit an unacceptably broad range of conduct by religious schools and universities, and other faith-based charities that would otherwise be unlawful discrimination.

The two separate tests now proposed in clause 11 only serve to exacerbate this problem. The narrower of the two tests, in clause 11(3), provides that:

A religious body does not discriminate against a person under this Act by engaging, in good faith, in conduct to avoid injury to the religious susceptibilities of adherents of the same religion as the religious body.

This provides for a weaker test than the religious exception in s 37(1)(d) of the *Sex Discrimination Act 1984* (Cth), which protects ‘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.’

Notably, the Religious Discrimination Bill test does not require the conduct to *conform* to the doctrines, tenets or beliefs of the religion. Nor must the conduct be *necessary* to avoid injury to the susceptibilities of adherents of the same religion. It only requires that the conduct is done in good faith for this latter purpose.

The Bill’s test consequently permits a much broader range of conduct that would otherwise be discrimination. This will pose a particular problem for members of ‘minority faiths’ and those who do not hold religious views.

PIAC is also seriously concerned about the impact on other legislation of introducing this much broader test, as it creates scope for arguments about ‘consistency’ to be raised with a view to diminishing protection from discrimination on grounds like sex, pregnancy, marital status, sexual orientation, gender identity and intersex status. It will most immediately arise in the context of the Australian Law Reform Commission’s inquiry into religious exceptions in anti-discrimination legislation.

These problems are compounded by the exceptional nature of the exclusion proposed in clause 11(1). This provides:

A religious body does not discriminate against a person under this 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.

As noted above, this test is exceptionally broad. It requires only that one other person of the same religion *could* reasonably consider the view to be in accordance with the doctrines etc of the religion. It is entirely novel in discrimination law. There is no principled basis advanced for departing from the established tests that exist in Commonwealth, State and Territory anti-discrimination laws. It will result in relevant religious organisations being beyond any meaningful scrutiny or accountability under this proposed Act.

This provision strikes at the heart of the Bill. By seeking to define away adverse treatment of people who do not share the beliefs of a religious organisation as not constituting discrimination, the provision fundamentally undermines the ability of the Bill to promote and support tolerance, diversity and freedom from adverse treatment on the basis of religion.

Recommendation 4: The exceptions for religious organisations should be replaced

The two alternative tests for whether religious organisations are allowed to discriminate on the basis of religious belief – in clauses 11(1) and (3), and replicated elsewhere – should be replaced with a narrower test based on s 37(1)(d) of the Sex Discrimination Act 1984 (Cth) and s 52(1)(d)(ii) of the Anti-Discrimination Act 1998 (Tas): ‘A religious body does not discriminate against a person under this Act by engaging, in good faith, in conduct that conforms to the doctrines, tenets, beliefs or teachings of that religion and is necessary to avoid injury to the religious susceptibilities of that religion.’

(b) Organisations covered by religious exceptions

A related problem with the general religious exception in clause 11 (and related clauses), is the breadth of organisations that are able to take advantage of them. As with the test which is proposed, this scope has been broadened in the Second Exposure Draft Bill.

The list of organisations in clause 11(5) remains largely the same as the list originally proposed in the First Exposure Draft, and covers:

- (a) an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion;
- (b) a registered public benevolent institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion; and
- (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.

PIAC has serious concerns with how the exemptions will operate for all three categories.

We remain strongly opposed to giving religious schools and universities the ability to disadvantage or expel students on religious grounds - for example, if a student decides in the course of their schooling that they no longer share the faith of the religious body, but nevertheless wish to complete their education in the school.

This is contrary to the approach taken in Queensland, Tasmania, the ACT and the Northern Territory, under which schools can discriminate at the time of enrolment, but not once a student is enrolled. The approach in these jurisdictions strikes an appropriate balance between the needs of schools and students and recognises the special vulnerability of children. It is unclear how a different and less protective approach is justified here.

Clause 11 should therefore at least be amended to exclude clause 19(2) (prohibiting discrimination against students of an educational institution) from its operation. This could be done, for example, by amending clause 11(5) to read: 'This section does not apply to section 19(2), relating to discrimination in education. It otherwise applies despite anything else in this Act'.

PIAC is also concerned by the public benevolent institution (PBI) provisions, including that clause 11(5)(b) has been amended to remove the qualifier 'other than a registered charity that engages solely or primarily in commercial activities' which was included in the First Exposure Draft.

PBIs provide an increasing share of public services, including delivering services on behalf of Commonwealth, State and Territory and even local governments, for which they receive substantial public funds. The effect of including them in this general exemption is to allow them to discriminate on the basis of religion in relation to both employment, as well the availability and terms of their services.

