Executive Summary

Comments on the Exposure Draft of the *Religious Discrimination Bill 2019* and the *Human Rights Legislation Amendment (Freedom of Religion) Bill 2019*

31 January, 2020

ICS believes that the Second Exposure Draft of the Religious Discrimination Bill (RDB2) is a considerable improvement on the First Exposure Draft. We welcome the fact that a number of our concerns that were raised in our submission on the First Exposure Draft have been addressed. However, a number of those concerns remain unaddressed and new provisions have been added to the Bill that give rise to additional concerns. There are therefore a number of further amendments and improvements that should be made in order to effectively protect individuals and organisations from religious discrimination and to meet Australia's obligations under Article 18 of the *International Covenant on Civil and Political Rights*.

Key issues addressed within this submission include the following:

1. ***The test that a religious believer must 'reasonably consider conduct or belief to be in accordance with the doctrines, tenets, beliefs or teachings of the religion' is an improvement on the prior test but is still highly problematic.***

   At the very least it should be made explicit in the Bill that there can be multiple and conflicting reasonably considered views by believers in the same religion as to whether particular conduct or a belief is in accordance with the doctrines, tenets, beliefs or teachings of the religion (consider for example the different and conflicting positions on treatment of divorce and same sex sexual relationships within some

religions). If this is not made clear a court may consider there is only one reasonably considered view of whether conduct or belief is in accordance with doctrine and exclude all others. This would effectively intrude the State into deciding disputes and disagreements on doctrine and beliefs within a religion. It will also lead to the State telling a believer that their sincerely held religious belief was an "incorrect" version of a religion and not worthy of protection from discrimination.

Some conduct in accordance with genuine religious belief should not to be protected from discrimination. But that is far better achieved by the other specific provisions in the Bill which exclude protection of certain conduct *based on the nature of the conduct* (eg the reasonableness defence to indirect discrimination, no protection for unlawful conduct and no protection for statements of belief which are malicious or incite hatred) rather than by a court telling a person whether they have got their sincere religious beliefs right or not. A much better solution is to replace the "reasonably considered to be in accordance with doctrine" test with a test that the person whose conduct or belief is in question *genuinely believed that their conduct or belief was in accordance with the doctrines, tenets, beliefs or teachings of the religion*. The test of genuineness of belief is used across the common law world. (page 12).

The RDB2 requires a judge to construct a hypothetical religious believer and then determine whether that believer would 'reasonably consider that the [complainant or religious body's beliefs or conduct are] in accordance with the doctrines, tenets, beliefs or teachings of that religion.' This test must be satisfied by religious bodies seeking to defend a claim of religious discrimination under clause 11, by employees in respect of statements made outside of the workplace (subclause 8(3)), by accredited professionals and tradespersons in respect of statements made outside the course of their employment (subclauses 8(4) and 32(6)), by health practitioners seeking to assert a conscientious objection (subclauses 8(5) and (6) and 32(7)) and by a person seeking to defend a discrimination claim for a statement of belief that they have made under clause 42.

We list five significant concerns with this test. Courts and academics across the world have emphasised the importance of avoiding exercises that measure an individual's beliefs against the beliefs of other members of the religion. Where a range of views on a particular doctrinal matter exist within a 'religious denomination, sect, stream or tradition' (to use the words employed in the EM), how is a court to determine which

view is the correct one that would be adopted by a 'reasonable' religious believer? Either the court will have to prefer one view over another, or it will conclude that that the particular beliefs of the complainant or respondent are not beliefs that are to be attributed to the 'relevant reasonable person' and the protections are lost. Perhaps most concerning, the test could conceivably have divisive consequences, causing 'religious denominations, sects, streams or traditions' to clarify their official position on contentious matters. In this way, the Bill risks undermining the ability of religious denominations to bring together believers who hold sincere, albeit differing, convictions in respect of the same religious texts.

The Bill displaces the High Court's jurisprudence by requiring a judge to objectively determine what conduct is sanctioned by a reasonable believer, regardless of the sincerely held convictions of the believer-claimant/respondent in question.

