



Anglican Church Diocese of Sydney

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The Secretary
Parliamentary Joint Committee on Human Rights
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Submission to Parliamentary Joint Committee on Human Rights, Inquiry into the *Religious Discrimination Bill 2021* and Related Bills

1. Who are we?

This submission is on behalf of the Anglican Church Diocese of Sydney (the Diocese). The Diocese is one of twenty three dioceses that comprise the Anglican Church of Australia. The Diocese is an unincorporated voluntary association comprising 270 parishes and various bodies constituted or incorporated under the *Anglican Church of Australia Trust Property Act 1917* (NSW) and the *Anglican Church of Australia (Bodies Corporate) Act 1938* (NSW). These bodies include 40 Anglican schools, Anglicare Sydney (a large social welfare institution, which includes aged care), Anglican Youthworks and Anglican Aid (which focusses on overseas aid and development). The Diocese, through its various component bodies and through its congregational life, makes a rich contribution to the social capital of our nation, through programs involving social welfare, education, health and aged care, overseas aid, youth work and not least the proclamation of the Christian message of hope for all people.

2. The Diocese has a direct interest in this Bill, both for the sake of individual 'Anglicans in the pew' and for our 800 or so Anglican 'religious bodies' that seek to operate in accordance with the doctrines, tenets, beliefs and teachings of the Anglican Church in the Diocese of Sydney. However, we also have a significant broader interest, on behalf of all people of faith in Australia. A 'silver lining' of the rising tide of religious

intolerance in Australia is that a diversity of faith groups have come together in common cause partnership, which has provided an opportunity for the larger Christian denominations (such as Roman Catholics and Anglicans) to speak up for religions in the minority in Australia (such as Judaism, Islam and Hinduism). As such, our strong support for this bill is not merely for the sake of Anglican Christians, but for people of all faith (and those of no faith), that we might live and work together for the common good.

3. We welcome the opportunity to make this submission and we give consent for this submission to be published. Our contact details are as follows.

4. **Terms of Reference**

We note that this inquiry is being undertaken in response to a request from the Attorney-General pursuant to s 7(c) of the *Human Rights (Parliamentary Scrutiny) Act* 2011, and therefore that the focus of the inquiry is 'any matter relating to human rights' arising from the Religious Discrimination Bill 2021 and related bills (hereafter 'the Bills').

5. The expressed intent of the Bills is to acquit Australia's international obligations under the treaties and instruments listed in s 3(1) of the *Human Rights (Parliamentary Scrutiny) Act* 2011, the most relevant of which is the International Covenant on Civil and Political Rights made at New York on 16 December 1966 ([1980] ATS 23, hereafter 'ICCPR'). The focus of this submission will therefore be on the extent to which the Bills are appropriate to acquit Australia's international human rights obligations.

6. **Introduction**

To this point in our nation's history, formal legal protections against religious discrimination have been limited. Section 116 of the Commonwealth Constitution does provide a measure of protection, but it is a denial of legislative power that only constrains the Commonwealth.¹ Notwithstanding this, our 'live and let live' social compact has made space for people of all faiths and none to express their beliefs without fear of discrimination or persecution, and to form religious institutions which seek to manifest their beliefs to society as a whole. A healthy democracy is built on shared civic virtues such as inclusion, tolerance of diversity and respectful disagreement, which allow all individuals to express and live out deeply held views in public and private. But this is now changing, and legal protections are necessary to

¹ *Attorney-General (Vic); Ex rel Black v Commonwealth (DOGS case)* (1981) 146 CLR 559 at 652 per Wilson J. See also at 577 per Barwick CJ and *Hoxton Park Residents Action Group v Liverpool City Council (No 2)* (2011) 256 FLR 156; [2011] NSWCA 363 at [38]-[42] per Basten JA.

protect people from religious discrimination, in order for Australia to acquit its obligations as a signatory to the ICCPR.

7. People of faith are facing increasing hostility in Australia. The website www.australiawatch.com.au documents more than 40 real-world examples of this, which demonstrate the need for this Bill. Recent polling from McCrindle Research reveals that 29% of Australians have experienced discrimination for their religion or religious views. As the report notes, 'this equates to about half of those who identify with a religion which is six in ten Australians'. The report also notes that 'Australians who identify with a non-Christian religion are more likely to have experienced discrimination (54%) than Protestants (27%) or Catholics (32%)'. Religious discrimination is also more likely to be experienced by younger Australians who are four times as likely as their older counterparts to say they have experienced religious discrimination (51% Gen Z cf. 13% Baby Boomers).'²
8. The accounts of religious discrimination against those who identify with a non-Christian religion are confronting. The Executive Council of Australian Jewry produces an annual report into antisemitic discrimination, violence and abuse in Australia. The most recent report, for October 2019 to October 2020, documents 331 antisemitic incidents in Australia, made up of 188 attacks and 143 threats.³ Similarly, the *Islamophobia in Australia (2019)* report compiled by Dr Derya Iner reports 349 verified incidents of discrimination, harassment and violence against Muslims in the two-year period of 2016-2017. The report found that 72 per cent of victims of anti-Muslim attacks were women.⁴ Christian denominations (such as Roman Catholics and Anglicans) are strongly in support of this Bill, particularly for the sake of those who belong to non-Christian religions, who experience disproportionately more discrimination for their faith.
9. These reforms are long overdue. They address a longstanding gap in federal discrimination law, and provide protection for the citizens of NSW and South Australia, whose laws do not protect their citizens from discrimination on the basis of religious belief. The *Anti-Discrimination Act 1977* (NSW) prohibits discrimination on the basis of race, including 'ethno-religious' origin, but this only protects a small subset of people of faith (e.g., Jewish and Sikh people). The *Equal Opportunity Act 1984* (SA) prohibits discrimination on the basis of 'religious appearance or dress' in work or study only.⁵

² <https://mccrindle.com.au/wp-content/uploads/reports/Australias-Changing-Spiritual-Landscape-Report-2021.pdf>

³ <https://www.ecaj.org.au/wordpress/wp-content/uploads/ECAJ-Antisemitism-Report-2020.pdf>

⁴ https://researchoutput.csu.edu.au/ws/portalfiles/portal/49094688/36368975_Published_report_final_version.pdf

⁵ Section 85T(7).

