

Human Rights Unit, Integrity Law Branch, Integrity and Security Division  
Attorney-General's Department  
3-5 National Circuit  
Barton ACT 2600

2 October 2019

Dear Officer,

**RE: Religious Freedom Bills 2019 – Exposure Draft**

The Australian National University Law Reform and Social Justice Research Hub ('ANU LRSJ Research Hub') welcomes the opportunity to provide this submission to the Attorney-General's Department, to provide comments on the package of legislative reforms on religious discrimination.

The ANU LRSJ Research Hub falls within the ANU College of Law's Law Reform and Social Justice program, which supports the integration of law reform and principles of social justice into teaching, research and study across the College. Members of the group are students of the ANU College of Law, who are engaged with a range of projects with the aim of exploring the law's complex role in society, and the part that lawyers play in using and improving law to promote both social justice and social stability.

**Summary of Recommendations:**

1. Religious institutions should generally not be exempted from the Bill's prohibitions on religious discrimination.
2. The Bill should adopt more explicit criteria of 'religious beliefs'.
3. In relation to cl 5 and cl 10, provide a definition for 'reasonableness' that courts can apply.
4. The exception under cl 27 of the Bill should extend not only to serious offences but also counselling, promoting, encouraging or urging conduct that breaches anti-discrimination laws. We also recommend removing cl 41 to accommodate for the revised cl 27.
5. Remove cl 9 which refers to engaging in conduct for two or more reasons, or alter it to require the religious reason to be the dominant reason.
6. Remove the requirement of 'unjustifiable financial hardship' for business with revenue greater than \$50 million, and instead implement a general reasonableness test applicable to all employers. Or, at the very least, provide guidelines around what constitutes an 'unjustifiable financial hardship' in cl 8(3) and remove the restricted meaning of reasonableness for businesses with revenue greater than \$50 million.
7. Provide a definition of 'malicious', so as to clarify the standard for the exemption to apply and lower the standard from that of inciting violence.
8. Include a definition of 'unjustifiable adverse impact' in clauses 8(5)-(6) to include resulting in death or serious injury, or significant emotional harm or financial detriment.
9. Express provisions are needed to ensure that existing employment contracts are not retrospectively invalidated by virtue of illegality.
10. Remove 'evangelisation' as a lawful religious activity in the Explanatory Notes and/or expressly exclude it from cl 5(1) of the Bill.

11. Include within cl 10 a note that it does not affect the operation of other Commonwealth anti-discrimination law and does not provide a basis to discriminate against persons on the basis of protected attributes, as noted in paragraph 163 of the Explanatory Notes.
12. The ability for religious educational institutions to discriminate should be limited solely to the religion of the (potential) student or employee.
13. Consider amending the *Fair Work Act* to include religious protections instead of introducing pt 3 div 2 of the Bill.
14. Amendments to the Human Rights Legislation Amendment (Freedom of Religion) Bill 2019 and the Marriage Act should not infringe upon the human right to marry without any limitations due to religion.
15. Recommendation 12 of the Religious Freedom Review 2019 should not be implemented because of its practical implications and conflict with human rights.

If further information is required, please contact us at [anulrsjresearchhub@gmail.com](mailto:anulrsjresearchhub@gmail.com).

On behalf of the ANU LRSJ Research Hub,

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## Introduction

We submit that, while the ANU LRSJ submission is aimed at improving the Bill, it cannot shake the fact that the Bill would, at its core, still be opening a can of worms. In an action alleging indirect discrimination, after determining that someone adheres to a *bona fide* religion, the court would need to rule whether a particular action is reasonable<sup>1</sup> by considering the extent of disadvantage that the alleged discriminator faces.<sup>2</sup> This would entail examining the tenets of that religion, for the more integral a belief or activity the action is said to disadvantage, the greater the disadvantage and the less likely will the action be reasonable. This would mean that the court would possibly consider multiple arguments as to the importance of a tenet of a religion, between adherents of the same religion or the same subset of the religion, and declare that a certain belief or practice is quite important. This would be highly sensitive, uncomfortable, and a morally inappropriate inquiry, but it is what the Bill could lead to. This should give pause to the whole enterprise.

