

Religious Discrimination Bills

**Submission to the Senate Legal and
Constitutional Affairs Committee**

17 December 2021

Public Interest Advocacy Centre
ABN 77 002 773 524
www.piac.asn.au

Gadigal Country
Level 5, 175 Liverpool St
Sydney NSW 2000
Phone +61 2 8898 6500
Fax +61 2 8898 6555

About the Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is leading social justice law and policy centre. Established in 1982, we are an independent, non-profit organisation that works with people and communities who are marginalised and facing disadvantage.

PIAC builds a fairer, stronger society by helping to change laws, policies and practices that cause injustice and inequality. Our work combines:

- legal advice and representation, specialising in test cases and strategic casework;
- research, analysis and policy development; and
- advocacy for systems change and public interest outcomes.

Our priorities include:

- 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 First Nations people
- Access to sustainable and 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)
- Improving outcomes for people under the National Disability Insurance Scheme
- Truth-telling and government accountability
- Climate change and social justice.

Contact

Alastair Lawrie
Public Interest Advocacy Centre
Level 5, 175 Liverpool St
Sydney NSW 2000

T: 02 8898 6515

E: alawrie@piac.asn.au

Website: www.piac.asn.au



Public Interest Advocacy Centre



@PIACnews

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

Contents

Contents	3
1. Introduction	3
2. Major Problems with the Religious Discrimination Bill.....	4
2.1 Protecting Demeaning and Derogatory Comments Against Others.....	4
2.2 Denying access to justice to vulnerable groups	6
2.3 Granting special privileges to religious organisations to discriminate on the basis of religious belief	7
2.4 Allowing discrimination against children.....	14
2.5 Allowing discrimination against teachers.....	16
2.6 Undermining community trust in professionals like doctors	19
2.7 The Religious Discrimination Bill is overly complex	20
2.8 The Religious Discrimination Bill undermines Australia’s anti-discrimination framework	21
3. Other Issues in the Religious Discrimination Bill.....	22
3.1 Granting ‘bodies corporate’ the ability to make complaints.....	22
3.2 Overriding local government by-laws	24
3.3 Religious exceptions for religious camps and conference sites	24
3.4 Creation of a Religious Discrimination Commissioner	25
3.5 Liability for being ‘knowingly concerned’ in unlawful conduct.....	26
4. The Human Rights Legislation Amendment Bill 2021	27

Recommendations

Recommendation 1 – The Religious Discrimination Bills should be rejected

The Religious Discrimination Bill, and its two associated Bills, should be rejected.

Recommendation 2 – The ‘statement of belief’ provision should be removed

The ‘statement of belief’ provision, in proposed section 12 of the Bill, should be removed.

Recommendation 3 – 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 proposed sections 7(2) and 7(4), and replicated elsewhere – should be replaced with a narrower test based on s 37(1)(d) of the Sex Discrimination Act 1984 (Cth): ‘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 or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.’

Recommendation 4 – The organisations covered by religious exceptions should be narrowed

The range of organisations covered by religious exceptions under the Bill, as included in the definition of religious body in proposed section 5, and via proposed sections 7, 8 and 9, should be narrowed, and replaced with the standard criteria of ‘a body established for a religious purpose’ as exists in the Sex Discrimination Act 1984 (Cth) and Age Discrimination Act 2004 (Cth).

Recommendation 5 – Students should not be discriminated against after enrolment

Religious schools and other educational institutions should only be permitted to discriminate on the basis of religious belief, or lack of belief, at enrolment and not beyond. Proposed section 7 should be amended, to include a new subsection stating that ‘This section does not apply to section 24(2), relating to discrimination in education.’

Recommendation 6 – The override of State and Territory laws relating to employment by religious educational institutions should be removed

Section 11 should be removed from the Bill. Schedule 2 of the Religious Discrimination (Consequential Amendments) Bill 2021 should also be removed.

Recommendation 7 – The ‘qualifying body conduct rules’ provision should be removed

The ‘qualifying body conduct rules’ provision, in proposed section 15 of the Bill, should be removed.

Recommendation 8 – 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. Proposed sections 13 and 14 should be amended to read ‘A person discriminates against another person (‘aggrieved person’) on the ground of...’, with ‘aggrieved person’ defined in proposed section 5 to mean only natural persons.

Recommendation 9 – Bodies corporate should not be associates in discrimination complaints

Proposed section 16(3) of the Bill, which grants the ability of religious organisations to bring complaints on their own behalf as ‘associates’ of natural persons, should be removed.

Recommendation 10 – Provisions overriding local government by-laws should be removed

Proposed section 5(3) of the Bill, which overrides the ability of Local Governments to regulate conduct in their own Local Government area, should be removed.

Recommendation 11 – Exceptions for religious camps and conference sites should be removed

Proposed sections 40(2)-(7) of the Bill, which provide extraordinarily broad exceptions allowing religious camps and conference sites to discriminate on the basis of religious belief in service provision, even where they provide services on a commercial basis to members of the public, should be removed.

Recommendation 12 – Religious Discrimination Commissioner

Based on Recommendation 19 of the Religious Freedom Review, the creation of the position of Religious Discrimination Commissioner within the Australian Human Rights Commission is unnecessary and should be abandoned.

Recommendation 13 – Liability for being ‘knowingly concerned’ in unlawful conduct should be amended across all Commonwealth anti-discrimination laws

Provision 70 introduces a new approach to liability for unlawful conduct under the Act, based on the provisions of the Regulatory Powers (Standard Provisions) Act 2014 (Cth). If this is to be the new standard on this issue for Commonwealth anti-discrimination laws, equivalent provisions should be included across the Age, Disability, Racial and Sex Discrimination Acts via the Human Rights Legislation Amendment Bill 2021.

Recommendation 14 – Amendment to the Charities Act should be removed

Proposed new section 19 of the Charities Act 2013 (Cth) should be removed.

Recommendation 15 – Amendment to the Marriage Act should be removed

Proposed new section 47C of the Marriage Act 1961 (Cth) should be removed.

Recommendation 16 – Amendments to objects clauses in the Age, Disability and Sex Discrimination Acts, and insertion of objects clause in the Racial Discrimination Act, should be removed

The proposed amendments to the objects clauses of the Age Discrimination Act 2004 (Cth), Disability Discrimination Act 1992 (Cth), and Sex Discrimination Act 1984 (Cth) should be removed. The proposed creation of an entirely new objects clause in the Racial Discrimination Act 1975 (Cth) should also be removed.

1. Introduction

There is a clear role for a Commonwealth Religious Discrimination Act to provide effective protection against discrimination on the grounds of religious belief in public life, consistent with the protection afforded other grounds such as sex, race, disability, age and sexual orientation.

Such an Act would play an important role in supporting a tolerant, diverse and fair community and help prevent discrimination against religious minorities in Australia.

This Bill is not that Act.

Unfortunately, the Religious Discrimination Bill is a radical departure from existing anti-discrimination law principles and norms. If passed, it would undermine the rights of women, LGBTI people, people with disability and people of minority faiths to live their lives free from discrimination. It is excessively complicated and contains a range of novel provisions that seek to privilege religious views over other rights in ways that will corrode, rather than build, tolerance and harmony.

We urge the Committee, and the Parliament, to reject the Bill.

Recommendation 1 – The Religious Discrimination Bills should be rejected

The Religious Discrimination Bill, and its two associated Bills, should be rejected.

Developing a Bill that is fit for purpose need not be a complicated exercise. A number of Australian jurisdictions already have protections against discrimination on the basis of religious belief that have worked effectively for decades. They have successfully balanced the rights of religious belief, expression and manifestation with other rights, such as the rights of children, women, LGBTI people and people with disability.

A Bill that builds on best practice would play an important role in supporting national consistency and the better protection of the right to freedom of religion. It is therefore unfortunate that this Bill has missed that opportunity.

PIAC has sought to engage constructively with the Government in the development of this Bill through its earlier iterations, and remains keen to support work on a Bill that would deliver a more effective and fairer result for all Australians.

The remainder of this submission will focus on:

- Major problems with the Religious Discrimination Bill
- Other issues with the Religious Discrimination Bill, and
- Problems in the Human Rights Legislation Amendment Bill.

Notwithstanding our view that this Bill should be rejected in its entirety given its entrenched problems, we also propose a range of amendments to improve the Bills in this package, including to lessen their adverse impacts on a range of different groups in the community.