The Features of the Bills Relevant to this Inquiry

10. The vast majority of the Bill is modelled on the other Commonwealth Anti-discrimination Acts, and is uncontentious. Some elements that were present in earlier Exposure Drafts of the Bill – such as provisions related to employee conduct rules that restricted statements of belief, and health practitioner conscientious objection provisions – no longer appear in the Bill. Given the scope of this inquiry, we confine our comments to four features of the Bill which are relevant to the intersection of the right to non-discrimination on the basis of religious belief or activity with other human rights.

11. The Scope of the Bill – Discrimination on the basis of Religious Belief or Activity

It is self-evident, and seemingly unnecessary to have to state, that the scope of the Bill is strictly limited to discrimination on the basis of religious belief and activity (or the absence thereof). And yet, it has become necessary to stress this point, because of what can only be described as a campaign of misinformation, which has sought to imply that this bill will enable discrimination against those who are disabled, those who are LGBTIQ+, those who are single mothers and so forth. For example, the Equality Australia website claims

Laws which should protect religious people from discrimination will be used to hand a licence to discriminate against LGBTIQ+ people, women, people with disability, and others.⁶

In the summary on page 1 of the Equality Australia Factsheet, the claim is made that

the Bill also *takes away* rights from people who are currently protected under anti-discrimination laws. Faith-based institutions will ***maintain special exemptions*** allowing them to discriminate against staff, students and people who rely on certain services. (emphasis added)

The fact that ‘Faith-based institutions will ***maintain special exemptions***’ is not a feature of the Religious Discrimination Bill 2021, and it is therefore disingenuous for Equality Australia to include this claim under the heading ‘What Does the Religious Discrimination Bill 2021 Do?’. As the factsheet later acknowledges (buried in a footnote), these existing exemptions are in ss.37 and 38 of the *Sex Discrimination Act* 1984. These exemptions have been referred to the ARLC for review, and nothing in this Bill has, or will have, *any impact* on the operation of the *Sex Discrimination Act* 1984.⁷ If a person has been discriminated against because of (for example) their sexual orientation, pregnancy status or marital status, this has been, and will always be a matter for the *Sex Discrimination Act* 1984, not the *Religious Discrimination Bill/Act*.

⁶ <https://equalityaustralia.org.au/freedom-from-discrimination/>, accessed 19 December 2021.

⁷ A point stressed in the redundant Note 2 to Clause 7(2).

12. The government has established a pathway for the removal of these so called ‘special exemptions’, which is contingent on the Religious Discrimination Bill becoming law. The remit of the ALRC review into religious exemptions in anti-discrimination legislation is to ‘limit or remove altogether (if practicable) religious exemptions to prohibitions on discrimination, while also guaranteeing the right of religious institutions to reasonably conduct their affairs in a way consistent with their religious ethos’. Faith groups support this review, recognising that the exemptions in the Sex Discrimination Act are too broad, and give religious bodies the right to do many things that they do not, in fact, do, and are not wanted or required to conduct their affairs in a way consistent with their religious ethos. For example, these exemptions give religious schools the right to expel a student on the basis of their sexuality, which is a right that religious schools do not want, and do not use. A Religious Discrimination Act is rightly a precursor to the ALRC review into, and removal of, religious exemptions in other acts, because it will establish, in positive terms, what religious bodies require in order ‘to reasonably conduct their affairs in a way consistent with their religious ethos’. Religious bodies do not want *carte blanche* to discriminate on the basis of sex, age, disability or race, but merely want to be able to operate in accordance with the doctrines, tenets, beliefs or teachings of their religion. Faith groups fully support ‘limit[ing] or remov[ing] altogether (if practicable) religious exemptions to prohibitions on discrimination’, once there is a mechanism for religious bodies to ‘reasonably conduct their affairs in a way consistent with their religious ethos’.
13. The rhetoric about ‘maintaining special exemptions’ is thus doubly misleading, in that it creates an impression that the existing overly-broad exemptions will remain, and that the Religious Discrimination Bill will only make matters worse.

For example, Equality Australia CEO Anna Brown is reported as saying, ‘Sadly, laws across Australia currently allow LGBTQ+ teachers, students and staff to be fired or expelled from faith-based schools and educational institutions simply because of who they are or whom they love’, and that she fears that the Religious Discrimination Bill will give new powers to discriminate, in addition to existing exemptions.⁸ Similarly, the Equality Australia fact sheet says

These broad exemptions [in the *RDB* 2021] are also ***in addition to existing exemptions*** that allow faith-based organisations (including schools) to fire, expel and treat unfairly women, LGBTQ+ people, and people who are pregnant, divorced or in de facto relationships. (emphasis added)

14. An analysis of the Religious Discrimination Bill 2021 needs to focus on this Bill, without muddying the waters with obfuscating statements such as ‘It is already legal for religious schools to fire, expel or treat unfairly LGBT students and staff, and the

⁸ <https://www.abc.net.au/news/2021-04-08/openly-gay-teacher-karen-pack-sacked-morling-college-email/100055422>

Religious Discrimination Bill put forward by government won't do anything to change this.⁹ This statement is irrelevant at best and misleading at worst.