For example, a publicly-funded mainstream faith-based PBI operating a youth drop-in centre, or a large religious PBI that provides home-based aged-care services, will be able to deny service to people from other faiths (including other denominations), as well as people without faith and people who do not disclose their faith. PIAC strongly opposes this excessively broad scope.

Similarly, we reiterate our concerns from our submission in response to the First Exposure Draft that clause 11(5)(c) is also unjustified in its scope. This is in part because it applies a different criteria to existing religious exceptions in the *Sex Discrimination Act 1984* (Cth) (SDA): under the SDA, bodies must be 'established for religious purposes', rather than simply bodies that are conducted in accordance with the religion's doctrines, tenets, beliefs or teachings.

The Second Exposure Draft has gone even further, adding new categories of organisations that will have access to religious exceptions.

Clause 32 proposes to allow hospitals, aged care service providers and accommodation providers operated by religious bodies to discriminate in employment on the basis of religious belief, or lack of belief (applying the unacceptably broad tests outlined above).

PIAC can see no justification for permitting a religious hospital to discriminate against potential or current employees, simply because they hold a different religious belief to the hospital. Indeed, such a policy – basing hiring decisions based on religion, rather than solely on competence – could jeopardise the quality of patient care. Similarly, allowing aged care services providers to hire and promote (or not hire or promote) based on religious belief could compromise the quality of care provided to people at a particularly vulnerable point in their lives. Nor can we see any legitimate justification for allowing accommodation providers to discriminate in this way.

Finally, we object to the inclusion of new exceptions, in clause 33, that allow religious camps and conference sites to discriminate in who they provide their services to. Where such facilities are offered to the public, often on a commercial basis, it is contrary to the purpose of a 'Religious Discrimination Bill' to facilitate discrimination on the basis of religious belief.

Recommendation 5: The organisations covered by religious exceptions should be narrowed

The list of organisations covered by religious exceptions in clause 11(5) should be narrowed, with clauses 11(5)(b) and (c) deleted and replaced with ‘any other body established for religious purposes (other than a body that engages solely or primarily in commercial activities)’.

(c) Alternative approaches

The appropriate and principled approach to exemptions in legislation that seeks to protect rights is to ensure they are carefully and narrowly drafted. They should respond to a pressing and identified need and be proportionate to a legitimate aim. The Bill fails to meet these standards and indeed this Second Exposure Draft is worse than the first. PIAC has consistently argued for existing religious exceptions, such as those in *Sex Discrimination Act 1984* (Cth), to be more narrowly drafted, so as not to permit unjustifiable discrimination on the basis of other attributes, such as sexual orientation and gender identity.

At the same time, we have acknowledged that there may be limited circumstances in which distinctions on the basis of religious belief, or lack of belief, may be warranted. From our submission to the Religious Freedom Review:⁵

PIAC acknowledges that the right to freedom of religion under Article 18 of the ICCPR requires State Parties to ‘have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions’.

This may allow for a religious school to discriminate against potential teachers and employees on the grounds of religious belief, in relation to roles that are sufficiently connected with the ‘religious and moral education’ of children. It may also support discrimination on the basis of religious belief against prospective students to support the religious ethos of the institution.

Such an approach is consistent with the practice of a number of State and Territory jurisdictions, including Tasmania which provides as follows in its *Anti-Discrimination Act 1998*:

Section 51 Employment based on religion

- (1) A person may discriminate against another person on the ground of religious belief or affiliation or religious activity in relation to employment if the participation of the person in the teaching, observance or practice of a particular religion is a genuine occupational qualification or requirement in relation to the employment.
- (2) A person may discriminate against another person on the ground of religious belief or affiliation or religious activity in relation to employment in an educational institution that is or is to be conducted in accordance with the tenets, beliefs, teachings, principles or practices of a particular religion if the discrimination is in order to enable, or better enable, the educational institution to be conducted in accordance with those tenets, beliefs, teachings, principles or practices.

Section 51A Admission of person as student based on religion

- (1) A person may discriminate against another person on the ground of religious belief or affiliation or religious activity in relation to admission of that other person as a student to an educational

⁵ PIAC, Submission to the Religious Freedom Review, 14 February 2018, p9, available here: <https://piac.asn.au/wp-content/uploads/2018/02/18.02.14-PIAC-Submission-re-Religious-Freedom-Review-FINAL.pdf>

institution that is or is to be conducted in accordance with the tenets, beliefs, teachings, principles or practices of a particular religion...