2. Major Problems with the Religious Discrimination Bill

2.1 Protecting Demeaning and Derogatory Comments Against Others

The first major problem with the Religious Discrimination Bill is proposed section 12, which provides that a 'statement of belief, in and of itself' does not constitute discrimination for the purposes of any Commonwealth, State or Territory anti-discrimination law.¹

The clause also specifically provides that statements of belief do not 'contravene subsection 17(1) of the *Anti-Discrimination Act 1998* (Tas)'.²

This is the first time a Commonwealth anti-discrimination law has sought to interfere in State and Territory anti-discrimination legislation in this way.

This will have serious procedural consequences, including limiting access to justice for vulnerable groups (discussed in detail at 2.2 below). However, in this section we focus on the substantive outcome of this unprecedented provision and how it reduces existing rights protections.

2.1.1 Protecting comments that offend, humiliate, insult or ridicule

While not protecting statements that are malicious or that a reasonable person would consider would threaten, intimidate, harass or vilify³ a person or group, the provision seeks to protect a wide range of demeaning and derogatory statements that offend, humiliate, insult or ridicule another person on the basis of who they are.

Religiously-motivated demeaning and derogatory comments will be protected in all areas of public life: in workplaces, in schools, colleges and universities, in hospitals and aged care facilities, on buses and trains, and in cafes, restaurants and shops.

This is not necessary to protect people of faith from discrimination and undermines the protection of others from discrimination on a wide range of grounds, including women, lesbian, gay, bisexual, transgender and intersex (LGBTI) people, and people with disability. It also permits comments that humiliate, insult or ridicule single parents, people who are divorced, and people who are in de facto relationships.

The Bill also allows for demeaning and derogatory statements against people of minority faiths.⁴ Jewish people, Muslim people, Hindus, Buddhists, atheists and agnostics may all be subjected to harmful religiously-motivated comments on the basis of who they are. It is particularly counter-productive for a Commonwealth Religious Discrimination Bill to permit anti-Semitic and Islamophobic comments, including where they previously would have been prohibited under State and Territory anti-discrimination laws.

¹ Proposed section 12(1)(a).

² Proposed section 12(1)(b).

³ Noting that the definition of 'vilify' in proposed section 5 of the Bill is extremely narrow: 'incite hatred or violence towards the person or group.' This can be compared to the definition found in section 18C of the *Racial Discrimination Act 1975* (Cth), which is commonly described as prohibiting racial vilification, and which applies to acts done 'otherwise than in private' if the act is 'reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people.'

⁴ Proposed section 12(1)(a)(i), privileging statements of belief over 'this Act'.

2.1.2 Protecting fringe beliefs, including religiously-motivated racist and ableist views

The breadth of provisions subject to this override mean there is a wide array of possible comments that could currently constitute discrimination (depending on the circumstances of the case), but which under the Bill would instead be lawful. Examples include:

- a single mother who, when dropping their child off at day-care, is told by a worker that they are sinful for denying their child a father;
- a transgender person who is told by a person providing goods or services, that their gender identity is not real, and is 'against the laws of God';
- a female employee who is told by a manager that a woman's place is in the home and that women should always submit to their husbands;
- a student with a disability being told by a teacher that their disability is caused by sin, and is a trial imposed by God;
- a Jewish person at a café who is told, while chatting with the waiter, that they are responsible for killing Jesus.

Many religious organisations would reject each of the above examples as reflections of their faith. Most individual people of faith would do likewise. But it is such extreme views that the Bill seeks to permit through its entirely subjective test for 'statements of belief'.

This is evident from the changes that this Bill has made to the Second Exposure Draft Bill. The Second Exposure Draft Bill protected statements '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'.⁵

While not without significant problems, this approach included at least an element of reasonableness. That element has been removed from the current Bill which merely requires that a statement be made in good faith, and 'is of a belief that the person genuinely considers to be in accordance with the doctrines, tenets, beliefs or teachings of that religion'.⁶

This definition is therefore entirely subjective in nature – only the beliefs of the person making the demeaning or derogatory comment are relevant. Even the most extreme views, which may be held by nobody else and disavowed or denounced by others of the same faith, will be protected as long as the individual 'genuinely considers' it to form part of their faith.

Disturbingly, this Bill also deliberately protects religiously-motivated racist comments.

The Bill explicitly provides that statements of belief do not constitute discrimination for the purposes of the *Racial Discrimination Act 1975* (Cth), nor State and Territory anti-discrimination law that protects against race discrimination (including 17(1) of the Tasmanian *Anti-Discrimination Act* which applies to race).

⁵ Which was itself a lower bar than the relevant test in the First Exposure Draft Bill, which required that statements must be 'of a belief that may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion.'

⁶ As defined in proposed section 5.

Accordingly, a white supremacist would be protected if they made demeaning and derogatory comments about people of other races, if they genuinely (but unreasonably) considered those comments formed part of their faith.

For 46 years, the *Racial Discrimination Act 1975* (Cth) has operated without religious exceptions, on the accepted premise that religious beliefs do not justify racism. The Religious Discrimination Bill undermines that foundation, introducing de facto 'religious exceptions' into the Act for the first time, for the purpose of protecting harmful speech.

The other anti-discrimination law which does not include religious exceptions is the *Disability Discrimination Act 1992* (Cth). Once again, by overriding the *Disability Discrimination Act*, State and Territory prohibitions on disability discrimination, the Bill seeks to protect religiously-motivated ableist comments.

2.1.3 Impact on other laws, including bans on conversion practices

Section 12(1)(c) also seeks to extend the scope of protection for 'statements of belief', providing that they will not 'contravene a provision of a law prescribed by the regulations for the purposes of this paragraph.'

We do not support such a broad power being given to future Attorneys-General to override State and Territory laws.

For example, this power could be used by a Commonwealth Attorney-General to override State and Territory bans on harmful and inhumane sexual orientation and gender identity conversion practices, as have been introduced in Victoria⁷ and the ACT,⁸ and partially in Queensland (only in health settings),⁹ with bans under consideration in other jurisdictions.¹⁰

Recommendation 2 – The 'statement of belief' provision should be removed

The 'statement of belief' provision, in proposed section 12 of the Bill, should be removed.

2.2 Denying access to justice to vulnerable groups

In overriding State and Territory anti-discrimination laws, the Bill will also cause serious procedural problems.

As barrister Simeon Beckett identified in relation to the First Exposure Draft Bill:¹¹

The government is proposing that a federal defence be available against a claim which is most likely to be made in a state tribunal. The constitution says that a tribunal cannot determine a

⁷ Via the *Change of Suppression (Conversion) Practices Prohibition Act 2020* (Vic).

⁸ Via the *Sexuality and Gender Identity Conversion Practices Act 2020* (ACT).

⁹ Via the *Health Legislation Amendment Act 2019* (Qld).

¹⁰ Including a 2021 Tasmanian Law Reform Institute consultation on Conversion Practices.

¹¹ Simeon Beckett, 'Key protection in religious discrimination bill is fatally flawed', *Sydney Morning Herald*, 18 September, 2019: <https://www.smh.com.au/national/key-protection-in-religious-discrimination-bill-is-fatally-flawed-20190917-p52s3n.html>

federal question of law and the government's proposed defence is a federal question of law. It will need to be decided by a court.

A person who claims in a state tribunal they have been discriminated against may now be dragged by a person countering with a statement of religious belief defence into a federal court or a state supreme court. Both parties face the cost and delay of running two cases. No one wins from such a legal quagmire.

This will happen because the proposed defence fractures the way in which discrimination claims have been managed for over 30 years.

PIAC raised these concerns in our submissions to both the First¹² and Second¹³ Exposure Draft Bills. We note they were also raised by a wide range of other anti-discrimination experts¹⁴ and bodies representing the legal profession.¹⁵

It is therefore extremely disappointing this significant flaw remains in the final version of the Bill.

It undermines one of the primary advantages of the existing anti-discrimination framework – that State tribunals offer a no-cost/low-cost, accessible option for people affected by discrimination to have their complaints resolved (and indeed a no-cost/low-cost method for respondents to have matters resolved too).

By requiring that matters involving statements of belief defence be resolved only by courts, all parties will see their costs increase, as well as other impacts in terms of resources and timeliness. This will put the ability to make a discrimination complaint out of reach for many people.

The statement of belief provision will therefore deny access to justice to the groups who are most likely to experience discrimination, including women, people with disability, LGBTI people and people of minority faiths.