15. Sensationalist headlines – such as ‘Teacher sacked for being gay’ – are simply not relevant in a discussion about the *Religious Discrimination Bill* 2021. If that were genuinely the case, it would be a matter for the *Sex Discrimination Act* 1984. However, behind most of these sensationalist headlines is a very different story – which *is* relevant to the *Religious Discrimination Bill* 2021 – about a teacher whose employment was terminated because they were unable in good conscience to sign a statement of belief, which was a condition of their employment.
16. In a much-reported example of a teacher supposedly (if one were to believe the headlines) ‘sacked for being gay’, her own words tell a different story. She writes ‘A Christian school fired me earlier this year ***because of my belief*** that a person can be a Christian and be gay’ [emphasis added].¹⁰ She had previously agreed with the doctrinal position taken by the School, and signed the School’s Statement of Belief affirming this. However, she reports that ‘[after] a long journey of research and reading into theology, history, psychology and science... I am now one of a rapidly growing number of people who see no incompatibility between having a genuine Christian faith and affirming LGBTQIA+ people and relationships.’¹¹ She recognises that ‘[i]n relation to sexuality, the school’s Statement of Belief and my view do not align.’¹² The school did not agree with her that it needs ‘queer Christian role models’, nor were they willing to accept her proposal that she would ‘teach the school’s ideas about sexuality *while acknowledging the multiple perspectives within the Christian community*’ (emphasis added).¹³ As her own words make clear, she is ‘convinced that Christian churches and organisations can be and should be fully accepting and inclusive of people of all genders and sexual identities’,¹⁴ and that she wanted to remain at the school to be an agent of change for a form of Christianity that affirms LGBTQIA+ sexual relationships. In an interview on The Project, when asked why she wanted to remain at the school, given its conservative sexual ethics, she said:

You can’t be what you can’t see. It’s really hard to feel like you have an option of a role model, something to grow into, if you can’t identify with the people that you are taught by and that you aspire to. I wish that as a teenager and as a High School student I had had role models of queer people

⁹ <https://www.abc.net.au/triplej/programs/hack/hack/13639372>, transcript of Anna Brown, from 3:43-3:57.

¹⁰ <https://www.smh.com.au/national/my-sin-of-being-gay-got-me-legally-fired-20211125-p59c06.html>

¹¹ <https://www.smh.com.au/national/i-lost-my-job-for-coming-out-as-gay-this-needs-to-change-20210812-p58i3b.html>

¹² <https://www.smh.com.au/national/my-sin-of-being-gay-got-me-legally-fired-20211125-p59c06.html>

¹³ <https://www.smh.com.au/national/i-lost-my-job-for-coming-out-as-gay-this-needs-to-change-20210812-p58i3b.html>

¹⁴ <https://www.smh.com.au/national/i-lost-my-job-for-coming-out-as-gay-this-needs-to-change-20210812-p58i3b.html>

of faith... and so that is what I want to do, and I believe that Christian Schools need people like that there.¹⁵

17. Correctly understood, the teacher's sexuality is not the key issue in this case. A heterosexual teacher who held the same theological views on sexuality and relationships, and therefore was unable to sign the Statement of Belief, would also have had his or her employment terminated. Conversely, there are those in the LGBTIQ+ community who self-identify as 'celibate gay Christians', who would be able to sign the school's Statement of Belief. This example fits squarely in the *Religious Discrimination Bill 2021*, not the *Sex Discrimination Act 1984*, and turns on the operation of Clause 7.

18. Clause 7 of the Religious Discrimination Bill 2021

But for clause 7, the action of the school to terminate the employment of this teacher would, *prima facie*, be discrimination on the basis of religious belief or activity. However, the effect of clause 7(2) is to declare that the school's actions are not religious discrimination, provided that the school was acting in accordance with the doctrines, tenets, beliefs or teachings of its religion (and provided that the school had expressed this in a publicly available policy, as required by clause 7(6)).

19. Clause 7 is an essential feature of any form of the Religious Discrimination Bill. Without it, religious bodies would not be able to function to fulfil their religious purpose, because their actions necessarily entail preferential decisions based on religion. For example, without clause 7, it would be religious discrimination for a Christian congregation to advertise that applicants for the position of minister had to be a Christian.

20. Clause 7 is a significant advance on existing State and Territory Anti-discrimination Acts, which provide broad exemptions to religious bodies to allow them to discriminate. As noted above, an approach based on broad exemptions is flawed and deeply problematic, firstly because the exemptions are too broad, secondly because it characterises religious bodies as 'discriminators', and thirdly because it frames religious freedom as an exception to another right (which effectively renders religious freedom a second order human right under our domestic law, contrary to its status as one of the few non-derogable human rights under Article 4 of the ICCPR).

21. The virtue of clause 7 is that it flips the paradigm of 'exemptions', and declares the long-settled principle of international human rights law that the legitimate exercise of religious freedom 'is not discrimination'. This also accords with the self-understanding that religious bodies have of themselves – that when (say) a Muslim school prefers to employ Muslim teachers, it is not because it is actively discriminating against Christians, Jews and Buddhists, but because it is fulfilling its

¹⁵ <https://twitter.com/theprojecttv/status/1425028829127626767?lang=en>

religious purpose to be a Muslim school by seeking to have teachers who can model the Islamic faith to students.