## Clause 10

**Recommendation 1: Religious institutions should generally not be exempted from the Bill's prohibitions on religious discrimination.**

The ANU LRSJ Research Hub welcomes the decision to include Australian atheists and agnostics within the aegis of the bill's protection.<sup>3</sup> This accords with the recommendations of the *Religious Freedom Review*,<sup>4</sup> Australia's international human rights obligations,<sup>5</sup> and with Australia's commitment to state secularism.<sup>6</sup> However, we express deep concern that cl 10 of the Bill would potentially allow for religious institutions, to lawfully and de facto discriminate against atheists and agnostics (as well as believers of other faiths). Some orthodox religious bodies may reasonably view discrimination against 'non-believers' as in accordance with the tenets of their religion.<sup>7</sup> Thus, the Bill could allow, for example, a religious homelessness shelter to refuse assistance to an atheist homeless person. This is manifestly egregious, especially if the body receives federal funding.

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<sup>1</sup> Religious Discrimination Bill 2019 (Cth) cl 8(1)(c) ('Religious Discrimination Bill').

<sup>2</sup> Ibid cl 8(2)(a).

<sup>3</sup> *Religious Freedom Reforms* (Outline of Reforms) 2.

<sup>4</sup> Philip Ruddock et al, *Religious Freedom Review: Report of the Expert Panel* (Report, 18 May 2018) 5 ('Ruddock Review').

<sup>5</sup> Human Rights Committee, *CCPR General Comment 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 48th sess, UN Doc. CCPR/C/21/Rev.1/Add.4 (30 July 1993) [2], [5].

<sup>6</sup> Margaret Thornton and Trish Luker, 'The Spectral Ground: Religious Belief Discrimination' (2009) 9 *Macquarie Law Journal* 71, 72.

<sup>7</sup> See 'What Does the Bible Says About Non-Believers?', *openbible.info* (Web Page)

<[https://www.openbible.info/topics/non\\_believers](https://www.openbible.info/topics/non_believers)>; Ibn Warraq, 'A Call To The Muslims Of The World', *Center For Inquiry* (Web Page, 10 August 2018) <<https://centerforinquiry.org/blog/a-call-to-the-muslims-of-the-world/>>.

## Clause 5(1)

### **Recommendation 2: The Bill should adopt more explicit criteria of ‘religious beliefs’.**

We recommend that while the Bill *should* keep the definition of ‘religious belief’<sup>8</sup> very broad, it would benefit from adopting an explicit criterion of what constitutes ‘religious belief’. This will ensure that the courts and the Australian Human Rights Commission would not be burdened by claims unless the plaintiff subscribes to *bona fide* religious beliefs. We submit that the Bill could benefit from synthesising the criteria for a ‘religious belief’ as developed in cases before the court.<sup>9</sup> While these criteria are likely to be applied should a case appear before an Australian court, it is in the interest of the public that it is made explicit beforehand. One could phrase the criteria as **considerations** in determining *bona fide* religious belief:

1. The presence of belief in a supernatural Being(s), Thing(s) or Principle(s),<sup>10</sup>
2. The acceptance of canons of conduct in order to give effect to that belief,<sup>11</sup>
3. That the adherents form, however loosely, an identifiable group.<sup>12</sup>
4. That the adherents of the belief subjectively see themselves as constituting a religion.<sup>13</sup>

While it is unlikely that we could formulate a definition of religion that would satisfy all,<sup>14</sup> these criteria do make valuable contribution in that inquiry and should therefore be adopted.

## Clause 5 and Clause 10(1)

### **Recommendation 3: In relation to cl 5 and cl 10, provide a definition for ‘reasonableness’ that courts can apply.**

In the *Religious Discrimination Bill 2019* (Cth) (‘the Bill’), the cl 5 definitions of ‘statement of belief’ and ‘health practitioner conduct rule’, in addition to cl 10(1) rely on a reasonableness test to encompass conduct that can ‘reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion.’<sup>15</sup> This submission acknowledges the necessity of such a test in anti-discrimination legislation, but questions the potential role of the courts in determining what can reasonably be regarded as in accordance with these elements of religion.

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<sup>8</sup> Religious Discrimination Bill (n 1) cl 5(1).

<sup>9</sup> See, eg, *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120 (‘*Church of the New Faith*’).

<sup>10</sup> See Ibid 131 (Mason ACJ and Brennan J), cited in *Ruddock Review* (n 3) 34 [1.84]. See also Joshua Neoh, ‘The Good of Religion’ (2019) 93 *Australian Law Journal* 791, 795.

<sup>11</sup> *Church of the New Faith* (n 10) 131 (Mason ACJ and Brennan J).