2.3 Granting special privileges to religious organisations to discriminate on the basis of religious belief

Another unprecedented element of the Bill is its approach to religious exceptions, which entrenches and extends the power of religious organisations to discriminate.

While all Commonwealth, State and Territory anti-discrimination laws – other than the *Racial Discrimination Act 1975* (Cth) and *Disability Discrimination Act 1992* (Cth) – currently permit

¹² PIAC, 'Religious Freedom' Bills Submission on Exposure Drafts, 30 September 2019 page 7. Available at: <https://piac.asn.au/wp-content/uploads/2019/10/19.09.30-PIAC-Submission-Religious-Freedom-Bill-Final.pdf>

¹³ PIAC, Submission on Second Exposure Draft 'Religious Freedom' Bills', 31 January 2020, page 6. Available at: <https://piac.asn.au/wp-content/uploads/2020/01/20.01.31-PIAC-Submission-2nd-Exposure-Draft-Religious-Freedom-Bills.pdf>

¹⁴ Such as the Australian Discrimination Law Experts Group, Submission re the Religious Discrimination Bill 2019 (Cth) Second Exposure Draft, 30 January 2020, pages 13-15.

¹⁵ Including the Law Council of Australia, 'Religious freedom bills – second exposure draft bills', 4 February 2020, pages 33-34. Available at: <https://www.ag.gov.au/sites/default/files/2020-05/law-council-of-australia.pdf>

religious organisations to discriminate in some circumstances that would otherwise be unlawful, none allow discrimination as generously as the exceptions in proposed sections 7, 8 and 9 (and elsewhere).

This includes both the exceptionally broad and novel test(s) that have been drafted, as well as the extensive range of organisations that are covered. Combined, they undermine the Bill's purported aim of reducing discrimination on the basis of religious belief, instead entrenching the ability of religious organisations to discriminate on these same grounds.

2.3.1 A much more lenient test to permit discrimination than other Acts

The Bill sets out two alternative tests to permit discrimination by religious organisations. A religious organisation need only satisfy one of these tests in order to discriminate.

The first, in proposed section 7(4),¹⁶ 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 can be contrasted with the general religious exception in s 37(1)(d) of the *Sex Discrimination Act 1984* (Cth), which protects 'an act or practice that ... is *necessary* to avoid injury to the religious susceptibilities of adherents of that religion'¹⁷ [emphasis added].

Notably, the Religious Discrimination Bill test does not require the conduct to 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 – lowering the bar to permit discrimination.¹⁸

However, it is the second test, in proposed section 7(2)¹⁹ that is even broader and more concerning. It provides that

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.

This is a radically more lenient test than the equivalent limb of the religious exception in s 37(1)(d) of the *Sex Discrimination Act*, which covers 'an act or practice that conforms to the doctrines, tenets or beliefs of that religion.'²⁰

¹⁶ Also replicated in proposed section 9(5)(c).

¹⁷ S 35(b) of the *Age Discrimination Act 1992* (Cth) also applies to 'an act or practice ... that is necessary to avoid injury to the religious sensitivities of adherents of that religion.'

¹⁸ Although we acknowledge this formulation, while not used for the general religious exception in s37(1)(d) of the *Sex Discrimination Act 1984* (Cth), is used in the more targeted specific exception for religious educational institutions in s 38 of the same Act ('if the person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed'), as well as in slightly different form in s 351(2)(c) of the *Fair Work Act 2009* (Cth).

¹⁹ Also replicated in proposed section 9(3)(c).

²⁰ Again, similar wording appears in s 35(b) of the *Age Discrimination Act 2004* (Cth): 'conforms to the doctrines, tenets or beliefs of that religion.'

By removing any requirement that the discrimination conforms with the doctrines, tenets, beliefs or teachings of a religion, and replacing it with an obligation merely to show that *one* other person of the same religion *could* reasonably consider the view to be in accordance with the faith's doctrines, the Bill dramatically expands the ability of religious organisations to discriminate.

The bar is set so low that religious organisations would be permitted to discriminate without meaningful scrutiny or accountability under this proposed Act.

As we noted in our submission in response to the Second Exposure Draft Bills:

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 tolerance, diversity and freedom from adverse treatment on the basis of religion.

Finally, we note the Australian Law Reform Commission (ALRC) has been provided with a reference to examine religious exceptions generally.²¹ We suggest a sensible interim approach for this Bill is to adopt the standard tests for religious exceptions in Commonwealth law, found in the *Sex Discrimination Act 1984* (Cth) and elsewhere, with a view to updating all religious exceptions following the ALRC process.

Recommendation 3 – 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 proposed sections 7(2) and 7(4), and replicated elsewhere – should be replaced with a narrower test based on s 37(1)(d) of the Sex Discrimination Act 1984 (Cth): ‘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 or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.’

2.3.2 A much broader range of organisations permitted to discriminate than other Acts

The extremely lenient test(s) to permit discrimination also apply to an extremely broad range of organisations. ‘Religious body’ is defined in proposed section 5 as

any of the following that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion:

- (a) an educational institution
- (b) a registered charity
- (c) any other kind of body (other than a body that engages solely or primarily in commercial activities).

‘Educational institution’ also extends far beyond ‘religious schools’, with its own definition in proposed section 5 covering: ‘a school, college, university or other institution at which education

²¹ See discussion at 2.3.6 below.

or training is provided'. A drafting note clarifies that '[t]his includes child care centres and early learning centres at which education or training is provided.'

The inclusion of 'registered charity' is also very broad, and has indeed been expanded from the Second Exposure Draft Bill, which applied only to the narrower category of 'registered public benevolent institution'.²²

And obviously 'any other kind of body (other than a body that engages solely or primarily in commercial activities)' encompasses an even broader category of institutions potentially granted special privileges to discriminate under the Bill.

The Bill again deviates from the standard approach to religious exceptions in anti-discrimination law by abandoning the need for such bodies to have been 'established for religious purposes' (as required under s 37(1)(d) of the *Sex Discrimination Act 1984* (Cth), and s 35 of the *Age Discrimination Act 2004* (Cth)).

Instead, bodies only need to be 'conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion' in order to qualify for exceptions under the Act.

Finally, proposed sections 8 and 9 clarify that religious hospitals, aged care facilities, accommodation providers and disability service providers all qualify for these religious exceptions, allowing them to discriminate in relation to employment (while prohibiting them from discriminating against the people accessing these services).

Overall, the range of religious organisations permitted to discriminate under this Bill is much broader than in any existing legislation. PIAC can see no justification for this expansion, nor any reason why the Bill should not instead adopt the standard test of 'bodies established for religious purposes' as included in both the Sex and Age Discrimination Acts.

Recommendation 4 – The organisations covered by religious exceptions should be narrowed

The range of organisations covered by religious exceptions under the Bill, as included in the definition of religious body in proposed section 5, and via proposed sections 7, 8 and 9, should be narrowed, and replaced with the standard criteria of 'a body established for a religious purpose' as exists in the Sex Discrimination Act 1984 (Cth) and Age Discrimination Act 2004 (Cth).

2.3.3 Disadvantaging people of minority faiths, and no faith

The overly expansive approach to religious exceptions in the Bill undermines the primary purpose of a Religious Discrimination Bill, by continuing to allow discrimination on the basis of religious belief in a wide range of circumstances.

Religious organisations are major providers of public services, receiving significant government funding. The major non-Government service providers across health, aged care, homelessness, disability, welfare and other community services, are operated by Christian organisations. The

²² Clause 11(5)(b) of the Second Exposure Draft Religious Bill, released December 2019.

ability of such organisations to discriminate accordingly has a potentially very wide impact, particularly on people of minority faiths and those who are agnostic or atheist.

In some circumstances, these service delivery organisations will be able to discriminate against people accessing their services on the basis of religious belief.

For example, a publicly-funded mainstream faith-based charity operating a youth drop-in centre, or a large religious organisation that provides home-based aged-care services,²³ will be able to deny service to people from other faiths (including other denominations), as well as people without faith or who do not disclose their faith. PIAC opposes this excessively broad scope.

An even broader range of organisations will be able to discriminate in employment, including hospitals, aged care facilities, accommodation providers and disability service providers.

As we observed in our submission in relation to the Second Exposure Draft Bill:²⁴

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 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.