22. To return to the example of the teacher sacked because her views no longer aligned with the school's Statement of Belief, the human rights question is how to balance the right of the religious school to maintain its doctrine, tenets, beliefs and teachings with the right of the individual to live in accordance with her or his own religious beliefs. Clause 7 resolves this in favour of the religious body, in line with the well-established principle of international human rights jurisprudence that the right of the individual to freedom of religious belief does *not* operate to compel the religious body to change its doctrine to accommodate the individual with a divergent doctrine. This would lead to tyranny of the majority by many minorities, forcing a religious body to accept mutually contradictory doctrines concurrently. This principle is reflected, for example, in the decision of the United Nations Human Rights Committee (UNHCR) in *William Eduardo Delgado Páez v Colombia*.¹⁶ Mr Delgado was a teacher of religion and ethics at a secondary school in Leticia, Colombia. He became an advocate of 'liberation theology'. His progressive theological position was not supported by the Church, and the Church withdrew his accreditation to teach religion. The Committee found that the requirement, by the Church authorities, that Mr Delgado teach the Catholic religion in its traditional form did not breach his right in Article 18 of the ICCPR to profess or manifest his religion, and did not breach his right under Article 19 to freedom of expression and opinion. Critically, it also found that "neither the terms of Colombian law nor the application of the law by the courts or other authorities discriminated against Mr. Delgado, and finds that there was no violation of [*the individual's right to non-discrimination before the law*] in article 26". This demonstrates that it is *not* discrimination when a religious body takes such actions in maintenance of its unique religious ethos, which is the principle articulated in clause 7. The religious freedom of the individual is protected provided he or she is free to leave a religious group with whom they do not agree, and form or join a new religious body with likeminded believers. There is a similar principle applied in the European Court of Human Rights, in *Sindicatul "Pastorul Cel Bun" v Romania* (2014) 58 EHRR 10, which was cited with approval by the Full Court of the Federal Court of Australia in *Iliafi v The Church of Jesus Christ of Latter-Day Saints Australia* [2014] FCAFC 26 at [78].
23. The approach taken in Clause 7 is welcome, because it incorporates this principle in Australian law for the first time.
24. Clause 11 - limited override of Inconsistent State and Territory Legislation
Once passed, clause 7 will establish this principle in Commonwealth Anti-discrimination law. However, clause 7(2) only applies 'under this Act', which means

¹⁶ *William Eduardo Delgado Páez v. Colombia*, Communication No. 195/1985, U. N. Doc. CCPR/C/39/D/195/1985 (1990).

that it will have no effect on inconsistent State and Territory legislation. That is, even though a federal Religious Discrimination Act declares that it is *not* religious discrimination for a Muslim school to preference the employment of Muslim teachers, if a State discrimination Act says that this *is* religious discrimination, then an aggrieved non-Muslim teacher could bring an action under the State legislation.

25. Victoria is a prime example of the need for clause 11, once the *Equal Opportunity (Religious Exceptions) Amendment Act 2021* comes into effect. This Act is an unprecedented and extraordinary overreach by the Victorian government into the internal operations of religious bodies. The motivation for the amendments was a concern that LGBTIQ+ students and teachers were being expelled or sacked because of their sexuality, but the amendments disproportionately affect religious activities of the school, which have nothing to do with human sexuality. The Act will prevent, for example, Muslim schools from preferring to employ Muslim Mathematics teachers, and will prevent Christian churches for advertising for a Church secretary who must profess the Christian faith. In short, the amendments are a sledgehammer used to crack a peanut.
26. To understand the draconian nature of these amendments, it is necessary to recognise two features of the Religious Education sector. First, there are not enough teachers of a given religious faith for the number of teaching positions for religious schools of that faith. Second, there are a range of ideological stances taken by religious schools about the employment of teachers – while a minority of schools require all teachers to profess the religious faith of the school, a majority of schools welcome teachers of other faiths or no faith who are prepared to ‘support the religious ethos of the school’ (or words to that effect), but at the same time seek to establish the religious culture of the school by having a ‘critical mass’ of teachers who profess and model the faith, and by preferencing the employment of teachers of that faith where possible, especially in key leadership positions.
27. Given this context, the Victorian amendments have established an ‘inherent requirements’ regime so restrictive that most Christian schools may find that the only two positions for which it will be possible to make employment decisions on the basis of a teacher’s faith or lack thereof will be the Chaplain and the Principal (and perhaps some other key leadership roles). This is the outworking of the ‘inherent requirements’, as articulated in the Bill’s second reading speech.

Another important factor in determining whether conformity with religion is an inherent requirement of a role is to consider how the requirement is applied to other employees with similar roles at the religious body or school. For example, a religious school may state that it is an inherent requirement of all teaching positions that conformity with the religion of the school is required because all teachers carry pastoral care duties. However, it may be that for various reasons, the school hires several teachers who are unable to meet this inherent requirement. This would suggest that religious conformity may not be an actual inherent requirement of the

teaching roles. While the school may prefer that its teachers conform with the religion, **the test is not about preference**, but a genuine inherent requirement in practice.¹⁷ [emphasis added]

That is, this amendment will outlaw the well-established current practice of the majority of Christian schools, who preference (but do not mandate) the employment of Christian staff (whether because teacher shortages preclude a mandate, or because of a policy decision to have a diverse staff team).

28. This makes a mockery of the claim earlier in the speech that ‘the Andrews Labor government is committed to preserving the fundamental rights of religious bodies and schools to practice and teach their faith, and to shape their religious ethos’. A key way in which the religious ethos of a school is maintained is by being embodied in a sufficient number of teachers who function as role models for the students. If there are only a handful of teachers in a school who are Christians, it is nonsense to think that their example and teaching will be sufficient to shape the culture of the organisation as a whole.

29. As an aside it is instructive to note that, in Victoria, political belief or activity is a protected attribute, and it is therefore unlawful to discriminate on the basis of a person’s political views. However, section 37 provides the following exception:

An employer may discriminate on the basis of political belief or activity in the offering of employment to another person as a ministerial adviser, member of staff of a political party, member of the electorate staff of any person or any similar employment.

Victorian members of Parliament have given themselves a right that they now deny to religious bodies, in that they can freely preference in employment on the basis of political belief or activity for all the members of their staff, regardless of the role.