<sup>12</sup> Ibid 174 (Wilson and Deane JJ), cited in *Ruddock Review* (n 3) 35 [1.87].

<sup>13</sup> *Church of the New Faith* (n 10) 174 (Wilson and Deane JJ).

<sup>14</sup> *Adelaide Company of Jehovah’s Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 123 (Latham CJ), cited in *Ruddock Review* (n 3) 34 [1.81].

<sup>15</sup> Religious Discrimination Bill (n 1) cl 5 (definition of ‘statement of belief’ para (a)(iii)).

## Clause 27

**Recommendation 4: The exception under cl 27 of the Bill should extend not only to serious offences but also counselling, promoting, encouraging or urging conduct that breaches anti-discrimination laws. We also recommend removing cl 41 to accommodate for the revised cl 27.**

We suggest revisions to the exception provided under cl 27 of the Bill and the removal of cl 41. The exception should not only extend to serious offences under Commonwealth, State, and Territory laws.<sup>16</sup> It should also extend to conduct that is counselling, promoting, encouraging, or urging conduct that would breach anti-discrimination laws, which generally does not have criminal sanctions directly attached to it, and the penalties they do have do not reach the 2 year imprisonment threshold.<sup>17</sup> In addition, a statement of expression of belief can be discriminatory without being necessarily malicious, harassing, vilifying, or inciting hatred.<sup>18</sup> We submit that these amendments are appropriate given that the Bill are asking these laws to take it into account in return,<sup>19</sup> and an acknowledgment that religion can inspire *transcendental* politics<sup>20</sup> and *real* discrimination.<sup>21</sup> Otherwise, we would suggest that religious freedom trumps prevention of racial, age, or sex discrimination, as if human rights occupy a hierarchy where religious freedom lies at the top. This is not in accordance with Australia's international commitments.<sup>22</sup>

## Clause 9

**Recommendation 5: Remove cl 9 which refers to engaging in conduct for two or more reasons, or alter it to require the religious reason to be the dominant reason.**

Under cl 9, if conduct is engaged in for two or more reasons, and one reason is religious, regardless if this is the dominating purpose, the conduct is taken to be engaged in for religious reasons. This clause provides a very broad protection for religious people, regardless of whether they are genuinely acting for a religious purpose or not. To ensure it is the former, the religious purpose should be the dominant reason; that is, an individual should be protected under this Bill if they engaged in conduct for the dominant or substantial purpose of engaging in religious behaviour. If not, there is a risk that the Bill will be used as a sword, rather than a shield.

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<sup>16</sup> Ibid cl 27(2).

<sup>17</sup> See, eg, *Racial Discrimination Act 1975* (Cth) ss 9, 27, 27F; *Sex Discrimination Act 1984* (Cth) Pt 2, 4; *Age Discrimination Act 2004* (Cth) pt 4 div 2; pt 5.

<sup>18</sup> See Religious Discrimination Bill cl 41 (1) and (2).

<sup>19</sup> Human Rights Legislation Amendment (Freedom of Religion) Bill (Cth).

<sup>20</sup> Neoh (n 8) 796.

<sup>21</sup> See Nicholas Aroney, 'Can Australian Law Better Protect Freedom of Religion?' (2019) 93 *Australian Law Journal* 708, 709; Thornton and Luker (n 3) 76–77.

<sup>22</sup> *Ruddock Review* (n 3) 13 [1.37].

### Clause 8(3)

**Recommendation 6: Remove the requirement of ‘unjustifiable financial hardship’ for business with revenue greater than \$50 million, and instead implement a general reasonableness test applicable to all employers. Or, at the very least, provide guidelines around what constitutes an ‘unjustifiable financial hardship’ in cl 8(3) and remove the restricted meaning of reasonableness for businesses with revenue greater than \$50 million.**

Currently, the Bill deems it discriminatory if a ‘relevant employer conduct rule’ has the ‘effect of restricting or preventing an employee ... from making a statement of belief’ outside of work unless compliance is ‘necessary to avoid unjustifiable financial hardship to the employer.’<sup>23</sup> If the statement is ‘malicious’ or ‘would, or is likely to, harass, vilify or incite hatred or violence’ cl 8(3) does not apply.<sup>24</sup> Other employers, who don’t fall within the definition of ‘relevant employer’<sup>25</sup> are subject to the general reasonableness test.