2.3.4 Disadvantaging people on the basis of specific tenets of faith

Another practical consequence of the novel approach to religious exceptions contained in the Bill is that religious organisations will be able to discriminate on the basis of specific tenets of faith in a wide range of circumstances.²⁵

Some religious organisations will be permitted to discriminate in service delivery even against individuals of the same faith as the body but who do not accept specific tenets (such as ‘life begins at conception’, ‘homosexuality is intrinsically disordered’, or ‘God created man and woman, therefore transgender people do not exist’). It would be open to a service provider, for example providing drop-in youth services, to limit its services to people who are prepared to accept such statements.

²³ Noting that only aged care providers that ‘establish, direct, control or administer an aged care facility’ (see proposed section 8(a)) are restricted to discriminating in employment – other organisations providing aged care services will be able to discriminate in both employment, and service delivery.

²⁴ PIAC, *Submission on Second Exposure Draft ‘Religious Freedom’ Bills*, 31 January 2020, page 11. Available at: <https://piac.asn.au/wp-content/uploads/2020/01/20.01.31-PIAC-Submission-2nd-Exposure-Draft-Religious-Freedom-Bills.pdf>

²⁵ With proposed section 5 defining religious belief broadly, including:

- (a) holding a religious belief; or
- (b) engaging in religious activity; or
- (c) not holding a religious belief; or
- (d) not engaging in, or refusing to engage in, religious activity.

An even larger range of religious organisations will be able to discriminate in employment on the basis of specific tenets of faith. For example, a religious hospital could discriminate against a highly qualified doctor, even though the doctor shared the same religion as the hospital, because they refused to affirm the hospital's view that life begins at conception. Or an exemplary aged care employee, sharing the same religion as their employer, could be denied a promotion because they refused to endorse the employer's view that 'homosexuality is intrinsically disordered.'

There is also a risk that permitting discrimination on the basis of specific tenets of faith, including in relation to beliefs such as 'homosexuality is intrinsically disordered' or 'God created man and woman, therefore transgender people do not exist', may create an alternative avenue to discriminate against lesbian, gay, bisexual and transgender people.

This concern is heightened given the drafting notes attached to the 'religious exceptions' of the Bill appear to have been watered down between the Second Exposure Draft Bill, and the version tabled in Parliament.

The note to clause 11(1) of the Second Exposure Draft Bill provided that:

This subsection does not permit conduct that is otherwise unlawful under any other law of the Commonwealth, including the *Sex Discrimination Act 1984*.

Whereas the equivalent note to proposed section 7(2) of the final Bill only states:

Conduct that is not discrimination under this Act may still constitute direct or indirect discrimination under other anti-discrimination laws of the Commonwealth including, for example, the *Sex Discrimination Act 1984*.

This change in language may be particularly relevant in relation to the treatment of students and teachers in religious schools, which is discussed in more detail below at 2.4 and 2.5 respectively.

2.3.5 Publishing a written policy does not make conduct any less discriminatory

The Bill contains new requirements that religious organisations seeking to discriminate in employment on the basis of religious belief (including specific tenets of belief) must have a 'publicly available policy' outlining their discriminatory approach.²⁶ This is intended as a 'safeguard', to ensure employees and potential employees of an organisation are at least aware of the discriminatory policies of their (potential) employer.

In PIAC's view, a public statement of discrimination does not make it more justifiable, nor does it ameliorate its impact on workers denied employment.

Furthermore, 'publicly available policies' expressing an intention to discriminate may have a

²⁶ See for example proposed section 7(6) in relation to religious educational institutions, and proposed sections 9(3)(d) and 9(5)(d) in relation to religious hospitals, aged care facilities, accommodation providers and disability service providers.

negative impact on people accessing such services. For example, LGBT residents of Government-funded, religiously-operated aged care services are protected against discrimination on the basis of their sexual orientation and gender identity because of the 'carve-out' from religious exceptions under s 37(2) of the *Sex Discrimination Act 1984* (Cth). A publicly available policy requiring all employees to affirm that 'homosexuality is intrinsically disordered' or 'God created man and woman, therefore transgender people do not exist' is likely to make them feel less safe in their environment at a vulnerable point in their lives.

2.3.6 Pre-empting and undermining the Australian Law Reform Commission review of religious exceptions

Before turning to the specific problems the religious exceptions in the Bill will cause for students and teachers (at 2.4 and 2.5 below), it is important to note the way in which the unprecedented and expansive approach to religious exceptions pre-empts and undermines the Australian Law Reform Commission's (ALRC) review into this issue.

On 10 April 2019, the ALRC was asked to undertake a 'Review into the Framework of Religious Exemptions in Anti discrimination Legislation'. The Terms of Reference for this inquiry asked the ALRC to consider:²⁷

what reforms to relevant anti-discrimination laws, the *Fair Work Act 2009* (Cth) and any other Australian law should be made in order to ... limit or remove altogether (if practicable) religious exemptions to prohibitions on discrimination, while also guaranteeing the right of religious institutions to conduct their affairs in a way consistent with their religious ethos.

It was clear that this report, which was requested by 10 April 2020, was intended to include examination of what religious exceptions should apply to permit religious organisations to discriminate on the basis of religious belief (in addition to other attributes like sexual orientation).

This would have allowed for a comprehensive and principled consideration of these issues.

However, when the First Exposure Draft Religious Discrimination Bill was released in August 2019, Attorney-General Porter amended the Terms of Reference²⁸ to clarify that '[t]he ALRC should confine its inquiry to issues not resolved by [the Religious Discrimination Bill], and should confine any amendment recommendations to legislation other than the Religious Discrimination Bill'.²⁹

²⁷ Original Terms of Reference to the ALRC 'Review into the Framework of Religious Exemptions in Anti discrimination Legislation', 10 April 2019, published here: <https://www.alrc.gov.au/wp-content/uploads/2019/04/Religious-Exemptions-Original-Terms-of-Reference-1.pdf>

²⁸ Amended Terms of Reference to the ALRC 'Review into the Fraemwork of Religious Exemptions in Anti discrimination Legislation', 29 August 2019, published here: <https://www.alrc.gov.au/inquiry/review-into-the-framework-of-religious-exemptions-in-anti-discrimination-legislation/terms-of-reference/>

²⁹ On 2 March 2020, the Attorney-General also changed the reporting timeframe to be '12 months from the date the Religious Discrimination Bill is passed by Parliament.'

This approach undermines one of the objectives of the review, namely to achieve greater consistency in religious exceptions.³⁰ It also denies Parliament the opportunity to consider the issue of exceptions with the benefit of the ALRC's review.

A far better and more principled approach would be for this Bill to adopt religious exceptions consistent with those already contained in other Commonwealth anti-discrimination laws, including the *Sex Discrimination Act* and *Age Discrimination Act*, and allow the ALRC to review religious exceptions generally, before making any necessary changes to the Religious Discrimination Act at the same time as amending exceptions in those other laws.

2.4 Allowing discrimination against children

2.4.1 Allowing discrimination against children on the basis of religious beliefs

Another very concerning aspect of this Bill is that it allows discrimination against children and young people on the basis of their religious beliefs.

The religious exceptions in proposed section 7 apply to religious educational institutions, making them exempt from the requirement not to discriminate on the basis of religious belief in education in proposed section 24.

As noted earlier, religious educational institutions in this context includes not just religious schools, but also 'childcare centres and early learning centres at which education or training is provided', as well as colleges and universities.³¹

Therefore, religious schools and other educational institutions will be able to discriminate against children and young people at enrolment (proposed section 24(1)) and throughout their education (proposed section 24(2)). This means a school could:

- punish a child, for example with a detention or exclusion from activities, for questioning aspects of the school's religious views;
- suspend a teenager for expressing their opposition to a particular tenet of the school's religious views; and
- expel a Year 12 student who has attended the school throughout their education, for declaring they no longer believe in the school's religious views.

We recognise that most schools would not seek to punish children in these ways. But laws should not be made hoping for the best. By providing such broad exceptions, the interests of religious organisations are placed above the rights of children: to receive an education, to freedom of expression and indeed the rights of children to freedom of thought, conscience and religion.

Children and young people in this situation will have lesser protection than the adults teaching them – there is not even the 'safeguard' (ineffectual though it may be – see 2.3.5 above) requiring

³⁰ The Terms of Reference include: 'having regard to ... the interaction between Commonwealth, State and Territory anti-discrimination laws and the desirability of national consistency in religious exceptions in those laws.'