30. The Victorian legislation undermines the rights articulated in Article 18 of the ICCPR. Article 18(1) protects the right of people of faith to manifest their religion ‘in community with others’. Religious bodies are a key means by which people of faith in Australia come together to manifest their religion. To the extent that it denies all religious bodies the right to restrict employment and membership of these bodies to adherents of that religion, the Victorian legislation is inconsistent with Article 18(1). Furthermore, the limits it places on schools are inconsistent with the right of parents to ‘ensure the religious and moral education of their children in conformity with their own convictions’ found in Article 18(4). The decision of the European Commission of Human Rights in *Ingrid Jordebo Foundation of Christian Schools v Sweden* noted the important role that faith-based schools have in providing a bulwark against State education systems where students are ‘led to think only in the

¹⁷ https://www.parliament.vic.gov.au/images/stories/daily-hansard/Assembly_2021/Legislative_Assembly_2021-10-28.pdf, Hansard pages 4374-4375.

directions that are decided by the political majority of the Parliament'.¹⁸ Similar, the Ruddock Review noted the important contribution that faith-based schools provided to pluralism in the Australian education system. Clause 11 is an appropriate mechanism to ensure that the right of parents to send their children to the school of their choice and be taught in accordance with their religious convictions is respected and protected.

31. The Commonwealth government is a signatory to the ICCPR, which means that individuals may make complaints to the United Nations Human Rights Committee that Australian legislation (including legislation of individual States and Territories) is inconsistent with the protections offered by the ICCPR. Under the ICCPR, the Commonwealth is held to account for the actions of its States and Territories for failing to protect human rights. This provides a rationale for the limited override of inconsistent State or Territory legislation in clause 11, where that legislation undermines the rights protected in Article 18. By enacting clause 11, the Commonwealth Government is exercising its duty as a signatory to the ICCPR to establish a national minimum standard in relation to the freedom of religious educational institutions to maintain their religious ethos through employment.

32. Clause 12 – Statements of Belief

The provisions of clause 12 have also been subject to a sustained campaign of misinformation. The Equality Australia Factsheet claims that clause 12 'takes away existing anti-discrimination protections' because it makes discriminatory statements lawful. This is misleading, because the kinds of statements of belief covered by clause 12 which '*could be* discrimination today' [emphasis added] is an empty set.

33. Although there is some limited authority for the proposition that in certain contexts statements alone can amount to discrimination (see, for example, *Nationwide News Pty Ltd v Naidu*¹⁹ and *Singh v Shafston Training One Pty Ltd and Anor*²⁰), these kinds of statements would not have qualified as 'statements of belief' for the purpose of clause 12, because they would have failed the other hurdles in clause 12, that a statement must not be malicious, and must not harass, threaten, intimidate or vilify, and must not amount to the urging of a serious criminal offence. For example, Mr Naidu was systematically bullied and harassed by a superior over a period of 5 years, and Mr Singh was called derogatory (racist) names and maliciously exposed to severe public ridicule.
34. It is instructive to note that Equality Australia cannot point to a single example, across all of decisions of the various anti-discrimination tribunals in Australia, where clause 12(1)(a) would have had made any difference to the outcome. That is because

¹⁸ *Ingrid Jordebo Foundation of Christian Schools v Sweden* (European Commission of Human Rights, Application No. 11533/85, 7 May 1985).

¹⁹ *Nationwide News Pty Ltd v Naidu*; *ISS Security Pty Ltd v Naidu* [2007] NSWCA 377.

²⁰ [2013] QCAT 008 (ADL051-11).

non-malicious, non-harassing, non-threatening, non-intimidating, and non-vilifying statements of belief do not constitute discrimination. Clause 12(1)(a) should be understood as nothing more than a provision ‘for the avoidance of doubt’, not as a provision that ‘takes away existing anti-discrimination protections’.

35. The examples cited by Equality Australia (such as statements that ‘homosexuality is a sin’, ‘God made only men and women’, and ‘people who don’t believe in Jesus can’t get into heaven’) are not discriminatory now, and clause 12(1)(a) will make no difference to this.
36. Where clause 12 does have work to do is in relation to clause 12(1)(b), which will protect Statements of Belief from being a contravention of subsection 17(1) of the *Anti-Discrimination Act 1998* (Tas.). This has been dubbed the ‘Porteous Clause’, because of a complaint lodged under subsection 17(1) against Archbishop Julian Porteous and the entire Australian Catholic Bishops Conference in relation to a document distributed to parents of Catholic school students that respectfully and sensitively expounded Catholic teaching on marriage. Subsection 17(1) makes unlawful ‘any conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of [a protected] attribute’. The problem with this law is that reasonably ‘offend’, as interpreted by the Tasmanian anti-discrimination commissioner, establishes a very low bar for complaints.
37. In addition to the complaint against Archbishop Porteous, section 17(1) has also been the basis of a complaint against Presbyterian pastor Campbell Markham, in relation to written material in his blog, and multiple complaints against Dr David Gee in relation to his street preaching in Hobart, because the complainant was offended by their statements of belief in relation to human sexuality and marriage.
38. Subsection 17(1) of the *Anti-Discrimination Act 1998* (Tas.) is an inappropriate restriction on the right protected by Article 18 of the ICCPR to manifest one’s religion in public, and the right to freedom of expression protected by Article 19. The Commonwealth override of this law is necessary to ensure that Australia upholds its obligations as a signatory to the ICCPR.

Three Omissions, Inconsistencies and/or Drafting Errors.