Instead, the focus should remain on the sincerity of the belief, consistent with the approach taken amongst leading common law jurisdiction Courts across the world, including the High Court in the Scientology Case, the Supreme Court of Canada, the House of Lords and the United States Supreme Court. These sincerity tests recognise that when limitations are to be imposed upon the manifestation of religious beliefs, they should be imposed *after* the sincere belief has been evidenced, rather than through a refusal of the claim as a properly asserted religious claim, which engages the court in an unnecessary exercise of resolving doctrinal disputes. Importantly, a sincerity test will not permit a religious believer to merely write themselves into legal protection. In the *Scientology* case in the High Court, Mason ACJ and Brennan J after endorsing the test of sincerity of belief stated that it would not lead to the acceptance of a trumped up religious belief that was no more than a parody of religion or a sham such as the claimed religion of "Chief Boo Hoo" and the "Boo Hoos".

Even if the government persists with the test that a person of the same religion would 'reasonably consider that the [complainant or religious body's] beliefs or conduct are in accordance with the doctrines, tenets, beliefs or teachings of that religion', it is essential to make explicit in the Bill that there can be multiple and conflicting reasonably considered views by believers in the same religion as to whether particular conduct or a belief is in accordance with the doctrines, tenets, beliefs or teachings of

the religion. If this is not made clear a court may consider it must choose the one reasonably considered view of whether something is in accordance with doctrine and exclude all others which effectively intrudes the State into deciding disagreements on religious doctrine.

2. Protection of incorporated religious bodies from discrimination and the new Associates clause– see also points 12 and 13 below

In addition to the external affairs power, the corporations power enables the Parliament to (a) protect a constitutional corporation from discrimination on the basis of religious belief or activity and (b) to make it unlawful for a constitutional corporation to discriminate against an individual or incorporated or unincorporated body on the basis of the religious belief or activity of that individual or body. The Bill does the second of these in clause 59 but not the first. To facilitate the first would require a provision as to how a corporation demonstrates a religious belief and our first submission addressed that need. To confer protection from discrimination on a constitutional corporation is within the core of the corporation's power and not its incidental scope. That could be done though a further additional operation provision like clause 59. Such an additional operation provision would be a severable provision if it were held invalid, but we think there is no basis for it being held invalid given the *Work Choices case*.

Newly inserted clause 9 on associates appears intended to be the mechanism through which religious corporations, such as schools or charities, will be able to assert a complaint of religious discrimination under the Bill. The intended application of clause 9 is not clear and may be ineffective. Several issues need to be addressed to make it effective.

(a) As the AHRC has emphasised in respect of the equivalent provisions in the Disability Discrimination Act 1992, the definition of direct and indirect discrimination do not but need to make reference to how they are to be applied to associates. We propose drafting to address this concern.

(b) Unlike the DDA, the substantive provisions dealing with unlawful discrimination across various fields of Australian life in the RDB2 (under Part 3) do not but should cover discrimination against associates. In the absence of reference to associates within

the substantive provisions, the effective force of clause 9's application to associates is lost and the clause is rendered meaningless.

(c) Unlike the DDA, the Bill fails to define 'associate'. By operation of ejusdem generis the drafting appears to limit the wider application of the associate's clause to bring it within the class 'of near relatives. To avoid the need to resolve the uncertainty as to the reach of the notion 'associate' through costly litigation, the Bill should provide a definition and that definition should include the relationship between incorporated and unincorporated religious bodies and their members and board members and, in the case of bodies conducting or facilitating religious gatherings, the attendees at such gatherings.

We support both the above changes to make the associate provisions effective and the use of the corporation's power to give the Bill additional operation to protect constitutional corporations as described above. See also points 12 and 13 below.

3. Problems with some aspects of defining 'statement of belief' and the scope of protection

Various provisions of the Bill protect statements of belief which are made in good faith, not malicious, harassing, vilifying, inciting hatred or violence (we refer to these as "reasonable statements of belief") e.g. clause 42 of the Bill. The purpose and effect of the test that the statement is made in 'good faith' is unclear. If it means that it is not made in bad faith, then the requirement that the statement not be malicious already seems to cover that. If its purpose is that the belief be genuinely held then provide for that. A requirement of "good faith" could be interpreted in many unhelpful ways, imposing secular (and inappropriate) considerations, such as a statement is not made in good faith if the maker of the statement know that the statement could cause offence and distress to the person to whom it is addressed.