³¹ As defined in proposed section 5.

the school to have a publicly available policy outlining the circumstances in which they seek to discriminate against students.

The approach in the Religious Discrimination Bill also falls short of the best practice approach to this issue that has been operating effectively in anti-discrimination laws across Australia.

Specifically, in Queensland,³² Tasmania,³³ the ACT³⁴ and Northern Territory,³⁵ religious schools are allowed to discriminate on the basis of religious belief only at the point of enrolment, and not beyond that point.

This approach accommodates the right of religious parents, and faith communities generally, to establish religious schools for the purpose of educating their children, while also respecting the evolving ability of those children to explore and develop their faith as they grow and learn.

This could be easily incorporated in the current Bill, by providing that the religious exceptions in proposed section 7 only apply in relation to proposed section 24(1) (which relates to enrolment), but do not apply in relation to proposed section 24(2) (which relates to the treatment of students beyond enrolment).

We urge the Committee to recommend this simple and straight-forward amendment, to protect children and young people against discrimination on the basis of religious belief, and to respect their own religious freedom and right to an education.

Recommendation 5 – Students should not be discriminated against after enrolment

Religious schools and other educational institutions should only be permitted to discriminate on the basis of religious belief, or lack of belief, at enrolment and not beyond. Proposed section 7 should be amended, to include a new subsection stating that ‘This section does not apply to section 24(2), relating to discrimination in education.’

2.4.2 Allowing discrimination against children on the basis of other attributes

As indicated in the discussion at 2.3.4 above, permitting discrimination on the basis of specific tenets of faith – such as that ‘homosexuality is intrinsically disordered’ or that ‘God created man and women, therefore transgender people do not exist’ – may provide an alternative avenue for discrimination against LGBT people.

This prospect is especially concerning in the context of the particular vulnerability of LGBT children and young people attending religious schools.

By adopting such expansive religious exceptions, there is a risk that even if the Government ultimately implemented its 2018 promise to remove exceptions from the *Sex Discrimination Act 1984* (Cth) which allow religious schools to discriminate against students on the basis of their sexual orientation or gender identity, the Religious Discrimination Bill could provide a separate

³² S 41, *Anti-Discrimination Act 1991* (Qld).

³³ S 51A, *Anti-Discrimination Act 1998* (Tas),

³⁴ S 46, *Discrimination Act 1991* (ACT).

³⁵ S 30(2), *Anti-Discrimination Act 1992* (NT).

method for schools to discriminate – this time in relation to beliefs *about* sexual orientation and gender identity, rather than on the basis of these specific attributes.

These concerns would be best addressed by providing that religious schools and other educational institutions may only discriminate at enrolment, but not beyond. Indeed, the four jurisdictions which have adopted this approach to religious belief – Queensland, Tasmania, the ACT and the Northern Territory – are also the four jurisdictions which, at the time of writing,³⁶ protect LGBT students in religious schools against discrimination on the basis of their sexual orientation and gender identity. This represents best-practice to ensuring the safety and inclusion of LGBT children and young people.

We therefore reiterate our call for the Committee to amend proposed section 7, to clarify that it does not apply to proposed section 24(2) (relating to treatment of students beyond enrolment), and thereby ensure students are not discriminated against on the basis of religious belief, or via alternative avenues on the basis of other attributes like sexual orientation or gender identity.

2.5 Allowing discrimination against teachers

2.5.1 Discrimination against LGBT teachers under the ‘guise of religious views’

Teachers and other employees of religious educational institutions are included within the general religious exception in proposed section 7. As we have seen, this permits discrimination on the basis of both religious belief or lack of belief generally, and on the basis of specific tenets of faith, subject to the requirement for a publicly available policy (s 7(6)).

We noted above (see 2.3.4) our concern that the broad approach to granting religious exceptions may permit discrimination against LGBT people.

This concern was confirmed in relation to teachers by the Government on the same day that the Religious Discrimination Bill was introduced into Parliament. The Assistant Minister to the Attorney-General, who has been closely involved in the Bill’s development,³⁷ indicated that not only would religious schools be able to discriminate against teachers of different religious beliefs, but that these provisions would allow discrimination on the basis of sexual orientation too. As reported by the *Sydney Morning Herald*:³⁸

³⁶ The *Equal Opportunity (Religious Exceptions) Amendment Act 2021 (Vic)*, which was passed on 3 December 2021 but not yet commenced, adopts a different approach, in that it allows religious educational institutions to discriminate beyond enrolment. However, it also imposes an additional requirement, that such discrimination must be ‘reasonable and proportionate in the circumstances’ (amendment to section 83(2) of the *Equal Opportunity Act 2010 (Vic)*), which sets a much higher bar than the exceptions proposed under the Religious Discrimination Bill, and is far less likely to provide an additional avenue to discriminate against LGBT students.

³⁷ For example, Senator Stoker told Senate Estimates on 23 March 2021 that: ‘I’m working closely with [previous Attorney-General Christin Porter] to make sure that the government delivers on its commitment to Australians to address this issue [a Religious Discrimination Bill] that was made at the last election’. In response to a question from Labor Senator Deb O’Neill: ‘So is it fair to say that you’ve been leading the consultation, Senator Stoker?’, Stoker replied: ‘I’ve been playing an important role, but it has been a team effort.’ Legal and Constitutional Affairs Committee, Senate Estimates Transcript, 23 March 2021, page 99.

³⁸ ‘Sensible and balanced’: Morrison makes the case for religious freedom bill, *Sydney Morning Herald*, 25 November 2021, available at: <https://www.smh.com.au/politics/federal/sensible-and-balanced-scott-morrison-makes-the-case-for-religious-freedom-bill-20211125-p59c0p.html>

Assistant Minister to the Attorney-General Amanda Stoker did not rule out the possibility that schools could adopt a written policy that prohibited the employment of gay teachers.

“I think that is something that would depend a great deal upon what that school is prepared to be upfront with the community about,” Ms Stoker told ABC radio.

“I’d suggest there would be very few schools that want to be in a position where they’ve got to say to the community that this is what we believe and we’re not going to hire people, unless they subscribe to a version of beliefs that is very, very strict on that front.”

The Office of the Attorney-General confirmed this expansive interpretation. As reported in *news.com.au*.³⁹

In a statement, Attorney-General Michaela [sic] Cash’s office stressed that any decision to “prefer” heterosexual applicants over gay applicants would need to be done under the guise of religious views, not purely sexual orientation.

2.5.2 ‘Preferencing’ to override State and Territory protection of teachers

In addition to the broad scope for religious educational institutions to discriminate against teachers under the Bill, the Bill also overrides protections that teachers would otherwise have under State and Territory anti-discrimination laws.

Proposed section 11 states:

- (1) A religious body that is an educational institution does not contravene a prescribed State or Territory law if:
 - (a) When engaging in conduct described in section 19 (about employment), the religious body gives preference, in good faith, to persons who hold or engage in a particular religious belief or activity...

Proposed section 11(3) then states:

- (3) The regulations may prescribe one or more laws of a State or a Territory for the purposes of subsection (2) if the Minister is satisfied that the law has the effect of both:
 - (a) prohibiting discrimination on the ground of religious belief or activity; and
 - (b) preventing religious bodies that are educational institutions from giving preference, in good faith, to persons who hold or engage in a particular religious belief or activity when engaging in conduct described in section 19 (about employment).

This provision appears to respond to the Victorian Government’s recently passed, although yet to commence, *Equal Opportunity (Religious Exceptions) Amendment Act 2021* (Vic).⁴⁰ That legislation amends the *Equal Opportunity Act 2010* (Vic) to prohibit discrimination against

³⁹ ‘New religious freedom laws will give private schools right to refuse to hire gay teachers’, *news.com.au*, 25 November 2021, available at: <https://www.news.com.au/lifestyle/new-religious-freedom-laws-will-give-private-schools-right-to-refuse-to-hire-gay-teachers/news-story/9e55e286dc152b45d8da1d056f82bef2>

⁴⁰ Including because of the Contingent Amendments in Schedule 2 of the Religious Discrimination (Consequential Amendments) Bill 2021.

teachers and other staff on the basis of sexual orientation and gender identity, and only permit discrimination on the basis of religious belief in particular circumstances, namely where:⁴¹

- (a) conformity with the doctrines, beliefs or principles of the religion in accordance with which the educational institution is to be conducted is an inherent requirement of the position; and
- (b) the other person cannot meet that inherent requirement because of their religious belief or activity; and
- (c) the discrimination is reasonable and proportionate in the circumstances.