Although the Bill provides two protective caveats, they are phrased in vague language and can benefit from further specificity. Regarding ‘unjustifiable financial hardship’ in cl 8(3), the Bill does not indicate as to what constitutes ‘unjustifiable,’ or whether it involves a prospective inquiry. However, given the high bar that the ordinary definition of ‘unjustifiable’ imposes — it refers to an action/omission that ‘cannot be shown to be just, right or reasonable’<sup>26</sup> that suggests the level of financial impact might be quite high, it is foreseeable that situations will emerge in which companies are financially impacted to a degree that does not qualify as ‘unjustifiable,’ but nonetheless severely impacts their future prosperity. This submission thus recommends that, at the very least, the ‘unjustifiable financial hardship’ be defined so the standard is clear. Ideally, the provision would be removed, and instead a general reasonable test be implemented.

Further, the burden seems to be arbitrarily imposed only on an employer that ‘has or had revenue for the current or previous financial year of at least \$50 million’.<sup>27</sup> The Explanatory Notes contemplate that the ‘requirements in [cl 8(3)] only apply to the largest businesses operating in Australia’ that play a ‘significant role in setting standards of workplace culture across the country’.<sup>28</sup> Not only is ‘\$50 million’ an arbitrary measure of a business’s ‘influence’ on workplace culture, there is simply no reason to limit the prohibition on employer conduct rules on large businesses. If the Government is serious about protecting religious freedoms of employees, cl 8(3) — and the accompanying reasonableness test — should be applied to all types of employers/businesses. We argue that such an arbitrary limitation is merely reactionary to recent events concerning Israel Folau and the Government has not given due consideration to its potential implications.

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<sup>23</sup> Religious Discrimination Bill (n 1) cl 8(3); see also cl 8(1).

<sup>24</sup> Ibid cl 8(4).

<sup>25</sup> Ibid cl 5(1).

<sup>26</sup> *Oxford English Dictionary* (online at 30 September 2019) ‘unjustifiable;’ defined as ‘that cannot be shown to be just, right or reasonable; lacking justification.’

<sup>27</sup> Religious Discrimination Bill (n 1) cl 5.

<sup>28</sup> Explanatory Notes, Religious Discrimination Bill 2019 126.

### Clause 8(3) and Clause 8(4)

**Recommendation 7: Provide a definition of ‘malicious’, so as to clarify the standard for the exemption to apply and lower the standard from that of inciting violence.**

Similar to the high bar imposed by cl 8(3), cl 8(4) imposes a very high standard by requiring that religious statements be ‘malicious’ or ‘harass, vilify or incite hatred or violence’ to lose protection under cl 8(3). Again, while ‘malicious’ is not defined in the Bill, the Oxford English Dictionary definition suggests a high bar.<sup>29</sup> Statements that discriminate based on gender or sexual identity — but lack this active intention — will thus be permissible, despite its negative impact. Such a high bar is unacceptable; comments that belittle one’s sexual identity or gender, without necessarily “doing evil” should not be protected by the law. Moreover, cl 8(4)(b) similarly creates a high standard — while ‘harass’ by itself may be read down to include a range of belittling comments, employing the maxim *noscitur a sociis* would assume a meaning beyond that of merely upsetting someone. Instead, it appears to be at the level of vilifying or inciting hatred. Such a high bar thus excludes a wide range of comments that may do serious damage to a person’s identity without reaching the level of inciting hatred or violence against a group. In light of this, this submission recommends the bar be lowered in this clause to encompass comments that deliberately target protected attributes (such as sex, gender, race, age) and have the potential to harm that person’s identity.

### Clause 8(5) and Clause 8(6)

**Recommendation 8: Include a definition of ‘unjustifiable adverse impact’ in clauses 8(5)-(6) to include resulting in death or serious injury, or significant emotional harm or financial detriment.**

The Explanatory Notes provide examples of conduct rules that may be objectionable, including ‘rules requiring health practitioners to undertake procedures or provide information, prescriptions or referrals related to services including abortion, euthanasia, contraception or sterilisation.’<sup>30</sup> The consequence of these contemplated scenarios are significant and far-reaching, potentially impacting a broad range of factors in a patient’s life. The test of unjustifiable adverse impact is not defined within the Bill, but it is supplemented in the Explanatory Notes as resulting in ‘death or serious injury of the person seeking the health service.’<sup>31</sup> However, denial of these services has the potential to result in far more than death or serious injury that nonetheless has an adverse impact. Consider the denial of abortion services: potential life-threatening situations in informing family of the pregnancy; the significant emotional toll both in being denied and forced to find a new practitioner; financial detriment in multiple consultations as a result; time to be taken from work in seeking consultations and services; increased likelihood of stigma and ostracism from the community. Given these factors, adverse impact clearly encompasses much more than death or serious injury and thus should be explicitly defined within the legislation to resulting in death or serious injury, or significant emotional harm and financial detriment.