Puzzling new amendments to the Bill protect only statements made 'by written or spoken words'. Many religious statements are made by pictures, images and symbols

such as a cross or crucifix or menorah. In the UK a mobile electrician was threatened with dismissal for displaying an 8-inch palm cross on the dashboard of his company van. Is that not a statement of belief which should be within clause 8(3)'s protections from employer conduct rules and within clause 42 even though it is not written or spoken words? The clause excludes the display or symbols and pictures and drives a wedge between religious belief and religious action.

Additionally, the Bill provides no clarification as to whether the words 'malicious', 'harass', 'threaten' or 'seriously intimidate' focus on the subjective intent of the statement maker (presumably "malicious" does) or the response of the hearer, or the response of a reasonable member of the community. The EM provides no substantive clarification as to the operation or intended meaning of these words. The Bill should make clear that the test is whether a reasonable person would be harassed, threatened or seriously intimidated by the statement in the circumstances.

The protection for reasonable statements of belief in clause 42 is commendable, however if an employer can still sack or discipline an employee for a reasonable statement of belief, or an education authority can discipline a student or a qualifying body impose a detriment or remove a right to practise a trade or business or a grant body reject an application because of a person's reasonable statement of belief, the protection offered by the RDB2 clause 42 of itself is very limited. Hence there must also be protection of reasonable statements of belief from indirect discrimination through conduct rules by employers, partnerships, qualifying bodies, registered organisations, employment agencies, educational institutions and providers of goods, service and facilities and accommodation included in clause 8. So far, the Bill only provides this protection against conduct rules of employers and qualifying bodies and only to a limited extent.

4. Clause 42 must protect statements of belief from vilification complaints as well as discrimination complaints (page 27)

Clause 42 should protect reasonable statements of belief (as defined in 42(2)) not only from complaints of discrimination under anti-discrimination law, but also from complaints made pursuant to State or Territory prohibitions on vilification whether those prohibitions are in anti-discrimination laws or in standalone vilification laws like

the Racial and Religious Tolerance Act (Vic). Religious speech may in comes cases constitute technical discrimination and therefore the current draft clause 42 has work to do. However, the failure to extend the provision to vilification laws is a very serious omission, undermining the stated aim of the provision. The most significant limitations placed upon religious speech within Australia are imposed under vilification provisions, which are distinct from the relevant prohibitions on discrimination.

5. *A narrow interpretation of what constitutes a "religious activity" could render the Bill largely useless: cl 5 (page 28)*

The words 'religious activity' in clause 5, may be read too narrowly in accordance with some existing judicial precedent and be restricted to activities such as prayer and worship, but not to the manifestation of religious, moral or ethical views. The Bill protects some statements of belief made outside work hours by employees in large businesses from discriminatory codes of conduct but the majority of statements of belief are not protected from discrimination unless they fall within the phrase "religious activity". If existing judicial precedent to that effect is applied under the Bill, that interpretation has the potential to exclude religious statements on matters such as marriage, gender or the family from the Bill's protections, or to exclude religiously motivated acts, or to exclude refusals to perform 'secular' acts that are contrary to religious teaching. *The definition of religious activity should be amended to cover any conduct to which the religious person has a genuine conviction is in accordance with or in furtherance of religious doctrine or beliefs. Appropriate limitations on permitted religious should be dealt with through other means such as the requirement that the activity or statement not be in breach of the law.*

6. *Application of the comparator test: cl 7 (page 28) and Reforms to clauses 7 and 8 to introduce a reasonable accommodation requirement for religious belief and activity along the lines of the Disability Discrimination Act's reasonable adjustment requirement*

Existing anti-discrimination law provides that if a person who acted in the same way without religious reasons would have been treated the same, an employer has not discriminated. In application, this will seriously undermine the protections provided.

We discuss how the Bill can avoid this outcome including by using a reasonable adjustment requirement

There should be a new provision in the Bill requiring those who may discriminate in the relevant fields where unlawful discrimination is prohibited (e.g. employment, accommodation, provision of good and services) to make reasonable adjustment for people who refuse to engage in conduct or to express or associate themselves with particular views because of their genuine religious beliefs e.g. the Jewish or Adventist believer who won't work on Saturday, the Muslim who needs to be absent from work duties to pray at midday on Friday, the health practitioner who won't participate in abortion or euthanasia.