The Victorian provisions seek to take a balanced and measured approach, recognising the balancing of human rights that is in issue. By overriding those provisions, the effect of the Bill is to

- take rights away from Victorian teachers and other staff to be protected against discrimination on the basis of religious belief where it is not an inherent requirement of the role and/or where such discrimination is disproportionate and unreasonable, and
- expose Victorian teachers and other staff to discrimination on the basis of other attributes, including sexual orientation and gender identity, for the reasons set out above.

The ability of the regulations to prescribe one or more laws of a State or a Territory for the purposes of this override provision means that teachers in a number of other jurisdictions are also at risk.

For example, s 25 of Queensland's *Anti-Discrimination Act 1991* has several similarities with Victoria's new laws.⁴² It only permits discrimination in employment by religious schools:

- That is 'not unreasonable', which includes consideration of 'whether the action taken or proposed to be taken by the employer is harsh or unjust or disproportionate',⁴³ and
- Only where 'the person openly acts in a way that the person knows or ought reasonably to know is contrary to the employer's religious beliefs... and it is a genuine occupational requirement of the employer that the person, in the course of, or in connection with, the person's work, act in a way consistent with the employer's religious beliefs.'⁴⁴

Two other Australian jurisdictions also currently protect LGBT teachers and other staff members against discrimination in employment: Tasmania and the ACT. Both permit discrimination on the basis of religious belief, although each adopts a purposive test to assess whether such discrimination is allowed. For example, s 51(2) of the *Anti-Discrimination Act 1998* (Tas) provides that:

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

⁴¹ Proposed s 83A, *Equal Opportunity Act 2010* (Vic).

⁴² Although the Queensland provision offers narrower protections to LGBT teachers, for example, adopting a 'Don't Ask, Don't Tell' approach in relation to sexual orientation and gender identity, rather than unqualified prohibitions against discrimination on the basis of these attributes (see s 25(4): 'Subsection (3) does not authorise the seeking of information contrary to section 124).

⁴³ S 25(5), *Anti-Discrimination Act 1991* (Qld).

⁴⁴ S 25(3), *Anti-Discrimination Act 1991* (Qld).

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.⁴⁵

This purposive test – with discrimination only being allowed where it is in order to enable, or better enable, the school to be conducted in accordance with the school’s faith – is narrower than the simple ‘preference’ test under the Bill. This means that the higher level of protection for teachers against discrimination available in both Tasmania and the ACT is at risk of being overridden.

Rather than overriding the ‘reasonable and proportionate’ approach to religious exceptions in employment for religious schools recently adopted by Victoria, we urge the Commonwealth to instead consider adopting the same or similar provisions under both the Religious Discrimination Bill and *Sex Discrimination Act 1984* (Cth).

Recommendation 6 – The override of State and Territory laws relating to employment by religious educational institutions should be removed

Section 11 should be removed from the Bill. Schedule 2 of the Religious Discrimination (Consequential Amendments) Bill 2021 should also be removed.

2.6 Undermining community trust in professionals like doctors

While we welcome the removal of the so-called ‘Folau clause’ between the Second Exposure Draft Bill and the final Bill introduced to Parliament, a similar provision still applies in relation to qualifying body conduct rules. It is unnecessary and should be removed.

Proposed section 15 limits the ability of ‘qualifying bodies’ to take into consideration ‘statements of belief’ made, ‘other than in the course of the person practising in the relevant profession, carrying on the relevant trade or engaging in the relevant occupation’,⁴⁶ even where these comments may cause community members to lose confidence in the ability of these professionals to provide their services in a safe and inclusive manner.

Qualifying bodies are defined extremely broadly in proposed section 5:

qualifying body means an authority or body that is empower to confer, renew, extend, revoke, vary or withdraw an authorisation or qualification that is needed for, or facilitates, any of the following, by an individual: (a) the practice of a profession; (b) the carrying on of a trade; (c) the engaging in of an occupation.

This therefore applies to everything from doctors and lawyers through to accountants, plumbers and electricians.

⁴⁵ While s 46(2)(b) of the *Discrimination Act 1991* (ACT) applies where ‘the discrimination is intended to enable, or better enable, the institution to be conducted in accordance with [the school’s] doctrines, tenets, beliefs or teachings.’

⁴⁶ Proposed section 15(1)(b).

As discussed above at 2.1, the statements of belief that are protected include religiously-motivated comments that offend, humiliate, insult and ridicule women, LGBTI people and people with disability, and even some comments that are anti-Semitic, Islamophobic and racist.

We see no justification for such an extraordinary and unprecedented provision. The ordinary definition of indirect discrimination,⁴⁷ and the standard test of reasonableness,⁴⁸ should be sufficient to protect professionals from adverse treatment on the basis of their religious beliefs by qualifying bodies. Where the actions of the qualifying body are unreasonable, the professional would be protected.

Indeed, in the absence of the so-called 'Folau clause', other employees will rely on the ordinary definition of indirect discrimination, and standard test of reasonableness, to protect them against indirect discrimination by their employers. The same approach should apply to professionals, which means that proposed section 15 should be removed.

Recommendation 7 – The 'qualifying body conduct rules' provision should be removed

The 'qualifying body conduct rules' provision, in proposed section 15 of the Bill, should be removed.

2.7 The Religious Discrimination Bill is overly complex

The above sections describe particular problems caused by some of the Bill's unorthodox and unprecedented provisions, from the statement of belief override of all other Commonwealth, State and Territory anti-discrimination laws; the excessive exceptions granted to religious organisations; and the override of protections for employees of religious educational institutions. Other novel provisions, with their own problems, are described below.

The overall impact of these provisions is to create an anti-discrimination law that is extraordinarily complex, making it almost impossible for individuals, community organisations and businesses to understand their rights and responsibilities under the law.

For example, a teacher at a religious school could have their right to be protected against discrimination on the basis of religious belief limited by three, differently-worded exceptions:

- the test in proposed section 7(4) (which applies where the school engages 'in good faith, in conduct to avoid injury to the religious susceptibilities of adherents of the same religion as the religious body');

⁴⁷ In proposed section 14(1): A person discriminates against another person on the ground of the other person's religious belief or activity if:

- (a) the person imposes, or proposes to impose, a condition, requirement or practice; and
- (b) the condition, requirement or practice has, or is likely to have, the effect of disadvantaging persons who hold or engage in the same religious belief or activity as the other person; and
- (c) the condition, requirement or practice is not reasonable.

⁴⁸ In proposed section 14(2): Whether a condition, requirement or practice is reasonable depends on all the relevant circumstances of the case, including the following:

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

- the test in proposed section 7(2) (which applies where the school engages ‘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’); and/or
- if the Attorney-General has prescribed the relevant anti-discrimination law in their State or Territory, the test in proposed section 11(1) which will operate to override their State/Territory law where a school ‘gives preference, in good faith, to persons who hold or engage in a particular religious belief or activity’.

To understand their rights, not only will the teacher need to consult with the text of the Religious Discrimination Act, but also any Regulations made under it, as well as potentially the anti-discrimination legislation in their respective State or Territory which may or may not have been overridden.

The complex interaction of Commonwealth, State and Territory laws, caused by the Government’s deliberate and unprecedented decision to interfere with the previously co-operative federal approach to anti-discrimination protections, also creates complexity in other ways.

For example, individuals, community groups and/or businesses may consult the anti-discrimination legislation in their relevant jurisdiction and seek to rely on the text of these laws to assess their rights and responsibilities in a particular situation – without knowing that the statement of belief override may have rendered some or all of a particular provision inoperable, depending on the circumstances.

The novelty of the provisions in the Bill, including the excessive religious exceptions, the override of protections for teachers and other staff in religious educational institutions, and the override in relation to statements of belief, mean that the full extent of their application will not be known until they have been interpreted by courts, which may take many years.

This complexity represents bad law-making. Laws should, as far as possible, be understandable – notably by the individuals, community groups and businesses who are supposed to be governed by them.

The complexity also significantly reduces the normative value of the law. Anti-discrimination law can be powerful in setting standards regarding what behaviour is, and is not, permitted. This cannot be achieved when the impact of the law is unclear.

