

Human
Rights
Law
Centre.

Submission on the Religious Discrimination Bill 2021

December 2021

Human Rights Law Centre.

Adrienne Walters, Daney Faddoul & Harriet Forster
Human Rights Law Centre Ltd
Level 17, 461 Bourke Street
Melbourne VIC 3000

T: + 61 3 8636 4400
F: + 61 3 8636 4455
E: adrienne.walters@hrlc.org.au
W: www.hrlc.org.au

Human Rights Law Centre

The Human Rights Law Centre uses strategic legal action, policy solutions and advocacy to support people and communities to eliminate inequality and injustice and build a fairer, more compassionate Australia. We work in coalition with key partners, including community organisations, law firms and barristers, academics and experts, and international and domestic human rights organisations.

The Human Rights Law Centre acknowledges the people of the Kulin and Eora Nations, the traditional owners of the unceded land on which our offices sit, and the ongoing work of Aboriginal and Torres Strait Islander peoples, communities and organisations to unravel the injustices imposed on First Nations people since colonisation. We support the self-determination of Aboriginal and Torres Strait Islander peoples.

Follow us at <http://twitter.com/rightsagenda>

Join us at www.facebook.com/HumanRightsLawCentreHRLC/

Contents

| | | |
|-----|---|----|
| 1. | EXECUTIVE SUMMARY | 2 |
| 2. | SUMMARY OF RECOMMENDATIONS | 3 |
| 3. | FEDERAL LAWS ARE NEEDED TO PREVENT RELIGIOUS-BASED DISCRIMINATION | 5 |
| 4. | BETTER HUMAN RIGHTS LAWS FOR AUSTRALIA | 6 |
| 4.1 | Frameworks for getting the balance right | 6 |
| 4.2 | An Australian Charter of Human Rights | 7 |
| 4.3 | Consolidated and strengthened equality laws | 8 |
| 5. | KEY CONCERNS WITH THE BILL | 9 |
| 5.1 | The Bill grants a far-reaching licence to discriminate to religious institutions | 9 |
| 5.2 | The Bill will create a dangerous authorising environment for harmful statements of belief | 15 |
| 5.3 | The Bill undermines efforts to promote diversity and inclusion | 17 |
| 5.4 | The Bill should protect people of faith from hate speech | 18 |
| 5.5 | Other concerns with the Bill | 19 |

1. Executive Summary

The Human Rights Law Centre (**HRLC**) has long advocated for legal protection of the right to freedom of thought, conscience, religion or belief within a framework which guarantees robust human rights protections for all Australians. We support balanced laws that protect all people in Australia from discrimination, including on the ground of their religious belief or activity, as well as on the ground of not holding a religious belief or engaging in a religious activity.

The inclusion of religion as a protected attribute in Australia's federal anti-discrimination law framework has an important role to play in combatting discrimination and bigotry. This is particularly important in light of the alarming rate of unfair and hateful treatment experienced by people of minority faiths in recent years. For example, in 2021, a survey by the Australian Human Rights Commission found that nearly 80 per cent of Muslims have experienced unfair treatment because of their religion, race or ethnicity, while a survey by the Executive Council of Australian Jewry found a 35 per cent increase in reports of antisemitic incidents.¹ Australia's anti-discrimination laws are not providing the protection that they should.

Disappointingly, the Government's Religious Discrimination Bill 2021 (**the Bill**) repeats the patterns of the first and second exposure drafts of the Bill and fails to strike the right balance between the freedom to manifest religion and the right of everyone to equal treatment and non-discrimination.

The removal of a provision from the second exposure draft that would have allowed doctors with a religious objection to certain health services to abandon their ethical duties to their patients is welcome, as well as the removal of the so-called 'Folau clause'. However, there remain a number of provisions that are unprecedented, unjustified and inconsistent with international human rights laws, including those that would:

- dramatically broaden the scope for religious bodies, including charities, schools and organisations providing vital health, welfare and social services, *to discriminate* against people on the basis of religion in a range of settings (clauses 7-9 and 40(2)-(7));
- override state and territory laws, and specifically the Victorian *Equal Opportunity Act 2010*², that are designed to prevent religious-based discrimination against staff at religious schools (clause 11);
- introduce highly subjective and individualised tests to determine whether the statement or conduct of a person or religious body is consistent with a religion (the 'religion of two' and 'religion of one' tests), without any requirement to consider the human rights of people who may be adversely affected (clauses 7-9, 12, 15 and 40(2)-(7));
- authorise offensive, humiliating, derogatory and harmful "statements of belief" being made by one person against another, while removing hard-fought protections in federal, state and territory anti-discrimination laws (clause 12); and

¹ Australian Human Rights Commission, *Sharing the Stories of Australian Muslims* (2021); Executive Council of Australian Jewry, *Report on Antisemitism in Australia 2021* (12 December 2021) 6. See also Andrew Markus, *Mapping Social Cohesion: The Scanlon Foundation Surveys 20121* (2021) 62-65.

² See contingent amendments in the Religious Discrimination (Consequential Amendments) Bill 2021, sch 2.

- undermine the ability of professional regulatory bodies to enforce codes of conduct that promote public confidence and safety in trades and professions, such as the medical profession and legal profession (clause 15).