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<sup>29</sup> *Oxford English Dictionary* (online at 25 September 2019) ‘malicious’; defined as ‘the intention or desire to do evil or cause injury to another person; active ill will or hatred’.

<sup>30</sup> Explanatory Notes, Religious Discrimination Bill 2019 (Cth) [137].

<sup>31</sup> *Ibid* [147].

## Impact on Existing Employment Contracts

**Recommendation 9: Express provisions are needed to ensure that existing employment contracts are not retrospectively invalidated by virtue of illegality.**

Under the doctrine of illegality, the provisions of the Bill may void existing employment contracts if they affect an employee's right to religious expression in the workplace.<sup>32</sup> There is a danger that such situations will occur where the impugned expression is not remotely related to or necessary to the terms of employment, but are nevertheless expressed in the workplace. Another concern is that contracts are retrospectively invalidated despite being entered into in good faith and for valid reasons at the time. Despite the historical reluctance of courts to void contracts due to illegality, the passage of the Bill will only invite uncertainty and prolonged litigation over the enforceability of current employment contracts.<sup>33</sup> It would be against public policy to question the validity of existing, bona fide contracts that are otherwise lawful and deny the benefits of such contracts to either parties while litigation is underway. It would also be against public policy to *actually* invalidate contracts on grounds that are far removed from its express terms, its spirit, or otherwise on grounds that were not in the contemplation of the parties at the time they entered into contract.

## Clause 5(1) and Explanatory Notes

**Recommendation 10: Remove 'evangelisation' as a lawful religious activity in the Explanatory Notes and/or expressly exclude it from cl 5(1) of the Bill.**

Clause 5(1) defines 'religious belief or activity' to include engaging in 'lawful religious activity'; however, the Bill does not define the latter phrase any further. Nevertheless, the Explanatory Notes contemplate that religious activity will encompass a range of physical acts, including evangelising other persons.<sup>34</sup>

We argue that 'lawful religious activities' in the workplace should be limited to acts that can peacefully co-exist with day-to-day operations of the employer, such as wearing religious dress or observing the Sabbath. Evangelisation, as a much more overt manifestation of belief, simply does not belong in the workplace. Not only is it likely to be unrelated to the terms of employment, it can potentially create tensions in the workplace and interfere with daily operations of the organisation. Incessant evangelisation may even be considered as harassment of 'another person or group of persons' within cl 41(2) of the Bill, especially if it is unwanted by those who are subjected to it and therefore not protected.

Despite the Bill not specifying what religious activities are 'lawful' in cl 5(1), there is still a concern that evangelisation will be deemed as lawful. A purposive approach to statutory interpretation involves considering extrinsic materials, such as the Explanatory Notes, and adopting an interpretation of the Bill that is consistent with such material. However, as we have pointed out above, there are valid reasons as to why evangelisation should not be considered a 'lawful religious activity'.

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<sup>32</sup> *Re Mahmoud and Ispahani* [1921] 2 KB 138; *Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410 ('Yango').

<sup>33</sup> See *Yango* for the courts' reluctance on invalidating contracts merely because of illegality.

<sup>34</sup> Explanatory Notes, Religious Discrimination Bill 2019 (Cth) [69].



## Clause 10

**Recommendation 11: Include within cl 10 a note that it does not affect the operation of other Commonwealth anti-discrimination law and does not provide a basis to discriminate against persons on the basis of protected attributes, as noted in paragraph 163 of the Explanatory Notes.**

Religious bodies offer valuable contributions to the community, particularly religious educational institutions. Clause 10 acknowledges this contribution, but is modified in the explanatory notes to highlight that:

[t]his provision does not affect the operation of other Commonwealth anti-discrimination law and does not provide a basis for religious bodies to engage in conduct in accordance with their religious beliefs which discriminates against persons on the basis of other protected attributes (such as age, sex, disability or race).<sup>35</sup>

This is a crucial moderator for the clause and should be included as a provision within the Bill to emphasise an ongoing protection of other attributes.