Section 52 Participation in religious observance

- (1) A person may discriminate against another person on the ground of religious belief or affiliation or religious activity in relation to
- (a) the ordination or appointment of a priest; or
 - (b) the training and education or any person seeking ordination or appointment as a priest; or
 - (c) the selection of appointment of a person to participate in any religious observance or practice; or
 - (d) any other act that-
 - (i) is carried out in accordance with the doctrine of a particular religion; and
 - (ii) is necessary to avoid offending the religious sensitivities of any person of that religion.

We therefore urge that the religious exceptions proposed in clause 11 and related provisions be redrafted along these lines, with a view to achieving an appropriate and principled balance.

Recommendation 6: Students should only be discriminated against at enrolment

Religious schools should only be permitted to discriminate on the basis of religious belief, or lack of belief, at enrolment. Clause 11(6) should be amended to provide that 'This section does not apply to section 19(2), relating to discrimination in education. It otherwise applies despite anything else in this Act.'

Recommendation 7: Hospitals, aged care service providers and accommodation providers should not be permitted to discriminate in employment

Hospitals, aged care service providers and accommodation providers that are operated by religious organisations should not be permitted to discriminate on the basis of religious belief, or lack of belief, in employment. Clauses 32(8) and (10) should be removed.

Recommendation 8: Religious camps and conference sites should not be permitted to discriminate in who they provide goods and services to

Religious camps and conference sites that are operated by religious organisations should not be permitted to discriminate on the basis of religious belief, or lack of belief, in the provision of goods and services. Clauses 33(2) and (4) should be removed.

4. Other problems with the Religious Discrimination Bill

In addition to the three major problems identified above, there are a range of other serious problems in the Second Exposure Draft Religious Discrimination Bill. We focus on five of these problems here, namely:

- Protections provided to bodies corporate
- Bodies corporate as associates
- Indirect discrimination and statements of belief other than in the course of the employees' employment
- Indirect discrimination and qualifying body conduct rules, and
- Overriding of local government by-laws.

4.1 Protections provided to bodies corporate

In our submission in response to the First Exposure Draft, we noted that:

the Religious Discrimination Bill takes the unusual step of seeking to include bodies corporate within the scope of 'persons' protected from discrimination. Such an approach is at odds with fundamental principles of human rights (being such rights as inhere to human beings) as well as Australia's existing framework of discrimination law'.

We therefore welcome the removal of the definition of 'person' from clause 5 of the Second Exposure Draft. This has not, however, resolved the problem because the absence of a definition means that 'person' is to be interpreted by reference to the *Acts Interpretation Act 1901* (Cth), section 2C of which provides that person 'include[s] a body politic or corporate as well as an individual.'

Indeed, the Explanatory Notes of the Second Exposure Draft Religious Discrimination Bill acknowledge that 'the Act does not preclude bodies corporate or other non-natural persons from being 'persons aggrieved' for the purposes of the AHRC Act in appropriate cases'.⁶

We continue to believe that this is an inappropriate outcome. We endorse the solution proposed by the Australian Discrimination Law Experts' Group in their submission to the Second Exposure Draft, to clarify that only aggrieved persons may be the person about which a discrimination complaint may be brought, and that aggrieved persons means only natural persons.

Recommendation 9: Bodies Corporate should not be complainants in discrimination complaints

The ability of bodies corporate to make complaints about 'religious discrimination' against them should be removed. Clauses 7 and 8 should be clarified to read 'A person discriminates against another person ('aggrieved person')...' and 'aggrieved person' defined in clause 5 to mean only natural persons.

4.2 Bodies corporate and associates

A related problem with the Bill is how it deals with discrimination against associates. Specifically, clause 9 provides 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.

Once again the Bill departs from precedent without any apparent justification. The vague phrasing ('near relative or otherwise'), can be contrasted with other Commonwealth anti-discrimination laws, such as the *Disability Discrimination Act 1992* (Cth), which includes a definition of associate in section 4(1):

associate, in relation to a person, includes:

- (a) a spouse of the person; and
- (b) another person who is living with the person on a genuine domestic basis; and
- (c) a relative of the person; and
- (d) a carer of the person; and

⁶ Explanatory Notes, Second Exposure Draft Religious Discrimination Bill 2019 (Cth), para 66.

(e) another person who is in a business, sporting or recreational relationship with the person.

Significantly, the current drafting of the Bill would provide another avenue for bodies corporate to bring discrimination complaints as associates of a religious (or non-religious) person.

Therefore, as with Recommendation 9 above, we again endorse the solution proposed by the Australian Discrimination Law Experts Group: clause 9 should be clarified to ensure bodies corporate and other organisations cannot bring claims of discrimination owing to an association with a natural person.