The effect is to give a greater licence *to discriminate* on religious grounds than already exists in law, to the detriment of people of minority faiths, women, LGBTIQ+ people, people with disability, First Nations people, people of colour and many others. For people who face multiple and intersecting forms of discrimination, such as ableism, racism and sexism, this Bill is an even greater threat.

The Bill is inconsistent with Australia's international human rights obligations and **should be opposed by the Committee**. It is also inconsistent with the commitment made by former Attorney General Christian Porter to draft a bill that does *not provide a licence to discriminate*.³

As is outlined below, the patchwork approach to Australia's federal anti-discrimination law framework has resulted in insufficient protections against religious-based discrimination, while the absence of a national human rights law means that Australia lacks a framework for the vital task of carefully and comprehensively balancing competing human rights. A better approach, therefore, would be for the Government to finally address the significant gaps in legal protections for the fundamental rights and freedoms of all people in Australia by consolidating and strengthening anti-discrimination laws and adopting an Australian Charter of Human Rights.

2. Summary of recommendations

Overarching recommendations

1. The Committee should oppose the Bill and recommend that the Australian Government take an approach that promotes protection of all of Australia's international human rights obligations.
2. The Committee should recommend that the Australian Government prioritise enacting a legislative Charter of Human Rights.
3. The Committee should recommend that the Australian Government prioritise a process to consolidate and strengthen Australia's federal anti-discrimination law framework.

Recommendations about amending the Bill if it is to be supported by the Committee

4. The Committee should recommend that the Australian Government narrow permanent religious exemptions in federal anti-discrimination laws, including the *Sex Discrimination Act 1984*, through a thorough and independent review process. This process should adopt best-practice reforms drawing on the experience of jurisdictions that have recently narrowed religious exemptions, such as Victoria. Until this is done, at a minimum, the Committee should recommend that the Bill be amended by:

³ See e.g. Sarah Martin and Naaman Zhou, 'Coalition Stops Short of 'Licence to Discriminate' in Religious Freedom Bill', *The Guardian* (online) 20 August 2019.

- (a) Replacing clauses 7-9 and 40(2)-(7) with a test that requires that a discriminatory act or practice of a religious body conform to the doctrines, tenets, teachings or beliefs of the religion and is necessary to avoid injury to the religious susceptibilities of adherents of that religion, before it is exempt from the protective provisions of the Bill. This should be in addition to the public policy requirement.
 - (b) Narrowing the definition of religious body to one that is established for a religious purpose.
 - (c) Prohibiting discrimination on the basis of religion in service delivery by religious bodies providing any health, aged care, disability, homelessness, family violence, youth support, food and financial support services, and other community, social and welfare services provided to the public.
 - (d) Include standard exemptions that allow the appointment and training of religious leaders and members of a religious order, and the appointment of persons to participate in religious worship and observance.
5. The Committee should recommend that Clause 11 of the Bill be deleted, together with Schedule 2 of the Religious Discrimination (Consequential Amendments) Bill 2021.
 6. The Committee should recommend that section 38 of the SDA be repealed to prevent discrimination against students, teachers and staff on the basis of sex, sexual orientation, gender identity, marital or relationship status or pregnancy.
 7. The Committee should recommend that clause 7 of the Bill be amended to expressly exclude its application to clause 24(2) so that students cannot be discriminated against once admitted to a school.
 8. The Committee should recommend that clause 12, the related definition of “statement of belief” in clause 5, and the related objects clause 3(1)(d), be deleted.
 9. The Committee should recommend that clause 15 and related definitions are deleted (in relation to qualifying body conduct rules outside of work).
 10. The Committee should recommend that the Australian Government better protect communities of faith, particularly minority faith communities, from hate speech and violence by consulting carefully and introducing laws to prohibit vilification on the grounds of religious belief or activity.

The HRLC also endorses a number of recommendations made by Equality Australia, as set out in section 5.5 of this submission.

3. Federal laws are needed to prevent religious-based discrimination

While the HRLC cannot support the Government's unbalanced Religious Discrimination Bill, we do support *balanced* laws that would make religious belief and activity, as well as the absence of religious belief and activity, a protected attribute in federal anti-discrimination law.

Religion plays an important role in the lives of many people in Australia. According to the 2016 Census, 52% of people in Australia identify as Christian and 8.2% of people identify with another religion, including Islam, Buddhism, Hinduism, Sikhism and Judaism. There has also been a rapid decline in religious belief in Australia in recent years, with 30% of Australians reporting no religion.⁴

Better protections against religious discrimination and intersectional discrimination are particularly important for minority faith communities, with evidence of Muslim and Jewish Australians and other faith communities experiencing regular vilification and unfair treatment.⁵

The right to freedom of thought, conscience, religion or belief is a fundamental right under international law⁶ and should be protected under Australian law. The right to form, hold or change inner convictions extends to beliefs that may be objectionable to others. It is not however, a freedom to discriminate and cause harm against others.

Equality and freedom *from* discrimination are fundamental human rights belonging to everybody.⁷ The Australian Government has an obligation to guarantee all people equal and effective protection against discrimination "on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".⁸

The inclusion of religious belief (and not holding a religious belief) as a protected attribute in federal anti-discrimination law should strengthen protections for people with and without religious beliefs. However, this must not come at the cost of weakening discrimination protections for other groups of people, such as women, people living with disability and LGBTIQ+ people.