2.8 The Religious Discrimination Bill undermines Australia’s anti-discrimination framework

Alongside its complexity, another concerning aspect of the Bill is the ways in which it undermines Australia’s existing anti-discrimination framework, developed carefully over 46 years, starting with the passage of the *Racial Discrimination Act 1975* (Cth).

The Bill does this most obviously and directly by abandoning the well-established complementary approach to anti-discrimination law, by which the laws of the Commonwealth, States and Territories have functioned alongside each other. Instead, the statement of belief and religious

educational institutions provisions in the Bill override the operation of State and Territory anti-discrimination laws.

We are also concerned that the Bill undermines Australia's anti-discrimination framework by decreasing community confidence in such laws through the clear preferencing of religious interests over the rights of others. The deliberate departure from accepted tests of reasonableness and proportionality in defining exceptions and the provisions relating to 'statements of belief', means that the legislation is unbalanced and extreme.

The Bill's approach can be contrasted to the approach adopted in Victoria, Queensland, Western Australia, Tasmania, the ACT and Northern Territory, all of which have successfully managed to prohibit discrimination on the basis of religious belief or activity, without introducing special privileges for religious organisations as wide as those proposed in this Bill, and without anything resembling its 'statement of belief' provisions.

For many Australians – women, LGBTI people, people with disability, people of minority faiths and many more besides – this Bill threatens to take rights away and permits new forms of discrimination in their daily lives.

The result is a divisive law with significant community opposition and a wasted opportunity.

As PIAC and others have consistently argued - through the Religious Freedom Review, and in our submissions to the First and Second Exposure Draft Bills - the prohibition of discrimination on the basis of religious belief can be achieved without undermining the rights of others to live free from discrimination.

Such a Bill could have been a genuine moment of national unity, with a Religious Discrimination Act sitting alongside the Racial, Sex, Disability and Age Discrimination Acts and working as a complement to State and Territory laws. Such an Act could have delivered effective protection equivalent to that available for other protected attributes.

Instead, the Bill promotes new ways to discriminate against others, including people of minority faiths. The Bill should be rejected.

3. Other Issues in the Religious Discrimination Bill

We have set out above the major problems with the Religious Discrimination Bill. They are by no means the only issues contained in this extraordinary and unprecedented legislation.

3.1 Granting 'bodies corporate' the ability to make complaints

We have serious concerns that, in addition to allowing individual people of faith to make discrimination complaints, the Bill will provide religious organisations at least two avenues to do the same (on their own behalf, rather than as a representative complaint on behalf of individuals). Once again, this would be a unique approach in Commonwealth anti-discrimination law.

3.1.1 Right to make complaints

The term ‘person’ is not defined in the Bill. ‘Person’ is therefore 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 Memorandum acknowledges that ‘the Bill does not preclude bodies corporate or other non-natural persons from being ‘persons aggrieved’ for the purposes of the [Australian Human Rights Commission] Act in appropriate cases.’⁴⁹

In PIAC’s view, complaints of discrimination should only be able to be brought by or on behalf of *natural* persons.

This is consistent with the view expressed by the Australian Discrimination Law Experts Group (ADLEG) in their submission in response to the Second Exposure Draft Bill.⁵⁰

Human rights are expressly designed to protect innately *human* characteristics. While bodies corporate and other organisations should, consistent with other federal anti-discrimination laws, be prohibited from *engaging in* discriminatory conduct, such bodies should not be permitted to themselves *bring a claim of* discrimination [emphasis in original].

We also endorse the solution to this issue proposed by ADLEG: that a new definition of ‘aggrieved person’ should be added to proposed section 5, and amending the substantive provisions of proposed sections 13 and 14, so that they start ‘A person discriminates against another person (‘aggrieved person’) on the ground of...’

Recommendation 8 – 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. Proposed sections 13 and 14 should be amended to read ‘A person discriminates against another person (‘aggrieved person’) on the ground of...’, with ‘aggrieved person’ defined in proposed section 5 to mean only natural persons.

3.1.2 Religious organisations as ‘associates’

The second way in which religious organisations will be permitted to make discrimination complaints on their own behalf is through the unique approach to ‘associates’ under the Bill. Specifically, proposed section 16(1) provides that:

This Act (other than section 15 and Part 2) applies to a person who has an association 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.

⁴⁹ Religious Discrimination Bill 2021, Explanatory Memorandum, para 30.

⁵⁰ Australian Discrimination Law Experts Group, *Submission re the Religious Discrimination Bill 2019 (Cth) Second Exposure Draft*, 30 January 2020, page 28.

However, proposed section 16(3) then expands that: ‘For the purposes of subsection (1), a person that is a body corporate has an association with an individual if a reasonable person would closely associate the body corporate with that individual.’

PIAC can see no justification for expanding the concept of ‘associate’ in this way, again allowing religious organisations to bring complaints on their own behalf.

Recommendation 9 – Bodies corporate should not be associates in discrimination complaints

Proposed section 16(3) of the Bill, which grants the ability of religious organisations to bring complaints on their own behalf as ‘associates’ of natural persons, should be removed.

3.2 Overriding local government by-laws

Another unprecedented feature of the Bill is found in proposed sections 5(2)-(3), which provide:

- (2) For the purposes of paragraph (b) of the definition of religious belief or activity in subsection (1), religious activity does not include an activity that is unlawful.
- (3) For the purposes of subsection (2), an activity is not unlawful merely because a local by-law prohibits the activity.

The Explanatory Memorandum further expands on this point:⁵¹

This would 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.

As with the other unprecedented provisions of this legislation, we are unconvinced of the need to include this amendment. We are also concerned by the example provided in the Explanatory Memorandum, noting that Local Governments should retain the ability to regulate conduct in their Local Government area.

Recommendation 10 – Provisions overriding local government by-laws should be removed

Proposed section 5(3) of the Bill, which overrides the ability of Local Governments to regulate conduct in their own Local Government area, should be removed.

3.3 Religious exceptions for religious camps and conference sites

Proposed section 40 of the Bill contains additional religious exceptions allowing camps and conference sites operated by religious organisations, that provide services to the public, to discriminate on the basis of religious belief against people seeking to access these facilities.

As with the religious exceptions described above at 2.3, these exceptions:

⁵¹ Religious Discrimination Bill 2021, Explanatory Memorandum, para 53.

- Adopt a much more lenient test to permit discrimination than other Acts (with proposed section 40(2)(c) merely requiring that ‘a person of the same religion as the first person could reasonably consider the conduct to be in accordance with the doctrines, tenets, beliefs or teachings of that religion’), and
- Allow a much broader range of organisations to discriminate than other Acts (with proposed section 40(2)(ii) only requiring that the camp or conference site be ‘conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion’, rather than having been ‘established for a religious purpose’).

We can see no justification for providing such extraordinarily broad exceptions to organisations that provide services to the public, including on a commercial basis. These provisions should be removed.

Recommendation 11 – Exceptions for religious camps and conference sites should be removed

Proposed sections 40(2)-(7) of the Bill, which provide extraordinarily broad exceptions allowing religious camps and conference sites to discriminate on the basis of religious belief in service provision, even where they provide services on a commercial basis to members of the public, should be removed.

3.4 Creation of a Religious Discrimination Commissioner

We question the need for a Religious Discrimination Commissioner within the Australian Human Rights Commission (AHRC).⁵² Freedom of thought, conscience and religion already falls within the remit of the Human Rights Commissioner. As we wrote in our submission in response to the Second Exposure Draft Bill.⁵³

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... 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.

Taxpayer money would be better directed to increasing the existing capacity of the AHRC to protect and promote human rights.

⁵² Proposed section 52, and related provisions, of the Bill.

⁵³ PIAC, *Submission on Second Exposure Draft ‘Religious Freedom’ Bills*, 31 January 2020, page 18. Available at: <https://piac.asn.au/wp-content/uploads/2020/01/20.01.31-PIAC-Submission-2nd-Exposure-Draft-Religious-Freedom-Bills.pdf>

Recommendation 12 – Religious Discrimination Commissioner

Based on Recommendation 19 of the Religious Freedom Review, the creation of the position of Religious Discrimination Commissioner within the Australian Human Rights Commission is unnecessary and should be abandoned.

3.5 Liability for being ‘knowingly concerned’ in unlawful conduct

Proposed section 70 sets out a broad range of circumstances in which a person will be liable for unlawful conduct under the Act. This extends as far as:

- (1) A person must not do any of the following in relation to conduct that is unlawful under Part 4:
 - (d) be in any way, directly or indirectly, knowingly concerned in, or party to, that conduct...