There is a similar concept of *reasonable adjustment* in the Disability Discrimination Act.

We propose amending both clause 7 on direct discrimination and clause 8 on indirect discrimination to require persons who may discriminate on the basis of a religious belief or activity to make reasonable adjustments for persons with that religious belief or activity.

This will reduce the comparator test problem that courts may say there is no discrimination if the same consequences apply equally to all persons who engage or refuse to engage in particular conduct regardless of whether the conduct is motivated by religious belief.

In terms of indirect discrimination, we propose that both:

(a) the *result* sought by the person imposing the condition, requirement or practice (e.g. that all staff must be working at midday on Fridays if rostered on or all interns must assist as required at all medical procedures) must include a reasonable adjustment for religious belief and activity of people affected by the conditions, requirement or practice; and

(b) the condition, requirement or practice itself must makes a reasonable adjustment for religious belief and activity of people affected by (e.g. no roster swaps or flexitime can be taken for absences at midday on Friday, or interns who do not attend a medical procedure when required will lose pay and promotion credits).

7. Defining "lawful religious activity": cl 5 (page 29)

This definition at clause 5 permits the Bill's protections to be held hostage to the whims of State laws that render a religious activity unlawful, thereby removing federal discrimination protection for the activity. As a result the Act would not protect against a State Government that imposed limitations on a religious school in its funding contract; or a State Government ban on homosexual 'conversion practices (such as is currently proposed in Queensland and Victoria), even should that ban limit teaching , prayer, counselling or pastoral care based on traditional religious views of human sexuality; or a State Government requiring that faith-based aged-care providers facilitate euthanasia on their premises.

The Queensland *Health Legislation Amendment Bill 2019* ,promulgated after the release of the First Exposure Draft, criminalises any act of conversion therapy by a health practitioner, including unregistered counsellors. On passage of the Queensland Bill, any public or private religious school chaplain prosecuted for affirming a traditional Biblical view of gender would not be protected under the RDB2, as the act of affirmation is not 'lawful' under Queensland law. Further, we note that any such 'statement of belief' would not be protected under clause 42, as the provisions prohibiting such statements are not made within the context of 'discrimination' law prohibitions. If the Queensland Bill or the Victorian proposal becomes law they should be added to the list in clause 42(1) or prescribed by regulation for the purposes of clause 42.

8. The reasonableness requirement for indirect discrimination: cl 8 (page 31)

The 'reasonableness test' for indirect discrimination under clause 8 devolves significant matters of policy to the courts. The reasonableness criterion for indirect discrimination in cl 8(1)(c) is not consistent with the relevant international law which only permits such limitations on manifestation of religious belief which are established by law and which are "necessary" to ensure public safety, order, health or morals, or the fundamental rights of others (ICCPR Art 18). The reasonableness defence to indirect discrimination in clause 8(1) does not use any concept of necessity but instructs a tribunal or court to determine whether the disadvantage is proportionate to the result

sought to be achieved by the person imposing the condition or practice which discriminates against religion. A proportionality test is a broad gift of policy making power to the tribunal or court.

The proportionality test should be replaced with a test that
(a) the condition, requirement or practice must provide reasonable accommodation for the religious beliefs, expression of beliefs and religious activities of persons affected by it; and
(b) the condition, requirement or practice must create no more disadvantage for persons of the religious belief, and no more limitation of such persons' ability to hold or express their religious belief or engage in a religious activity, than is necessary to achieve a result sought by the person who imposes the condition, practice or requirement.

In addition, Commonwealth law should only permit religious manifestation to be limited where such is consistent with the international standard Australia has ratified. Where a set of circumstances gives rise to a claim of discrimination under the *Sex Discrimination Act 1984* and a crossclaim of religious discrimination under the Bill, the two claims should be balanced according to the 'necessary' limitations standard set out in the ICCPR.

9. The employer conduct and qualifying body conduct reasonableness rules: cl 8(3) and 8(4) and extending protection of reasonable statements of belief to education and other areas of discrimination (page 32)

The provisions under clause 8(3) of the RDA effectively introduce an implied presumption that regulation of statement of belief of employees by small employers and government is reasonable, whether within or outside their workplace. Similarly, the provisions introduce an implied presumption that regulation of the speech of employees of large employers within the workplace is reasonable. It also introduces an implied presumption that regulation of the speech of accredited professionals and tradespersons by qualifying bodies within the course of their profession or trade is reasonable. These presumptions should be expressly displaced.