As is outlined below, weakening the human rights protections of other people is precisely what this Bill does and why we urge the Committee to oppose the Bill.

We note that the attribute of religious belief or activity in the Bill will encompass the religious beliefs and activities of Aboriginal and Torres Strait Islander people. There is a long history in Australia, since colonisation, of Aboriginal and Torres Strait Islander peoples' spiritual and cultural life being actively oppressed, displaced and devalued by Australian governments.⁹ We are not aware of consultation with

⁴ Australian Bureau of Statistics, "Religion in Australia", 2071.0 - *Census of Population and Housing: Reflecting Australia - Stories from the Census, 2016* (28 June 2017), accessible at <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/2071.0~2016~Main%20Features~Religion%20Data%20Summary~70>.

⁵ Above n 1.

⁶ *International Convention on Civil and Political Rights*, opened for signature 16 December 1966 (entered into force 23 March 1976) (ICCPR) art 4(2) art 18(1).

⁷ See e.g. UN Human Rights Committee, *General Comment No 18: Non-discrimination*, UN Doc HRI/GEN/1/Rev.6 (1989) 146; *D.H. v The Czech Republic*, Appl. No. 57325/00 (2007); *Nachova v Bulgaria*, Appl. Nos. 43577/98 & 43579/98 (2005); *Morales de Sierra v Guatemala*, Case 11.625, Inter-Am. C.H.R., Report No. 4/01, OEA/Ser.L/V/II.111, doc. 20 rev (2001).

⁸ ICCPR art 26.

⁹ See e.g. Katja Mikhailovich & Alexandra Pavli, "Freedom of Religion, Belief, and Indigenous Spirituality, Practice and Cultural Rights", *Australian Institute of Aboriginal and Torres Strait Islander Studies* (2010).

Aboriginal and Torres Strait Islander peoples in the preparation of this Bill, and strongly urge the Australian Government to do this.

4. Better human rights laws for Australia

4.1 Frameworks for getting the balance right

While the freedom to *hold* religious beliefs is absolute,¹⁰ a person's right to outwardly display or *manifest* a religious belief through their actions can be limited.

Limitations on the manifestation of a religious belief are important due to the risk that other people's fundamental human rights are suppressed, including the freedom to manifest a different religion and the right to equality.¹¹ In international law, manifesting a religious belief can be limited where those limitations are "prescribed by law and are necessary to protect public safety, order, health, or morals or *the fundamental rights and freedoms of others*."¹² As the UN Special Rapporteur on the Freedom of Religion noted in his 2020 report on gender-based discrimination in the name of religion, "no human right may be invoked to destroy another human right."¹³

Not all acts that a person claims to be a manifestation of their religion should be protected. Article 18(1) of the ICCPR states that freedom of religion includes the freedom to manifest religion or belief in "worship, observance, practice and teaching". This encompasses a broad range of acts.¹⁴ European case law provides guidance – to fall within the potential protection of the freedom, an external act must be "intimately linked" to the religious belief and there must be "a sufficiently close and direct nexus between the act and the underlying belief".¹⁵ Places of worship, items connected to the observance of a particular religion and religious ceremonies are examples of public expressions of religious belief that are clearly protected.

Balancing competing human rights and drawing a line as to which religious practices should be accommodated in a pluralistic society that respects the rights of diverse groups is not a simple exercise. Fortunately, international law provides a framework for drawing this line.¹⁶ That is, in order for a limitation on a human right to be justified, the limitation must be prescribed by law, necessary, pursue a legitimate aim, be rationally connected to that aim, and be proportionate to that aim. This is known as a 'proportionality test' (or 'general limitations test').¹⁷

¹⁰ UN Human Rights Committee, *General Comment No. 22: Freedom of Thought, Conscience or Religion*, UN Doc CCPR/C/21/Rev.1/Add.4 (1993) [8].

¹¹ Manfred Nowak, *UN Convention on Civil and Political Rights: CCPR Commentary (2nd revised edition)* (2005) 408.

¹² ICCPR art 18(3).

¹³ Special Rapporteur on Freedom of Religion or Belief, *Gender-based violence and discrimination in the name of religion or belief*, UN doc A/HRC/43/48 (24 August 2020).

¹⁴ UN Human Rights Committee, *General Comment No. 22: Freedom of Thought, Conscience or Religion*, UN Doc CCPR/C/21/Rev.1/Add.4 (1993). The scope of these concepts are clarified at [4].

¹⁵ *Eweida & Ors v The United Kingdom* [2013] ECHR 37 [82]. See also *Ladele v London Borough of Islington* [2009] EWCA Civ 1357 [52].

¹⁶ See e.g. ICCPR art 18(3); UN Human Rights Committee, *General Comment No. 22: Freedom of Thought, Conscience or Religion*, UN Doc CCPR/C/21/Rev.1/Add.4 (1993) [8].

¹⁷ UN Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4 (1985) Annex. This reflects the limitation criteria used by Australia's Parliamentary Joint Committee on Human Rights. These principles are also reflected in the limitation provisions of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2), and the *Human Rights Act 2004* (ACT) s 28.