## Religious Educational Institutions

**Recommendation 12: The ability for religious educational institutions to discriminate should be limited solely to the religion of the (potential) student or employee.**

Religious education offers a valuable place in education and institutions should be entitled to admit and employ those who profess the same faith. Beyond this, the right to non-discrimination based on sex, gender, age or race should be upheld. The Bill itself highlights every person's equality before the law and the principle that every person is free and equal in dignity and rights. As such, other attributes should be protected. Given religious education institutions receive public funding for public good, they cannot be allowed to discriminate against people with other protected attributes. LGBT wellbeing in particular should be highlighted here, given the possibility for potential students or employees to be both religious and LGBT. Only religious beliefs should be considered when admitting students. Further, when employing teachers, religious belief should only be considered in hiring decisions with respect to Religious Education teachers.

## Part 3, Division 2 - 'Discrimination in Work'

**Recommendation 13: Consider amending the *Fair Work Act* to include religious protections instead of introducing pt 3 div 2 of the Bill.**

Religious exemptions already exist in current Commonwealth anti-discrimination legislation to protect employers. For instance, s 351(2)(c) of the *Fair Work Act 2009* (Cth) ('*FW Act*') provides that an 'adverse act' of a religious body against an employee is not discrimination if done in accordance with their religious doctrine. Sections 37-38 of the *Sex Discrimination Act 1984* (Cth) ('*SDA*') and s 35 of the *Age Discrimination Act 2004* (Cth) ('*ADA*') provide the same protection to a religious body when selecting

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<sup>35</sup> Ibid [163].

employees against their sexuality or age, respectively.<sup>36</sup> Additionally, the definition of ‘discrimination’ in s 3(1) of the *Australian Human Rights Commission Act 1986* (Cth) excludes discrimination for employment in religious organisations. For employees, s 351(1) of the *FW Act* protects them from discrimination by their employers because of, amongst other protected attributes, their religion.

Since the above statutes already provide for religious exemptions in the area of employment — especially the *FW Act* — pt 3 div 2 of the Bill is superfluous. Even if the Bill provides more protection to employees vis-a-vis employers, this can also be effected by amending the *FW Act* and other relevant legislation without having to introduce further legislation.<sup>37</sup> In fact, the Bill elevates the right to religion to the detriment of other freedoms. Employers are expected to accommodate religious expression in the workplace even though it may interfere with other rights held by other employees within the organisation. The exceptions to the prohibition of discrimination, as mentioned previously, are limited to ‘unjustifiable financial hardship’ to relevant employers or whether religious expression would amount to harassment, vilification or incitement of hatred or violence. As we have argued above, such exceptions are either vague or impose too high a bar.

## Right to Marry

**Recommendation 14: Amendments to the Human Rights Legislation Amendment (Freedom of Religion) Bill 2019 and the Marriage Act should not infringe upon the human right to marry without any limitations due to religion.**

The Religious Freedom Review released in 2018 provided a comprehensive review of religious freedom in Australia and produced numerous recommendations regarding law reform in the Commonwealth legal system. In particular, Recommendation 12 relates to the refusal of religious schools to provide goods and services for any marriage.<sup>38</sup>

Recommendation 12 states:

The Commonwealth should progress legislative amendments to make it clear that religious schools are not required to make available their facilities, or to provide goods or services, for any marriage, provided that the refusal:

- (a) Conforms to the doctrines, tenets or beliefs of the religion or body, or
- (b) Is necessary to avoid injury to the religious susceptibilities of adherents of that religion.<sup>39</sup>

This recommendation is included in the Human Rights Legislation Amendment (Freedom of Religion) Bill 2019. The amendment provides that ‘religious institutions, including educational institutions, should not be

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<sup>36</sup> Sections 37-38 of the *SDA* apply to pt II div 1 (‘Discrimination in work’) and s 35 of the *ADA* apply to pt 4 div 2 (‘Discrimination in work’).

<sup>37</sup> For instance, cl 13(2)(a) of the Bill prohibits employers from denying employees the benefit of their employment on the basis of religion. This can also be effected by amending the term ‘adverse action’ in s 342 of the *FW Act*.

<sup>38</sup> Philip Ruddock, *Religious Freedom Review* (Report, May 2018) 4.