Furthermore, any assessment of the financial hardship on the employer must exclude the anticipated and actual responses of third parties who threaten to impose hardship.

This makes the law victim to the whims of boycotts by sponsors, suppliers, customers etc. in order to assure a particular legal outcome.

There is reason, however, to provide specific direction in respect of the regulation of the speech of employees and this submission provides a detailed framework. That framework starts with the proposition that no employer or qualifying body can restrict an employee's freedom to state their genuine religious beliefs, whether within or outside the workplace, with exceptions applying for criminal activity, for vilification, and where internal workplace restrictions are required for the effective operation of the workplace.

If the special rules about employer conduct rules and qualifying body conduct rules which limit reasonable statements of belief are retained, they should be expanded to cover educational institutions and accommodation providers. Not all education institutions are qualifying bodies in respect of all their students because some of the courses they offer do not qualify or facilitate entry into a profession or trade. Many tertiary education institutions have over-reaching codes of conduct purporting to regulate what students can say off campus in their own time. These have the potential to restrict freedom of religious speech through imprecise language around maintaining respect and student well-being and appeals to 'reputational damage'. Some of these were criticized in the review into University Freedom of Speech by the Hon Robert French AC.[1] There are currently many Australian universities with written policies which could be applied in ways which violate the religious freedom of the student.[2] Many of these apply to all on-campus and off-campus expression by students including all online expression regardless of whether there is any connection between the communication and the student's enrolment at the university.[3] We recommend a

[1] https://docs.education.gov.au/system/files/doc/other/report_of_the_independent_review_of_freedom_of_speech_in_australian_higher_education_providers_march_2019.pdf, page 151.

[2] The Institute for Civil Society has developed a list of these university policies, and the review into University Freedom of Speech by the Hon Robert French AC also raises similar concerns.

[3] Eg. Monash University Student Use Procedures - When using social media in the context of education or research training, and when making identifiable personal use of social media, students must not:
- make any comment or post material that is, or might be construed to be, racial or sexual harassment, offensive, obscene (including pornography), defamatory, discriminatory towards any person, or inciting hate;
- make any comment or post material that creates, or might be construed to create, a risk to the health or safety of a student, contractor, staff member or other person, including material that amounts to bullying,

provision stating that education institution conduct rules are not reasonable to eh extent they limit reasonable statements of belief by students.

10. The exception for inherent requirements: cl 32

Clause 32 of the RDB2 permits discrimination against a person in employment (cl 14) or partnerships (cl 15) or in relation to qualifying bodies (cl 16) or by employment agencies (cl 18) where, because of the person's religious belief or activity, the person is unable to carry out the "inherent requirements" of the employment, partnership, profession, trade or organisation. This exception could permit an employer, qualifying body etc. to circumvent the RDB2 by simply making it an inherent requirement of a position that the person acts to affirm various matters that contradict his or her religious beliefs in circumstances where this has nothing to do with the core business of the employer. To clarify that the 'inherent requirements' test cannot be abused by employers who assert that a religious believer's expression of belief or conduct is contrary to the requirement that all employees support the secular "values" of the organisation an example to that effect should be provided in the Bill itself. ICS recommends that the exceptions only apply to chaplaincy roles that are employed by non-religious employers (such as in hospitals, prisons or schools) or where being a religious adherent is an actual requirement of the role. Religious businesses such as medical practices or law firms should be able to maintain their ethos by preferring employees who share their faith, not just in respect of senior leadership roles, but across the entire organisation. The inclusion of new cl 8(4) will require, for consistency with 32(6) and 32(7) in respect of employer conduct rules and health practitioners conduct rules, the inclusion of a subparagraph that provides any qualifying body conduct rule that contravenes cl 8(4) cannot impose an inherent requirement under cl 32.