Recommendation 10: Provisions around associates should be clarified, including precluding bodies corporate from bringing claims of discrimination as associates

'Association' should be defined in clause 5 based on the definition of associate found in section 4(1) of the Disability Discrimination Act 1992 (Cth), with the phrase 'whether as a near relative or otherwise' removed from clause 9. Clause 9 should also be amended to read 'This Act applies to a person ('aggrieved person') who has an association with a person...' with 'aggrieved person' defined in clause 5 to mean only natural persons.

4.3 Indirect discrimination and statements of belief other than in the course of the employee's employment

Clauses 8(6) and (7), regarding conscientious objection (discussed at 3.2 above), are not the only provisions which seek to amend the ordinary test of reasonableness for determining indirect discrimination in the Second Exposure Draft Religious Discrimination Bill.

The test contained in clause 8(2)(a) to (c) is largely consistent with similar tests in other Commonwealth anti-discrimination legislation, and is both sufficient and appropriate to resolve issues of indirect discrimination in a wide range of situations.

However, the Bill then seeks to tinker with the test of 'reasonableness' by including several provisions applying to statements of belief made by employees outside the ordinary course of employment – specifically, 8(2)(d), 8(3) and 8(5).

These provisions are largely the same in the Second Exposure Draft as they were in the First, although we acknowledge the welcome clarification that they apply to statements of belief 'other than in the course of the employee's employment': a narrower set of circumstances than in the initial drafting.

PIAC remains opposed to these unnecessary, novel and complicated provisions for the same reasons as set out in our earlier submission.

The Bill also seeks to limit the circumstances in which it will be reasonable for large employers to impose standards of dress, appearance or behaviour. It will be necessary for large employers to demonstrate that compliance with 'employer conduct rules' which restrict the ability of employees to make 'statements of belief' outside work hours is 'necessary to avoid unjustifiable financial hardship to the employer': cl 8(3).

In PIAC's view, financial hardship should not be the determining factor for large employers seeking to promote values of diversity and inclusion, especially where their workplace is itself diverse, or to protect their reputation in the community where damage is not easily quantifiable in financial terms. Legitimate considerations of corporate social responsibility go well beyond financial matters and should be relevant to questions of reasonableness.

Indeed, the Explanatory Notes to the Bill recognise that 'businesses play a significant role in setting standards of workplace culture across the country'. The Explanatory Notes suggest these provisions 'will assist in building a corporate culture that supports religious diversity across the Australian community at large'. There is no suggestion that religious diversity is only relevant to the extent that it is reflected in financial terms. Nor is there any justification offered for why religious diversity is to be privileged over other forms of diversity.

In addition, the test of 'necessity' is a very high one that may impose an impossible burden on employers wishing to set standards that support values like diversity. Before introducing an 'employer conduct rule' that applies outside of work, employers will need to undertake complicated and potentially costly attempts to quantify a range of hypothetical circumstances that could have a financial impact on the business. It is difficult, if not impossible, to see how this could be done.

We understand the concept of 'unjustifiable hardship' is derived from the DDA. However, in that context, not only are all the circumstances of the case to be taken into account in determining unjustifiable hardship (not just financial matters: see s 11 DDA), but the defence is not couched in terms of necessity (see s 21B of the DDA).

A comparable test in the context of this Bill would be to provide that an employer conduct rule is not reasonable unless 'non-compliance with the rule by employees would impose an unjustifiable hardship on the employer'. Even then, however, it is not clear why the ordinary test of reasonableness – which requires an assessment of the proportionality of the condition or requirement imposed – is inadequate or inappropriate to allow all relevant factors to be balanced.

These provisions should be removed.

Recommendation 11: Specific provisions regarding statements of belief other than in the course of the employees' employment should be removed

Clauses 8(2)(d), (3) and (5), which amend the test of reasonableness for determining indirect discrimination applying to statements of belief other than in the course of the employees' employment, should be removed, with complainants relying on the ordinary test as established in clause 8(2)(a)-(c).

4.4 Indirect discrimination and qualifying body conduct rules

There are also two new provisions in the Second Exposure Draft Religious Discrimination Bill which again seek to amend the ordinary test of reasonableness. These are:

Clause 8(2)(e)

If the condition, requirement or practice is a qualifying body conduct rule – the extent to which the rule would limit the ability of a person to hold or engage in the person's religious belief or activity.

Clause (4)

For the purposes of paragraph (1)(c), 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 relevant profession, carrying on the relevant trade or engaging in the relevant occupation is not reasonable unless compliance with the rule by the person is an essential requirement of the profession, trade or occupation.