39. We wish to draw to the attention of the Committee three possible omissions, inconsistencies and/or drafting errors in the Bills.
40. *The Burden of Proof in Indirect Discrimination*
Other Commonwealth Discrimination Acts stipulate that the burden of proof in relation to the reasonableness test for indirect discrimination lies on the person who did the potentially discriminatory act or imposed the condition. See s. 7C of the *Sex Discrimination Act 1984*, s. 6(4) of the *Disability Discrimination Act 1992* and s. 15(2)

of the *Age Discrimination Act* 2004. A provision to this effect was included in both Exposure Drafts of the Religious Discrimination Bill (clause 8(7) in ED1 and clause 8(8) in ED2), in the following terms:

Burden of proof

For the purposes of subsection (1), the person who imposes, or proposes to impose, the condition, requirement or practice has the burden of proving that the condition, requirement or practice is reasonable.

This clause has been inexplicably omitted in the *Religious Discrimination Bill* 2021. As a matter of consistency with other Discrimination Acts, this omitted clause should be restored.

Recommendation: Insert new subclause 14(3)

Burden of proof

(3) For the purposes of this subsection, the person who imposes, or proposes to impose, the condition, requirement or practice has the burden of proving that the condition, requirement or practice is reasonable.

41. Timing of the Commencement of the Amendments to Section 11

There appears to be a minor drafting error in clause s 2(1) of the *Religious Discrimination (Consequential Amendments) Bill* 2021 ('RDCA Bill') in relation to the timing of the commencement of the amendments in Schedule 2. The Schedule 2 amendments alter Section 11 of the Religious Discrimination Act, contingent on the commencement of the Equal Opportunity (Religious Exceptions) Amendment Act 2021 (Vic.), which are intended to ensure that religious educational institutions in Victoria can continue to seek to prefer to employ staff who share or support the religious ethos of the educational institution. The apparent error is that the timing is tied to 'the commencement of **Division 2** of Part 2' of the Victorian Act, where it should be 'the commencement of **Division 1** of Part 2', on the basis that Division 1 relates to Religious Educational Institutions, whereas Division 2 relates to *other* religious bodies (not schools) providing 'government funded goods and services'.

Recommendation: In the table in clause s 2(1) of the Religious Discrimination (Consequential Amendments) Bill 2021, replace the words 'Division 2 of Part 2' with the words 'Division 1 of Part 2'.

42. Defining the Scope of the Publicly Available Policy of a Religious Body

There is an inconsistency between clause 7(7) and clause 11(1)(b), in that there are two different mechanisms for determining the scope of a religious educational institution's 'publicly available policy'. The approach in clause 7(7) allows the Minister to determine the requirements of the policy. The comments in para 129 of

the Explanatory Memorandum indicate that it is *intended* that the Minister's power under this subsection will be limited in scope:

It is anticipated that guidance would be based on the kinds of matters set out in the Religious Freedom Review Report of the Expert Panel on this subject. The Expert Panel suggested that a publicly available policy should outline the precepts of the religion that relate to preferencing employees, outline the school's own position on this issue, explain how the school's policy will be enforced, and that this policy should be publicly available, so that prospective employees can make choices about making an application. Beyond providing general guidance on the kinds of matters that a policy could address, guidance would be limited to the form, presentation and availability of policies.

43. However, although this might be the intent behind clause 7(7), the Minister's power is not in fact limited in this way. Clause 7(7) is too broad, because it would allow the Minister to stipulate the *content* of an employment policy, and not merely its *form, presentation and availability*. There is a quite different approach to the same subject matter in clause 11(1)(b), which prescribes the scope of the publicly available policy rather than leaving it to ministerial discretion. It must be

a written policy that:

- i. outlines the religious body's position in relation to particular religious beliefs or activities; and
- ii. explains how the position in subparagraph (i) is or will be enforced by the religious body; and
- iii. is publicly available, including at the time employment opportunities with the religious body become available.

44. As a matter of consistency and clarity, there should be a single mechanism for determining the scope of a 'publicly available policy'. The approach in clause 7(7) is not appropriate, for the reasons already articulated. We therefore recommend that the approach in 11(1)(b) be replicated in clause 7, and similarly in clauses 9(3), 9(5) and 40(3), which address the matter of a publicly available policy for other types of religious bodies.

Recommendation: Modify clause 7(6) and delete 7(7), as marked up below

(6) If a religious body that is an educational institution engages in conduct mentioned in subsection (2) or (4) in relation to the matters described in section 19 (about employment):

~~(a) the conduct must be in accordance with a publicly available policy; and~~

~~(b) if the Minister determines requirements under subsection (7)—the policy, including in relation to its availability, must comply with the requirements.~~

~~(7) The Minister may, by legislative instrument, determine requirements for the purposes of paragraph (6)(b).~~

a written policy that:

- i. **outlines the religious body's position in relation to particular religious beliefs or activities; and**

- ii. explains how the position in subparagraph (i) is or will be enforced by the religious body; and
- iii. is publicly available, including at the time employment opportunities with the religious body become available.

Parallel amendments will be required in 9(3)(d-e), 9(5)(d-e), the deletion of 9(7), amendments to 40(2)(d-e) and the deletion of 40(3).

Three Recommended Improvements

45. Extending Clause 11 to apply to all religious bodies

The limited override of State and Territory law in clause 11 only applies to protect employment preferencing by religious *educational institutions*. It will not, for example, protect churches, synagogues and mosques. It is clear from the Victorian Minister's second reading speech for the *Equal Opportunity (Religious Exceptions) Amendment Bill 2021* (Vic) that, while the general exemptions for 'priests, ministers, rabbis, imams or other members of a religious order' will remain, 'the intention of the amendments' is that all other employees of the religious bodies 'will be governed by the employment provisions being introduced by this Bill'.²¹ This means, for example, that a mosque may not be able to require its secretary be a Muslim, unless they can prove that Muslim faith is an inherent requirement of the role.

46. The limited scope of the override in clause 11 has the somewhat bizarre outcome that the right of the Muslim school to preference the employment of (say) Muslims as Mathematics teachers is protected, but the right of a mosque to preference the employment of a Muslim secretary is not protected.