In Australia, in the absence of a national Equality Act or a Charter of Human Rights with a proportionality test, the concepts of reasonableness, necessity and special measures have been used to balance competing rights and interests in anti-discrimination laws. For example, in existing federal anti-discrimination laws, determining whether a requirement or condition is indirectly discriminatory is done by reference to whether it is reasonable, having regard to the circumstances of the case.¹⁸ This allows for the balancing of a wide range of factors impacting both on the aggrieved person and the alleged discriminator. Federal anti-discrimination laws also provide for “special measures” or measures for “positive discrimination”, which involve actions taken to assist or recognise the interests of disadvantaged groups.¹⁹

While these existing concepts are clear and reliable, the difficulty with an approach that relies on a patchwork of anti-discrimination laws is that not all human rights are recognised in Australia’s anti-discrimination, and there is no consistent approach to exemptions from anti-discrimination laws. These issues could be resolved by consolidating and improving Australia’s anti-discrimination laws into one equality law, and adopting a comprehensive Charter of Human Rights.

4.2 An Australian Charter of Human Rights

The HRLC has long advocated for the protection of the right to freedom of religion or belief within a framework which *guarantees robust human rights protections for all people in Australia*.²⁰

Human rights are indivisible and have equal status. They cannot be positioned in a hierarchical order. It is important that human rights are not protected in isolation, or that one right is automatically privileged over other rights.

Australia has agreed to be bound by the major international human rights laws, but individuals cannot take action under Australian law when their rights are violated. Australian’s support better human rights protections – in 2009-2010, the National Human Rights Consultation found that a Human Rights Charter was supported by over 87% of a record 35,000 public submissions.²¹ More recently, an opinion poll of 1000 Australians commissioned by the Human Rights Law Centre found that 74 percent agreed that a Charter of Human Rights would help people and communities to make sure government does the right thing, and 83 percent believed there should be a document that sets out in clear language the rights and responsibilities that everyone has in Australia.²²

A Charter of Human Rights would:

- protect human rights for all Australians;
- improve public service delivery and accountability, and enhance transparency and responsiveness;

¹⁸ See *Age Discrimination Act 2004* (Cth) s 15; *Disability Discrimination Act 1992* (Cth) s 6; *Sex Discrimination Act 1984* (Cth) ss 5 and 7B; *Racial Discrimination Act 1975* (Cth) s 9.

¹⁹ See *Age Discrimination Act 2004* (Cth) s 33; *Disability Discrimination Act 1992* (Cth) s 45; *Sex Discrimination Act 1984* (Cth) s 7D; *Racial Discrimination Act 1975* (Cth) s 8.

²⁰ See e.g. Human Rights Law Centre, *Rights and freedoms in Australia: Response to the Australia Law Reform Commission interim report of its inquiry into traditional rights and freedoms* (2009); *Striking the right balance: Submission to the inquiry into the status of the human right to freedom of religion or belief* (2017); *Protecting fundamental rights and freedoms in Australia: Submission to the Expert Panel on the Religious Freedom Review* (2018).

²¹ National Human Rights Consultation Committee, *National Human Rights Consultation: Report* (2009) 263.

²² QDos opinion poll of 1038 Australians conducted between 23 to 30 June 2021, commissioned by the Human Rights Law Centre. Results can be accessed at <https://charterofrights.org.au/news-events/2021/9/6/covid-19-sees-huge-increase-in-support-for-a-charter-of-human-rights-poll>.

- improve Australian laws and policies so that they better protect human rights; and
- contribute to the development of a human rights culture in Australia and enhance public awareness of human rights.

Australia is the only Western liberal democratic nation without comprehensive statutory or constitutional protection of human rights. There are many gaps in the protection of human rights in this country. The Australian Government should address these gaps in a comprehensive manner.

Disappointingly, the Australian Government is proposing a Bill that, in a number of respects, elevates the freedom of religion for some above the human rights of others.

Instead of unbalanced and piecemeal pieces of legislation, the Australian Government should comprehensively protect *all* human rights through an Australian Charter of Human Rights.

4.3 Consolidated and strengthened equality laws

There are well-recognised weaknesses in the current framework of Australia's anti-discrimination laws.²³ Federal anti-discrimination laws currently provide inconsistent and fragmented protections and rely on a fault-based system of individual complaints rather than incorporating measures to promote substantive equality.

In 2013, following a number of inquiries, the former Australian Government proposed a *Human Rights and Anti-Discrimination Bill 2013* (Cth). This would have consolidated and modernised the five separate federal anti-discrimination laws to ensure justice is not denied because of complex technicalities of our current laws.

The HRLC has consistently advocated for a modern, consolidated equality law (in addition to a Charter of Human Rights) with the following key features:²⁴

- A unified test for discrimination incorporating the elements of direct and indirect discrimination. These forms of discrimination should not be treated as mutually exclusive.
- An expanded list of protected attributes, including “religious belief or activity”.
- Prohibition of attribute-based harassment in all areas of public life covered by the legislation.
- Prohibition of vilification on the basis of all protected attributes.
- Specific protections against intersectional discrimination.
- A shifting burden of proof, so that a rebuttable presumption arises once the complainant establishes a *prima facie* case of discrimination.
- Discrimination is not unlawful if the discriminatory conduct is a necessary and proportionate means of achieving a legitimate end or purpose.