The case simply has not been made for amending the ordinary test of reasonableness in this area and creating additional complexity. There is no evidence that the approach taken in other Commonwealth discrimination legislation is inadequate to resolve issues of indirect discrimination in relation to qualifying bodies and conduct rules.

These provisions should be removed.

Recommendation 12: Specific provisions regarding qualifying body conduct rules should be removed

Clauses 8(2)(e), 8(4) and 8(5), which amend the test of reasonableness for determining indirect discrimination applying to qualifying body conduct rules, should be removed, with complainants relying on the ordinary test as established in clause 8(2)(a)-(c).

4.5 Overriding local government by-laws

Another new feature in the Second Exposure Draft is the inclusion of clause 5(2), which states: 'For the purposes of paragraphs (b) and (d) of the definition of religious belief or activity in subsection (1), an activity is not unlawful merely because a local by-law prohibits the activity.'

The Explanatory Notes further expands on this point:⁷

This will ensure that persons are still protected from discrimination under this Bill even if their religious activity contravenes council by-laws. This may include, for example, religious activities, such as street preaching, which are made unlawful by the operation of local government regulations. This subclause recognises that a person's ability to make a complaint of discrimination under this Bill should not be limited by the operation of delegated legislation which does not have the same levels of oversight and scrutiny as legislation made by the Commonwealth, or a state and territory government.

We understand that this approach is unique in Commonwealth anti-discrimination laws. As with the qualifying body conduct rules, we are unconvinced of the need to include this amendment. We are also concerned by the example provided in the Explanatory Notes, noting that Local Governments should retain the ability to regulate conduct in their Local Government area, including with respect to street preachers.

Recommendation 13: Provisions overriding local government by-laws should be removed

Clause 5(2) should be removed.

5. Problems with the other Second Exposure Draft 'Religious Freedom' Bills

The Second Exposure Draft Religious Discrimination Bill is accompanied by two other Second Exposure Draft 'Religious Freedom' Bills:

- The Religious Discrimination (Consequential Amendments) Bill 2019, and
- The Human Rights Legislation Amendment (Freedom of Religion) Bill 2019.

⁷ Explanatory Notes, Second Exposure Draft Religious Discrimination Bill 2019 (Cth), para 83.

5.1 Creation of a Freedom of Religion Commissioner

As with the First Exposure Draft, the Second Exposure Draft Religious Discrimination (Consequential Amendments) Bill 2019 would create the position of Religious Freedom Commissioner within the Australian Human Rights Commission.

PIAC maintains the position set out in our submission on the First Exposure Draft. The case has not been made for the creation of a stand-alone Commissioner. The recommendation of the Government's Religious Freedom Review, that protection of freedom of religion should be undertaken through the existing commissioner model and not through the creation of a new position, should be accepted.

Based on the evidence of ongoing legal, social and other forms of discrimination against lesbian, gay, bisexual, transgender and intersex Australians (including the homophobia and transphobia that arose because of the same-sex marriage postal survey), PIAC believes there is a more compelling case for creation of a Commissioner with a mandate focused on issues of sexual orientation, gender identity and expression, and sex characteristics issues.

Recommendation 14: Further consideration of Commissioners within the AHRC

Based on Recommendation 19 of the Religious Freedom Review, the Government should not proceed with the creation of a Religious Freedom Commissioner. If this position is created, the Government should also create a Commissioner with responsibility for issues of sexual orientation, gender identity and expression, and sex characteristics.

5.2 Amendments to the Charities Act

PIAC maintains its opposition to the proposed amendment to section 11 of the *Charities Act 2013* (Cth) to include the following:

(2) To avoid doubt, the purpose of engaging in, or promoting, activities that support a view of marriage as a union of a man and woman to the exclusion of all others, voluntarily entered into for life, is not, of itself, a **disqualifying purpose**. [emphasis in original]

This amendment is unnecessary. There is no evidence of any charity being de-registered or otherwise sanctioned by the Australian Charities and Not-for-profits Commission in relation to this issue.

PIAC does not support singling out views about one particular social issue for protection in this way – and it is inappropriate to single out one particular view (anti-marriage equality) about one particular social issue (especially as there was no equivalent protection of pro-marriage equality charities before 2017).

Recommendation 15: Remove amendment to the Charities Act

Clause 4 of the Human Rights Legislation Amendment (Freedom of Religion) Bill 2019, which would amend the disqualifying purpose provisions of the Charities Act 2013, should be removed.

6. Endorsements

This submission is endorsed by Community Legal Centres NSW.