Recommendation: Broaden the scope of Clause 11 to cover all religious bodies, by deleting the words 'that is an educational institution' and 'that are educational institutions' where appearing in 11(1), 11(3)(b) and 11(4).

47. Reasonable Adjustments

The Bill should contain a 'reasonable adjustments' provision, equivalent to the provisions in s. 5 and s. 6 of the *Disability Discrimination Act 1992*. The current framing of the Bill addresses discrimination 'on the ground of' religious belief or activity. However, if a religious person (such as an employee) acts in a particular way based on their religious belief or activity (e.g., a Muslim is absent from a work setting for 20 minutes at a particular time for prayer as part of a religious obligation) and another non-religious employee acts in the same way in the same circumstances but without a religious belief or activity (a non-religious employee is absent from a work setting for 20 minutes at the same time for a 'smoko') and the employer applies the

²¹ https://www.parliament.vic.gov.au/images/stories/daily-hansard/Assembly_2021/Legislative_Assembly_2021-10-28.pdf, Hansard pages 4376-4377.

same detrimental treatment to both employees because of their absence, the employer will argue that they have not discriminated against the religious person *on the ground of* their religious belief or activity but on the ground of their absence.

With respect to disability discrimination, the strict application of the rule of detriment ‘on the ground of disability’ has been found to provide insufficient protection. If, for example, a disabled employee is slow at a task and makes errors because of their disability and a non-disabled employee is similarly slow and makes errors because they don’t care about their work quality, the employer who sanctions each employee the same will claim that the sanction is on the ground of poor work standard, not disability. For this reason, the DDA includes ‘reasonable adjustments’ provisions both in relation to direct discrimination (s. 5) and indirect discrimination (s. 6).

The same principles ought to apply to religious belief and activity, and require an employer to make reasonable adjustments for an employee’s genuine religious beliefs unless to do so would cause the organisation substantial hardship. For example, where there are sufficient staff to allow flexible rostering that would accommodate those whose religion does not permit them to work on Saturdays, such as Jews and Seventh Day Adventists, it would be discrimination if the employer refuses to make the reasonable adjustments. Conversely, if it was *not* reasonable – for example, if an emergency requires *all* staff to work a full weekend – then an employer would not be required to adjust rosters to accommodate the religious obligations of some employees.

Such a ‘reasonable adjustments’ provision would be functionally similar to Title VII of the Civil Rights Act of 1964, which requires employers to ‘reasonably accommodate an employee’s or prospective employee’s religious observance or practice’ unless this would impose ‘undue hardship on the conduct of the employer’s business.’²²

Recommendation: Add the following definition to clause 5(1)

reasonable adjustment: an adjustment to be made by a person is a reasonable adjustment unless making the adjustment would impose an unjustifiable hardship on the person.

This drafting replicates the definition at s. 4 of the Disability Discrimination Act 1992.

Recommendation: Label the existing content of Clause 13 (direct discrimination) as subclause (1), and add the following subclauses.

(2) A person (the discriminator) also discriminates against another person (the aggrieved person) on the ground of the religious belief or activity of the aggrieved person if:

²² <https://www.eeoc.gov/statutes/title-vii-civil-rights-act-1964>, SEC. 2000e.(j).

- (a) the discriminator does not make, or proposes not to make, reasonable adjustments for the aggrieved person in relation to their religious belief or activity; and
- (b) the failure to make the reasonable adjustments has, or would have, the effect that the aggrieved person is, because of their religious belief or activity (including engaging in conduct or refusing to engage in conduct on the basis of their religious belief or activity) treated less favourably than a person without the religious belief or activity would be treated in circumstances that are not materially different.

(3) For the purposes of this section, circumstances are not materially different because of the fact that, because of their religious belief or activity, the aggrieved person requires adjustments.

This drafting is modelled on s. 5(2) and 5(3) of the Disability Discrimination Act 1992

Recommendation: Add the following to Clause 14 (indirect discrimination)

(3) a person (the discriminator) also discriminates against another person (the aggrieved person) on the ground of the religious belief or activity of the aggrieved person if:

- (a) the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and
- (b) because of the religious belief or activity, the aggrieved person would comply, or would be able to comply, with the requirement or condition only if the discriminator made reasonable adjustments for the person, but the discriminator does not do so or proposes not to do so; and
- (c) the failure to make reasonable adjustments has, or is likely to have, the effect of disadvantaging persons who hold the religious belief, or who engage in, the religious activity.

(4) Subsection (3) does not apply if the requirement or condition is reasonable, having regard to the circumstances of the case.

Burden of proof

(5) For the purposes of this section, the person who imposes, or proposes to impose, the condition, requirement or practice has the burden of proving that the condition, requirement or practice is reasonable.

This drafting is modelled on s. 6(2) – (4) of the Disability Discrimination Act 1992. Note that 14(5) is the renumbered 14(3) proposed above in paragraph 40.

48. Protecting employees and others – ‘legitimate aim’ and ‘least restrictive means’

Recommendation 2 of the Ruddock Review was that:

Commonwealth, State and Territory governments should have regard to the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights when drafting laws that would limit the right to freedom of religion.

Article 18(3) of the ICCPR only permits limitations on the manifestation of religious belief and activity where it is ‘**necessary** to protect public safety, order, health, or morals or the fundamental rights and freedoms of others’ [emphasis added]. In clarifying what “necessary” means in this context, the Siracusa Principles stipulate that any limitation to a protected right must be in ***pursuit of a legitimate aim*** and proportionate to that aim (#10), and that the limitation imposed must ‘use no more restrictive means than are required for the achievement of the purpose of the limitation’ (#11).