11. Application to corporations and other unincorporated bodies (page 37)

The addition of the 'associates' clause' (clause 9) appears intended to preclude a corporation from making a religious discrimination claim as a 'person' in its own right. To provide sufficient certainty as to their protection (and in light of the

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psychological or emotional violence, coercion, harassment, sexual harassment, aggressive or abusive comments or behaviour, and/or unreasonable demands or undue pressure;

novelties associated with clause 9), the original intent of the Bill in allowing corporations to directly assert a claim of religious discrimination should be reinstated (in addition to addressing the concerns stated above in respect of clause 9). The Commonwealth has clear power to protect corporate bodies utilising the Constitutional corporation's power, and both incorporated and unincorporated bodies through the external affairs power.

Even with that clarification the Bill would not make sufficiently clear that the full range of incorporated and unincorporated bodies may take the benefit of its protections. As the Bill protects against discrimination 'on the ground' of a religious belief, it must also displace existing case law which holds that such bodies cannot adopt a religious belief. It must also clarify that such a body can incur compensable damage as a result of religious discrimination.

12. Representative actions (page 40)

Representative actions do not provide sufficient protection for incorporated or unincorporated associations. Part IVA of the Federal Court of Australia Act 1976 only permits such actions to be initiated where seven or more people have been discriminated against. The result is that unincorporated bodies that have less than seven members will not be able to either assert that they comprise a 'person' in order to lodge a direct complaint under clauses 7 or 8 or take the benefit of the protections to associates at clause 9. The representative complainant provisions in the Australian Human Rights Commission Act 1986 are largely untested and rarely utilised. In order to be enlivened, the provisions require that any incorporated or unincorporated body be the subject of the discrimination. If an incorporated or unincorporated body is not a 'person' protected from discrimination under the Bill, a representative complaint may not be lodged on its behalf.

13. Scope of Protected 'Fields' (page 40)

In order to provide sufficient protection to incorporated and unincorporated bodies, clause 21 of the Bill should also clarify that the protected 'field' of 'services' clearly includes the determination of funding and the allocation of contracts and tenders by State and Territory Governments. It should be unlawful for such Governments to engage in religious discrimination, regardless of whether they are operating under a Commonwealth programme or law under clause 27.

14. Clause 16 should extend to the qualifications of corporate bodies, not just individuals (page 40)

The Bill should clarify that the provisions binding qualifying bodies (at clause 16) extend not just to individuals (for example in the accreditation of foster carers or adoptive parents or tradespeople or professionals), but also to corporate bodies. This will grant protection to bodies such as accredited independent faith-based schools or tertiary education providers or incorporated student clubs within universities or accredited service providers under government or other contracts. It is not at all clear that the associate's clause (clause 9) would protect such bodies if the protected field of accreditation extends only to individuals.

15. The provisions enabling Religious Bodies to Preference employees and members on religious grounds has become unwieldy with the use of Public Benevolent Institutions and the unprecedented exclusion of religious bodies that undertake "Commercial Activities": cl 12 (page 40). We propose a more nuanced policy regime.

Appendix 1 provides a table overviewing the proposed regime in RDB2. From this overview, it is readily apparent that the Bill introduces a very complicated regime and excludes a range of religious charities that are not excluded by existing exemption provisions in Commonwealth anti-discrimination law. PBIs comprise a very limited proportion of the wider religious and faith-based charitable sector (including churches). The new bespoke rules for aged care and hospitals do not allow them to act in accordance with their religious convictions (including in respect of euthanasia or IVF). The regime will prevent a sizeable proportion of the charitable and not-for-profit religious and faith-based sector from being able to ensure that their character remains identifiably religious, both through their employment decisions and in the actions that they are compelled to undertake. This submission analyses ACNC data to identify the wide range of excluded faith-based organisations as a result of the commercial activities test. These include, for example, faith-based marriage guidance and marriage or family counselling organisations, radio stations, public libraries, civic activity bodies, culture, historical and arts bodies, environmental bodies, grant-making and philanthropic, bodies volunteering bodies, religious bookstores (whether for profit or not), and childcare centres. The exclusions have no precedent in any anti-

discrimination law in any jurisdiction in Australia (or any common law-based democracy). Drawing such distinctions in the RDB2 will set a precedent for a similar demarcation to be drawn in other Commonwealth anti-discrimination law. Finally, it is important to note that the exemptions granted to religious bodies in anti-discrimination law have never been limited to charities alone. In 2010 the Productivity Commission estimated the number of Australian not-for-profits (bodies not able to distribute profit to their members) to be in the order of 600,000 (there are around 57,000 charities registered with the ACNC).