<sup>39</sup> *Ibid.*

compelled to provide food, services or facilities in support for marriages which are not in accordance with their religious beliefs’.<sup>40</sup>

What this does is extend the religious exemption already contained in the Marriages Act to include religious schools under religious institutions.<sup>41</sup>

Anti-discrimination laws surrounding religion are important, just as laws for discrimination on the basis of race, age, sex and other factors. It is still a balancing act in weighing up the freedom of religion and the freedom not to be discriminated against because you don’t share the same religion or world view. This is reflected in the Universal Declaration on Human Rights, which Australia played a leading role in developing as well as the international human rights treaties that followed.

Article 18 of the Universal Declaration on Human Rights provides:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.<sup>42</sup>

However, Article 16 specially relates to marriage and provides:

Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.<sup>43</sup>

Both the right to religious freedom and the right to marry free from limitations are human rights and must be considered in this balancing act.

### **Recommendation 12 of the Religious Freedom Review**

<b>Recommendation 15: Recommendation 12 of the Religious Freedom Review 2019 should not be implemented because of its practical implications and conflict with human rights.</b>
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This amendment to the Marriage Act presents some practical issues, especially for small towns. Small towns have fairly limited options when it comes to venues for weddings. Historically, school halls and similar venues are popular venues. They are easy and relatively inexpensive to hire. Thus, allowing religious schools the ability to refuse to allow the use of their facilities if the marriage is not in accordance with their religious beliefs could significantly impact the ability of couples, more specifically same-sex couples, in

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<sup>40</sup> Explanatory Notes, Human Rights Legislation Amendment (Freedom of Religion) Bill 2019 (Cth) 2.

<sup>41</sup> Ibid 9.

<sup>42</sup> *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948).

<sup>43</sup> Ibid.

being able to find wedding venues.<sup>44</sup> While there exists a right for freedom of religion, there also exists a right not to be discriminated against in other ways.

This Bill could have the unintended consequence of privileging religious rights over other forms of rights.<sup>45</sup> The proposed bill and amendments need to strike an appropriate balance between protecting Australians from religious based discrimination while not providing a licence<sup>46</sup> to discriminate.<sup>47</sup> By exempting religious schools from anti-discrimination law, the bill is in essence supporting a form of discrimination. The bill provides room for discrimination against minorities protected under currently existing anti-discrimination law, most notably same-sex couples.<sup>48</sup> It could also infringe human rights and be in direct conflict with the global sentiment and recent change to marriage laws regarding same-sex marriage.

Allowing religious schools to refuse to provide services, goods or their facilities for the solemnisation of marriage has an indirect impact upon its students and the community. Schools are a place for education and learning. They should be free from discrimination, be that sex, race, disability or age based. By allowing religious schools to refuse venues for the solemnisation of marriage, schools are indirectly showing their students and community who will and will not be tolerated or accepted within their community. It sends a message of unacceptance that has the power to marginalise children, who are in a position of vulnerability, and community members. In modern society, it is important that children are taught about tolerance of others, no matter their views. A school is a place that should be used for education, and should shy away from engaging in any form of possibly discriminatory behaviour or politics. School halls and other similar facilities are not also inherently religious.

Lastly, Australian anti-discrimination law is a piecemeal of several Acts. Amending the Marriage Act to allow religious schools to refuse to provide services, goods or their facilities for the solemnisation of marriage adds to the list of dispersive discrimination law. The effects of several Acts makes accessing discrimination law harder and more convoluted, both for those seeking redress or justice for discrimination and, as in this case, exemption from anti-discrimination law.<sup>49</sup>

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<sup>44</sup> Judith Ireland, 'Advocates warn of 'payback' for marriage equality in extra religious freedom bill'. *The Sydney Morning Herald*(Article, 21 July 2019) <<https://www.smh.com.au/politics/federal/advocates-warn-of-payback-for-marriage-equality-in-extra-religious-freedom-bill-20190719-p528ru.html>>.

<sup>45</sup> Bianca Levin, '10 Things You Should Know About The Religious Discrimination Bill', *The Foundation for Young Australians*(Article, 17 September 2019) <<https://www.fya.org.au/2019/09/17/10-things-you-should-know-about-the-religious-discrimination-bill/>>.

<sup>46</sup> Rodney Croome, 'This is not a religious freedom bill, it's a licence to hate'. *The Sydney Morning Herald* (Article, 30 August 2019) <<https://www.smh.com.au/national/this-is-not-a-religious-freedom-bill-it-s-a-licence-to-hate-20190829-p52m5h.html>>.

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