²³ UN Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, UN Doc CCPR/C/AUS/CO/6 (1 December 2017) [17]-[18].

²⁴ See e.g. Human Rights Law Centre, *Realising the Right to Equality: The Human Rights Law Centre's Recommendations for the Consolidation and Reform of Commonwealth Anti-Discrimination Laws* (January 2012).

- A positive obligation on the public and private sector to promote equality and eliminate unlawful discrimination.
- A no-costs jurisdiction for discrimination complaints so that people who bring complaints of discrimination do not face the risk of being forced to pay huge legal costs.

The Australian Government should prioritise a process for modernising and consolidating federal anti-discrimination laws to bring them in line with our international human rights obligations as recommended by the UN Human Rights Committee in 2017.²⁵

Recommendation 1: *The Committee should oppose the Bill and recommend that the Australian Government take an approach that promotes protection of all of Australia’s international human rights obligations.*

Recommendation 2: *The Committee should recommend that the Australian Government prioritise enacting a legislative Charter of Human Rights.*

Recommendation 3: *The Committee should recommend that the Australian Government prioritise a process to consolidate and strengthen Australia’s federal anti-discrimination law framework.*

5. Key concerns with the Bill

We reiterate that the HRLC does not support the passage of this Bill through Parliament. However, we provide a brief summary of our key concerns with the Bill and recommendations to address those should the Committee decide to support the Bill.

5.1 The Bill grants a far-reaching licence to discriminate to religious institutions

Clauses 7 to 9, 11 and 40(2)-(7) of the Bill grant a far-reaching licence to religious bodies (including schools and registered charities) to discriminate against others on the basis of religion by engaging, in good faith, in conduct:

- that “a person of the same religion as the religious body could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of that religion” (**religion of two test**); or
- to “avoid injury to the religious susceptibilities of adherents of the same religion as the religious body” (**religious susceptibilities test**).

The scope of this licence to discriminate extends to giving preference to people of the same religion. It applies to organisations that are funded by government to provide public goods and services, as well as those that are privately funded.

For religious hospitals²⁶, aged care facilities²⁷, accommodation providers and disability service providers, this licence to discriminate relates only to employment and partnerships (not to service delivery), so long as they have a publicly available policy outlining their position that complies with

²⁵ UN Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, UN Doc CCPR/C/AUS/CO/6 (1 December 2017) [18].

²⁶ This may also include health services provided outside of hospitals, given the Explanatory Memorandum uses the example of a medical centre (and not a hospital) in respect to clause 8 at p 47 [113], although the definition remains unclear.

²⁷ This excludes aged care services provided outside of facilities, such as in-home aged care.

any requirements set by the Minister (**public policy requirement**). In contrast, religious organisations would be allowed to discriminate in a range of other service delivery settings against people who seek their help, such as home-based aged care, social and welfare services and potentially healthcare services provided outside of hospitals. Camp and conference sites would also be allowed to discriminate based on religion in relation to facilities and accommodation where the public policy requirement is met.²⁸

For schools, discrimination in relation to employment must also meet the public policy requirement.²⁹ The public policy requirement does not extend to students.

Finally, clause 11 seeks to *override* state and territory laws where those laws prohibit or restrict religious schools from giving preference, in employment, to people who hold or engage in a particular religious belief or activity. The Minister has the power to prescribe which state/territory laws can be overridden and has explicitly targeted Victoria's *Equal Opportunity Act 2010* following the passing of amendments³⁰ in December 2021 that are designed to prevent unfair treatment towards staff in religious schools.³¹

The real-world consequences of this licence to discriminate are well documented by Equality Australia in their submission – we urge the Committee to look at those again. One further example is provided below in relation to the service delivery context. In considering case examples, it is important for the Committee to reflect on the huge numbers of people in Australia who attend religious schools, are employed by religious organisations or who turn to religious organisations for support services. For example:

- St Vincent De Paul Society, Salvation Army, Anglicare and Catholic Social Services Australia have provided a range of vital welfare services, such as youth support, food aid, financial support, child protection and homelessness support, to around 5 million Australians in recent years.³²
- Over 770,000 children in Australia attend Catholic schools (19.4 per cent of all enrolled students) and another 15 per cent attend independent schools, many of which are faith-based.³³
- Of nearly 200,000 people employed at non-government schools, most work in faith-based schools and over half are employed by Catholic schools.³⁴

²⁸ Religious Discrimination Bill 2021 (Cth) cl 40(2)-(7).

²⁹ Religious Discrimination Bill 2021 (Cth) cl 7(6).

³⁰ In the *Equal Opportunity (Religious Exceptions) Amendment Act 2021* (Vic).

³¹ See Religious Discrimination Bill 2021 (Cth) cl 11; Religious Discrimination (Consequential Amendments) Bill 2021.

³² St Vincent de Paul Society, *How Many People Does Vinnies Assist Annually In...* (2021)

<https://www.vinnies.org.au/page/About/FAQs/How_many_people_does_Vinnies_assist_annually_in_Australia/>; Anglicare Australia, *Annual Report 2020-2021*, 8; Catholic Social Services Australia (2021) <<https://cssa.org.au/>>.

³³ Australian Bureau of Statistics, *Schools, Reference Period 2020* (19 February 2021).

³⁴ Australian Bureau of Statistics, *Schools, Reference Period 2020* (19 February 2021).