In Appendix 2 we set out the preferred policy framework for deciding when various classes of religious organisations can and cannot apply preferences on religious grounds in:

- The selection of members and governors (e.g. board members) of the organisation
- Employment decisions relating to staff, contractors and volunteers
- Selection of attendees, clients or recipients of benefits, facilities or services provided by the organisation
- Rules limiting the use of facilities, products and services provided to members, attendees, clients or recipients of services where the rules are in accordance with the doctrines, tenets, beliefs or teaching of the religion

16. Freedom of Religion Commissioner: cl 45 (page 45)

The RDB2 should include more detailed appointment criteria, in order to ensure that the appointee to this position is a person who understands religion and has experience with religious freedom issues. This does not require that the person be a member of any religion or hold a religious belief.

17. Federal RDA should be expressed to override State and Territory laws which are directly inconsistent (page 45)

It should be made clear that if a State or Territory Act does not protect religious freedom to the same extent as the Federal RDA, the Federal RDA prevails to the extent of that inconsistency. We give examples of such inconsistency below.

For example, clause 62(1) could add at the end: "but this Act is intended to exclude or limit the operation of a law of a State or Territory to the extent that law is inconsistent with this Act within the meaning of section 90 of the Constitution".

18. Compelling a person to act against their conscience is discrimination (page 47)

Religious persons or entities should not be required to engage in, or affirm, acts or statements which are contrary to their genuine religious beliefs. In light of the watering-down of standard-form religious discrimination legislation by judicial interpretation overseas, to offer adequate protection, the Bill should clarify that such compulsion (including by making benefits conditional upon such affirmation) is religious discrimination.

Religious discrimination includes requiring, or making a benefit conditional upon, a religious individual or a religious entity having to express or support (including by conduct) a view, practice or action which is contrary to their genuinely held religious belief.

19. Health Practitioner Conduct Rule (page 48)

The provisions regarding objections by health practitioners (subparagraph 8(5) and (6)) do not extend to religious hospitals. This does not provide sufficient protection to faith-based health institutions from religious discrimination claims. To the extent that the protections to health practitioners are also made subject to weak State laws, they are inadequate. New statements in the Bill and the EM call into question the ability of the health practitioner to assert a claim of religious discrimination where the patient could be considered to be a subclass of the wider public. This draws an arbitrary line:

the religious basis for a conscientious objection to providing a service to a particular class of persons may be as doctrinally sound as the religious basis for refusing to provide a type of service to all persons. As a result of the new clarification provided, the 'unjustifiable adverse impact' test now appears to capture almost any imposition on a patient, regardless of the profundity of the effect on the religious health practitioner.

20. Protection of Charities - Human Rights Legislation Amendment (Freedom of Religion) Bill 2019: cl 4 (page 50)

Clause 4 of the *Human Rights Legislation Amendment (Freedom of Religion) Bill 2019* amends section 11 of the *Charities Act*, to provide that advocating for a traditional view of marriage will not lead to the loss of a charity's tax status. That Bill has not, however, amended section 6 of that Act, which requires that charities be for the 'public benefit'. Courts have removed the tax exemption of charities that have a traditional view of marriage or sexuality in other common law countries for not satisfying the 'public benefit' requirement. This is an area of the law where developments overseas are uniquely influential. Section 6 must also be amended.

21. Issues not addressed in the Religious Discrimination Bill

The following issues are not addressed in the RDB2. Some of them are currently with the Australian Law Reform Commission, which is now not due to report until late 2020. Others are not addressed at all under the government's agenda.

- Religious Freedom Act (page 52) - a Religious Freedom Act would be based on the external affairs power to meet Australia's international obligation to implement ICCPR Article 18. The history of weak purposive interpretation that the High Court has given to religious freedom under section 116 of the Constitution, demonstrates the need for such an Act. Under such an Act, any council or government agency would have to justify its administration of policy. The Act would also act as a defensive shield against practices which unduly burden religious freedom, unless they are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

- parental rights in relation to schooling (in particular, the right of parents to remove their children from teaching that is not in conformity with the parents' beliefs and morals pursuant to Art 18(4)); and
- the rules for allowing schools and religious bodies to manage their affairs in accordance with their faith under the Sex Discrimination Act and other discrimination laws.

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