Clause 14 permits indirect discrimination against a person on the basis of the religious belief or activity where a condition, requirement or practice is ‘reasonable’. It is therefore squarely in the category of laws addressed by Ruddock Recommendation 2. Clause 14(2) lists three ‘considerations relating to reasonableness’, but these do not adequately reflect Article 18(3)’s requirement that only ‘necessary’ limitations be permitted, as understood in light of Siracusa Principles 10 and 11. The current form of clause 14(2) is deficient, because it is modelled on the drafting of other Anti-discrimination Acts, which implement the Article 26 rights to equal and effective protection against discrimination before the law. This right is not protected to the same ‘necessary’ standard.

Recommendation: modify the ‘considerations relating to reasonableness’ in clause 14(2) to reflect Siracusa Principles #10 and 11.

(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 **imposition of a condition, requirement or practice is in pursuit of a legitimate aim, and the** disadvantage is proportionate to the result sought ~~by the person who imposes, or proposes to impose, the condition, requirement or practice; and~~
- d) **whether there was another means available to achieve the result sought with a less restrictive effect on the person holding or engaging in the religious belief or activity than the condition, requirement or practice imposed.**

These modifications to clause 14(2) will provide a bulwark against the overreach of employee conduct rules that seek to restrict the private expression of religious belief outside of work.

An alternative means of achieving a similar result would be via a targeted amendment to the clause 19, which deals specifically with statements of belief in the context of employment.

Alternative Recommendation: Add subclause (3) to clause 19.

(3) It is unlawful discrimination for an employer to apply an employee conduct rule that restricts or prevents a person from making, or impose a detriment on a person for making, a statement of belief, unless the employer demonstrates that

- (a) the rule was necessary for a legitimate aim of the employer’s business or activity and proportionate to that aim, and no rule with a less restrictive effect on the employee’s freedom of expression would have achieved that result; and**
- (b) the application of the rule to the particular statement of belief was necessary for a legitimate aim of the employer’s business or activity and proportionate to that aim, and there was no other means available with a less restrictive effect on the employee’s freedom of expression to achieve that result.**

Three Matters for Future Consideration

49. The three recommended improvements above were selected on the basis that they address pressing issues of current concern (i.e., the overreach of the amendments to the Victorian Anti-discrimination legislation, religious employees who are **not** afforded reasonable adjustments, and overly restrictive employee conduct rules). There are other issues with the Bill that are *potential* areas of concern, which are yet to be actualised. As such, these are raised as matters for future consideration. We note that clause 76 requires the Religious Discrimination Commissioner to conduct a review of the operation of the Act within 2 years of its commencement, and recommend that this would be an opportune time to consider these matters.

50. Discrimination by qualifying body against religious bodies

The implication of the definition of ‘qualifying body’ in clause 5 is it is only unlawful, by virtue of clause 21, for a qualifying body to discriminate **against an individual**. It would not be unlawful, for example, for a government body to deny accreditation to a religious school on the basis of religious belief or activity, such as has occurred in overseas jurisdictions. For example, the Law School of the Trinity Western University was denied accreditation by the Law Society of British Columbia because of the requirement of the University that all students sign a covenant affirming Christian belief.²³

51. Establishing the religious beliefs of a religious body

For the purposes of establishing the religious beliefs *of an individual*, the Bill rightly uses a subjective test – ‘a belief that the person genuinely considers to be in accordance with the doctrines, tenets, beliefs or teachings of that religion’. However, when establishing the religious beliefs *of a religious body* in clauses 7(2), 9(3) and 40(2)(c), the test is what ‘a person of the same religion as the religious body could reasonably consider to be in accordance with the doctrines, tenets, beliefs or

²³ <https://www.lawsociety.bc.ca/about-us/twu-accreditation/>

teachings of that religion’. Notwithstanding the assertions to the contrary in paragraph 97 in the EM, this formulation will inevitably require ‘courts to make decisions on matters of religious doctrine’, which they are ill-equipped to do. Paragraph 98 helpfully notes that:

A court may still have regard to any foundational documents that a religious body considers supports the conduct under consideration, where those documents are used to demonstrate that particular religion’s doctrines, tenets, beliefs or teachings.

However, it would be better for this principle to be embodied in the Bill, by allowing a religious body to adopt a statement of its religious beliefs which should be deemed to be sufficient evidence of what is in accordance with its doctrines, tenets, beliefs or teachings.

52. *Referencing the ICCPR in the Objects of the Act*

Paragraph 7 of the *Human Rights Legislation Amendment Bill 2021* would insert into the *Racial Discrimination Act 1975* (RDA) a new subsection 2A(1)(a) to specify that an object of the Act is ‘to give effect to certain provisions of the International Convention on the Elimination of All Forms of Racial Discrimination’. This would bring the RDA into alignment with the other Commonwealth Anti-discrimination Acts, which already have a similar provision in their Objects (s. 3(a) of the *SDA* 1984 and s. 3(e) of the *ADA* 2004), or elsewhere (s. 12(8)(ba) of the *DDA* 1992). Although there is a reference to the relevant International Conventions in clause 64 of the Bill, it is curiously inconsistent that the Bill does not articulate this as part of its objects. Future consideration should be given to adding a new subclause to the clause 3 that adds the following object – ‘to give effect to certain provisions of the International Covenant on Civil and Political Rights and to provisions of other relevant international instruments.’ (This drafting is modelled on section 3(a) of the *SDA* 1984).

Conclusion

53. We support the *Religious Discrimination Bill 2021* and related bills. All of the provisions currently in the Bill are necessary to ensure that Australia acquits its obligations as a signatory to the ICCPR. We have highlighted three omissions, inconsistencies or error that should be corrected, and have recommended three improvements to the Bill so that it might more adequately achieve its intended purpose. We thank you for the opportunity to make this submission, and would welcome an opportunity to appear before the Committee in relation to this Bill.

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Chair, Religious Freedom Reference Group

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