Case study: Discrimination in service delivery

Sarah* moved to a country town and started experiencing financial hardship when she returned to study. She contacted a local Commonwealth funded religious organisation for assistance with paying her rent and bills to avoid being evicted into homelessness.

Sarah was initially treated respectfully by volunteer staff and the organisation offered her financial counselling and support. After Sarah mentioned that she was gay, she was asked probing and inappropriate questions about her living situation from a staff member trying to ascertain whether she was sexually active with a woman. Sarah spoke to other staff about the change in how she was being treated by the organisation and was told she shouldn't have mentioned her sexual orientation. The organisation contacted Sarah and told her they could not assist her but did not provide a reason why they had decided to withdraw their previous offer of assistance.

Sarah tried to find another support service but was told that the religious organisation was the only service in her area that could assist. The support service's refusal to assist her had a significant impact on Sarah's mental health and feelings of safety and support. Sarah fell behind in her rent and eventually became homeless.

The Bill would authorise this unfair treatment on the basis that Sarah's relationship is inconsistent with the religious beliefs of the organisation, so long as that organisation could show that it acted in good faith and that one other person of the same religion considers their actions to be in accordance with the beliefs of the religion.

*A pseudonym has been used to protect privacy.

The right to equality and non-discrimination for all is undermined

While there are circumstances in which it can be acceptable for religious bodies to discriminate on the basis of religion, such as in the training or appointment of religious leaders and the conduct of worship, the Bill goes far beyond this and is inconsistent with international human rights law standards.

We do not suggest that all faith-based organisations are seeking to discriminate. However, the Bill does grant religious bodies a broad right to discriminate on the basis of religion and this threatens the right to equality and non-discrimination of other groups, in particular LGBTIQ+ people, women, people with disability and people of minority faiths. Neither the 'religion of two' or 'religious susceptibilities' tests require the human rights of people affected by the conduct of a religious organisation to be considered. Employees, students and people relying on vital public services provided by religious organisations are not protected if their beliefs or way of expressing their beliefs differ.

Furthermore, the Federal Government is targeting equality laws passed by democratically elected state and territory parliaments for override. The recently passed *Equal Opportunity (Religious Exemptions) Amendment Act 2021* in Victoria, which appears to be the driver for the Federal Government introducing clause 11, actually provides a model for balancing competing human rights. It requires consideration of reasonableness, proportionately and the inherent requirements of a job when deciding whether it is lawful to discriminate against a staff member or candidate on the basis of

religion. This allows for the balancing of the needs and rights of people of faith against the rights of others to be treated equally at work or when applying for a job.

Exceptions for religious bodies that are already too broad are being expanded

Religious bodies already have broad exemptions from complying with anti-discrimination laws across Australia. These exemptions are broader than permitted under international human rights law and should be narrowed, not expanded.

The Bill adopts a broader definition of ‘religious body’ than that which exists in existing anti-discrimination laws, while granting the licence to discriminate to a very broad range of religious organisations (with the key limitation being whether they are solely or primarily engaged in commercial activities).

The Bill also adopts new tests for assessing whether discriminatory conduct or a belief statement that would otherwise be unlawful is acceptable. The HRLC is deeply concerned by the ‘religion of two’ test outlined above, which has been retained from the Second Exposure Draft. The test of belief in relation to ‘statements of belief’ now no longer incorporates the religion of two test – alarmingly it has instead been weakened and become a ‘religion of one’ test. This is addressed further in section 5.2 below.

These tests are completely unprecedented in Australian law. Given that they can be used to erode the human rights of other people, they unacceptably broad, subjective and individualised – even more so because the Bill does not define religious belief or religious activity or place any limit on the types of beliefs that are protected. The religion of two test allows faith-based institutions to discriminate against those with different or no religious beliefs by defining religion at an extremely individualised level. In practice, this will make it near impossible for someone who is harmed to argue that the conduct of the religious body is not in accordance with the doctrines, tenets or beliefs of the religion. We are also concerned that it will legitimise conduct based on extreme interpretations of a religious text, belief or practice.

As an alternative to the religion of two test, the Bill also provides for a ‘religious susceptibilities test’, as outlined above. A similar version of this test exists in the *Sex Discrimination Act 1984 (SDA)* and *Age Discrimination Act 2004 (ADA)*. However, the Bill creates a lower threshold for unfavourable treatment on the basis of religion by excluding the word ‘necessary’, which is a key balancing feature of the equivalent exemptions in the SDA and ADA (i.e. to be exempt, the conduct must be “*necessary* to avoid injury to the religious susceptibilities of adherents of that religion”).

Permanent exemptions to anti-discrimination laws should be narrowed

Anti-discrimination laws have a vital role to play in promoting healthy, safe and inclusive communities, by protecting all people from being treated unfairly based on an attribute that is central to their identity and sense of self. Exceptions to anti-discrimination laws can be harmful and create fear for minority groups, such as LGBTIQ+ people. They should therefore only be allowed where necessary and be carefully and narrowly worded to directly address a legitimate aim.