This is much broader than the existing provisions in the *Age Discrimination Act 2004* (Cth),⁵⁴ *Disability Discrimination Act 1992* (Cth)⁵⁵ and *Sex Discrimination Act 1984* (Cth)⁵⁶, which instead provide that: ‘A person who causes, instructs, induces, aids or permits another person to do an act that is unlawful... shall, for the purposes of this Act, be taken also to have done the act.’⁵⁷

We note that the Explanatory Memorandum clarifies that: ‘This clause [proposed section 70] is consistent with the ancillary conduct provisions in section 92 of the *Regulatory Powers (Standard Provisions) Act 2014*.’⁵⁸

If this is intended to be the standard approach to the question of liability under Commonwealth anti-discrimination laws, we question why this legislative package has not been used as an opportunity to update the Age, Disability and Sex Discrimination Acts at the same time, to adopt the same approach (alongside consideration of introducing a similar provision in the *Racial Discrimination Act 1975* (Cth)).

The Human Rights Legislation Amendment Bill 2021 already proposes amendments to all four of the other Commonwealth anti-discrimination laws, we therefore see no reason why this provision should not be standardised across all of them and included via amendment in the same Bill.

Recommendation 13 – Liability for being ‘knowingly concerned’ in unlawful conduct should be amended across all Commonwealth anti-discrimination laws

Provision 70 introduces a new approach to liability for unlawful conduct under the Act, based on the provisions of the Regulatory Powers (Standard Provisions) Act 2014 (Cth). If this is to be the new standard on this issue for Commonwealth anti-discrimination laws, equivalent provisions should be included across the Age, Disability, Racial and Sex Discrimination Acts via the Human Rights Legislation Amendment Bill 2021.

⁵⁴ S 56.

⁵⁵ S 122.

⁵⁶ S 105.

⁵⁷ Although there does not appear to be an equivalent provision under the *Racial Discrimination Act 1975* (Cth).

⁵⁸ Religious Discrimination Bill 2021, Explanatory Memorandum, para 599.

4. The Human Rights Legislation Amendment Bill 2021

There are several problems in the Human Rights Legislation Amendment Bill, including:

4.1.1 Unnecessary amendments to the *Charities Act 2013* (Cth)

Clause 3 of this Bill proposes to add a new s 19 to the *Charities Act 2013* (Cth), providing that:

In determining whether an entity that:

- (a) engages in or promote activities advancing, expressing or supporting a view of marriage as a union of a man and woman to the exclusion of all others, voluntarily entered into for life; or
 - (b) encourages others to engage in or promote activities that advance, express or support such a view;
- is a charity, the entity's engagement in, or promotion of, such activities is to be presumed, conclusively, to be for the public benefit and not contrary to public policy.

The Explanatory Memorandum notes that: '[t]he Religious Freedom Review found that many faith-based charities were concerned about whether there was a risk that advocating for a 'traditional view of marriage' [following the introduction of marriage equality] could result in the loss of charitable status.'⁵⁹

PIAC has seen no evidence presented to substantiate these fears. In December 2021, more than four years following the passage of the *Marriage Amendment (Definition and Religious Freedoms) Act 2017*, 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.

Not only is this amendment unnecessary, it is inappropriate to single out one particular perspective about one particular social issue. No equivalent protection of pro-marriage equality charities was considered before 2017. Nor does the Bill propose equivalent protections for contrary views, such as the view that the religious exceptions included in the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* should be repealed.

Recommendation 14 – Amendment to the Charities Act should be removed

Proposed new section 19 of the Charities Act 2013 (Cth) should be removed.

4.1.2 Unnecessary amendments to the *Marriage Act 1961* (Cth)

The amendments to insert a new section 47C of the *Marriage Act 1961* (Cth), to 'clarify' that religious educational institutions may discriminate by refusing to make facilities available or provide goods or services to LGBT-inclusive couples, are also unnecessary.

Once again, more than four years since the passage of marriage equality, there is no evidence that this addresses anything other than hypothetical concerns.

⁵⁹ Human Rights Legislation Amendment Bill 2021, Explanatory Memorandum, para 30.

We also note that the breadth of proposed new s 47C(2) covers commercial services provided by these institutions, presumably to members of the public.⁶⁰

We do not believe a compelling argument has been provided to justify permitting organisations operating commercial services in this area to discriminate against LGBTI-inclusive couples.

Recommendation 15 – Amendment to the Marriage Act should be removed

Proposed new section 47C of the Marriage Act 1961 (Cth) should be removed.

4.1.3 Unnecessary amendments to objects clauses in the Age, Disability, and Sex Discrimination Acts, and insertion of objects clause in the Racial Discrimination Act

The Human Rights Legislation Amendment Bill 2021 also proposes to amend the objects clauses of the *Age Discrimination Act 2004 (Cth)*, *Disability Discrimination Act 1992 (Cth)* and *Sex Discrimination Act 1984 (Cth)*, as well as to insert an entirely new objects clause in the *Racial Discrimination Act 1975 (Cth)*.

In particular, the objects clauses of the first three Acts will be amended to include the following:

In giving effect to the objects of this Act, regard is to be had to:

- (a) the indivisibility and universality of human rights, and their equal status in international law; and
- (b) the principle that every person is free and equal in dignity and rights.

The Explanatory Memorandum then clarifies that: ‘in giving effect to these objects, which focus on the rights to equality and non-discrimination, appropriate regard must be had to all human rights. This may include, where relevant, the right to freedom of religion.’⁶¹

These provisions appear to be solutions in search of a problem, with no evidence provided that these Acts have been interpreted incorrectly, particularly to the detriment of other human rights including freedom of religion.

We are also concerned that the introduction of these novel interpretive provisions may have unintended consequences, and ultimately undermine the overall purpose of these Acts, which is to reduce discrimination on the basis of their respective protected attributes.

These concerns are heightened in relation to the *Disability Discrimination Act 1992 (Cth)*. As outlined at 2.1 earlier, it is one of only two anti-discrimination laws in Australia which currently includes no religious exceptions.

Not only does the Religious Discrimination Bill itself provide protection to religiously-motivated ableist comments in all areas of public life – introducing a de facto ‘religious exception’ into the

⁶⁰ As confirmed by the Explanatory Memorandum, which states ‘New subsection 47C(2) clarifies that this exemption applies to facilities, goods or services provided on both a commercial and non-commercial basis.’ Human Rights Legislation Amendment Bill 2021, Explanatory Memorandum, para 59.

⁶¹ See for example Human Rights Legislation Amendment Bill 2021, Explanatory Memorandum, para 33 re the *Age Discrimination Act 2004 (Cth)*.

Act for the first time – but the associated Human Rights Legislation Amendment Bill 2021 also seeks to introduce considerations of ‘religious freedom’ in the objects clause, with the possibility that this will further limit protections against discrimination on the basis of disability.

We are especially concerned about the intention to insert a new objects clause in the *Racial Discrimination Act 1975* (Cth). As outlined at 2.1 earlier, the *Racial Discrimination Act* is the other anti-discrimination law which currently includes no religious exceptions. As with the *Disability Discrimination Act*, the statement of belief provision will introduce a ‘de facto’ religious exception into the Act for the first time, providing protection to religiously-motivated racist comments in all areas of public life.

As with the *Disability Discrimination Act*, the introduction of considerations of ‘religious freedom’ in the objects clause of the *Racial Discrimination Act* creates the possibility of further limitations on protections against discrimination on the basis of race.

It is troubling that the Government appears not to have consulted closely with organisations representing First Nations peoples, or other racial minorities most likely to need protection under the *Racial Discrimination Act*, in relation to this objects clause.

If an entirely new objects clause is to be introduced into the *Racial Discrimination Act*, it should be done only after a dedicated consultation with First Nations groups, and other groups representing racial minorities. And it should not be included as part of a legislative package which otherwise takes rights away on the basis of race.

Recommendation 16 – Amendments to objects clauses in the Age, Disability and Sex Discrimination Acts, and insertion of objects clause in the Racial Discrimination Act, should be removed

The proposed amendments to the objects clauses of the Age Discrimination Act 2004 (Cth), Disability Discrimination Act 1992 (Cth), and Sex Discrimination Act 1984 (Cth) should be removed. The proposed creation of an entirely new objects clause in the Racial Discrimination Act 1975 (Cth) should also be removed.