Currently, all federal, state and territory laws already provide permanent exemptions, that render lawful, conduct by religious institutions that would otherwise constitute unlawful discrimination. These permanent exemptions are linked to a range of protected attributes, including religion, sex, sexual orientation, gender identity, intersex status, relationship status and age and vary across

jurisdictions. At the federal level, permanent exceptions sit in the SDA and ADA and exemptions can be applied for on a case-by-case basis.³⁵

The HRLC has previously expressed concern at the breadth and harmful impact of permanent religious exceptions in the SDA and ADA, in particular that they perpetuate a false and unjustified hierarchy of rights and entrench systemic discrimination.³⁶ These exceptions should be significantly narrowed. We support limited exemptions for religious bodies to organise and conduct affairs closely connected to religious worship, observance, practice and teaching. We also support provisions that enable applications for exemptions to be made and assessed against transparent and human rights-based criteria on a case-by-case basis. We do not support blanket religious exemptions across a range of areas of public life.

As noted above, the Bill's 'religion of two test' and 'religious susceptibilities test' for excusing discriminatory conduct by religious institutions departs significantly from existing religious-based exceptions, in particular in the SDA, ADA and *Fair Work Act 2009*.³⁷

The permanent exemptions in sections 23(3)(b) and 37(1)(d) of the SDA should be significantly narrowed as part of a thorough and independent review of permanent exceptions to federal anti-discrimination laws. This process should adopt best-practice reforms drawing on the experience of jurisdictions that have recently narrowed religious exemptions, such as Victoria, and it should feed into the consolidation and strengthening of Australia's anti-discrimination law framework (see recommendation 3). Until that time, we urge the Committee to recommend that the Bill go no further than the exceptions test already used in the SDA.

The SDA exempts, an act or practice that *conforms to* the doctrines, tenets or beliefs of that religion or is *necessary* to avoid injury to the religious susceptibilities of adherents of that religion. We note that this test is similar to s 52(d) of the Tasmanian *Anti-Discrimination Act 1998*, however the Tasmanian law only allows exemptions on religious grounds and requires an act or practice to both conform with the religion and be *necessary* to avoid injury to religious susceptibilities.³⁸ We believe this is a sensible *minimum* approach given the importance of the goals of anti-discrimination laws.

At a minimum therefore, and until our discrimination laws are comprehensively consolidated and improved, clauses 7-9 and 40 (2)-(7) should be replaced by a test that requires exempt conduct to conform to the religion and be necessary to avoid injury to religious susceptibilities of adherents. All references to preferencing people of the same religion should be removed.

Recommendation 4: *The Committee should recommend that the Australian Government narrow permanent religious exemptions in federal anti-discrimination laws, including the SDA, through a thorough and independent review process. This process should adopt best-practice reforms drawing*

³⁵ *Sex Discrimination Act 1984* (Cth) ss 37, 44; *Age Discrimination Act 2004* (Cth) ss 35, 44.

³⁶ See Human Rights Law Centre, *Protecting fundamental rights and freedoms in Australia: Submission to the Expert Panel on the Religious Freedom Review* (2018) and *Freedom from discrimination in religious schools: Submission to the Senate Legal and Constitutional Affairs Committee on the inquiry into legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff* (2018) – both available at www.hrlc.org.au. The HRLC has advocated for a general limitations clause in place of the current permanent exemptions. We continue to support such an approach in principle, however believe that such a reform should form part of a broader review and consolidation of federal anti-discrimination laws, rather than introducing a new concept into a single piece of federal anti-discrimination law.

³⁷ See *Fair Work Act 2009* ss 153(2)(b), 195(2)(b), 351(2)(c); *Age Discrimination Act 2004* s 35; *Sex Discrimination Act 1984* ss 37(1)(d), 38, 40(2AB).

³⁸ It should be noted that s 51 of the Tasmanian Act outlines a different test for employment in religious schools.

on the experience of jurisdictions that have recently narrowed religious exemptions, such as Victoria. Until this is done, at a minimum, the Committee should recommend that the Bill be amended by:

- a. Replacing clauses 7-9 and 40(2)-(7) with a test that requires that a discriminatory act or practice of a religious body conform to the doctrines, tenets, teachings or beliefs of the religion and is necessary to avoid injury to the religious susceptibilities of adherents of that religion, before it is exempt from the protective provisions of the Bill. This should be in addition to the public policy requirement.*
- b. Narrowing the definition of religious body to one that is established for a religious purpose.*
- c. Prohibiting discrimination on the basis of religion in service delivery by religious bodies providing any health, aged care, disability, homelessness, family violence, youth support, food and financial support services, and other community, social and welfare services provided to the public.*
- d. Include standard exemptions that allow the appointment and training of religious leaders and members of a religious order, and the appointment of persons to participate in religious worship and observance.*

Recommendation 5: *The Committee should recommend that Clause 11 of the Bill be deleted, together with Schedule 2 of the Religious Discrimination (Consequential Amendments) Bill 2021.*

The Bill should put an end to discrimination against school students and staff

All schools have a duty of care to their students to provide an environment that is safe and welcoming, including for LGBTIQ+ students. This may be a challenge for religious schools with doctrines, tenets or beliefs that do not support homosexual conduct or gender transition but the psychological welfare of children in their care should be paramount.

International law requires respect for the liberty of parents and legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.³⁹ However, it is reasonable and necessary to limit this right to protect the best interests of the child or the right of the child to an education appropriate to their needs.⁴⁰

In 2018, Prime Minister Morrison committed to:

*taking action to ensure amendments are introduced as soon as practicable to make it clear that no student of a non-state school should be expelled on the basis of their sexuality [...] and we should use the next fortnight to ensure this matter is addressed.*⁴¹

The Prime Minister did not implement this commitment and the Government has delayed the Australian Law Reform Commission's review of religious exemptions in anti-discrimination laws.⁴² The Bill, if anything, reinforces the provisions in the SDA that allow religious schools to discriminate

³⁹ UN Human Rights Committee, *General Comment No. 22: Freedom of Thought, Conscience or Religion*, UN Doc CCPR/C/21/Rev.1/Add.4 (1993) [6].

⁴⁰ CRC arts 3, 28 and 29.

⁴¹ Prime Minister of Australia, Media Release (13 October 2018), accessible at <https://www.pm.gov.au/media/media-statement>.

⁴² Australian Government Australian Law Reform Commission, *Review in the Framework of Religious Exemptions in Anti-discrimination Legislation* (10 April 2019, terms of reference altered 29 August 2019), accessible at <https://www.alrc.gov.au/inquiry/review-into-the-framework-of-religious-exemptions-in-anti-discrimination-legislation/>.

against staff, teachers and students on the basis of sex, sexual orientation, gender identity, marital or relationship status or pregnancy.⁴³ Overall, the message is that the Government does not consider the wellbeing of children experiencing discrimination at school, nor their teachers, a priority despite evidence of the distress and harm this is causing.⁴⁴

The Government should act now on the Prime Minister's commitment to ensure that no Australian school can discriminate against LGBTIQ+ children, or their teachers, by removing section 38 of the SDA.

In addition, clause 7, which authorises discrimination by religious schools against students on religious grounds, should, at a minimum, be amended to prevent schools from expelling or treating unfairly any student after they have been admitted into a school. This approach is consistent with anti-discrimination laws in Queensland, Tasmania, the ACT and the NT.⁴⁵

Recommendation 6: *The Committee should recommend that section 38 of the SDA be repealed to prevent discrimination against students, teachers and staff on the basis of sex, sexual orientation, gender identity, marital or relationship status or pregnancy.*

Recommendation 7: *The Committee should recommend that clause 7 of the Bill be amended to expressly exclude its application to clause 24(2) so that students cannot be discriminated against once admitted to a school.*

5.2 The Bill will create a dangerous authorising environment for harmful statements belief

The freedom to manifest religion is not absolute and can be limited to protect the human rights of others, including the right to equality and non-discrimination. However, clause 12 of the Bill would override federal, state and territory anti-discrimination laws in order to provide unprecedented protection for 'statements of belief', including those that are offensive, derogatory and humiliating. In addition, it singles s 17(1) of Tasmania's *Anti-Discrimination Act 1998*, which seeks to protect people against offensive, insulting, humiliating and ridiculing conduct.

A "statement of belief" is defined as written or spoken words, made in good faith, which the person making the statement "genuinely considers to be in accordance with the doctrines, tenets, beliefs or teachings" of their religion, or with the fact of not holding a religious belief (**religion of one test**).⁴⁶

The 'religion of one' test has replaced the 'religion of two' test referred to above since the second exposure draft of the Bill. This is an alarming move to an already dangerous and unwieldy provision that was nearly universally condemned in submissions on the previous exposure drafts of the Bill. It introduces an even more individualised and subjective test of intention of the person making the statement – whether they themselves "genuinely consider" their statement to be in accordance with a

⁴³ *Sex Discrimination Act 1984* (Cth) s 38.

⁴⁴ Lynne Hillier et al, 'Writing Themselves in 3: The Third National Study on the Sexual Health and Wellbeing of Same Sex Attracted and Gender Questioning Young People' (Australian Research Centre in Sex, Health and Society, La Trobe University, 2010) 91.

⁴⁵ See *Anti-Discrimination Act 1991* (QLD) s 41; *Anti-Discrimination Act 1988* (TAS) s 51A; *Discrimination Act 1991* (ACT) s 46; *Anti-Discrimination Act 1992* (NT) s 30(2).

⁴⁶ Religious Discrimination Bill 2021 (Cth) cl 5. The wording of this provision would appear to prioritise religious expression over other forms of expression, which is inconsistent with Article 18 of the ICCPR.

religious belief, which is in turn based on how they interpret their religion. There is no need for any other person of that religion to agree that the statement is in accordance with the beliefs of the religion.

This protection for statements of belief would not extend to statements that are malicious, or that a “reasonable person” would consider would harass, threaten, intimidate, vilify,⁴⁷ or that constitute certain offences.⁴⁸ This is an objective test that doesn’t allow for consideration of the background or experiences of the person or group targeted. Understanding the person or group targeted and “sociological context”⁴⁹ in which their identity occurs is pertinent to whether a statement causes them to feel threatened, harassed, intimidated or vilified.

Clause 12 would appear to support:

- A doctor who ‘politely’ denigrates a vulnerable single mother for ‘going against the will of God’ as she seeks help to leave an abusive relationship.
- A teacher telling young students that they are the product of sin because they were born out of wedlock.
- A white supremacist justifying ‘moderately expressed’⁵⁰ statements about the inferiority of people of colour based on their interpretation of their religion.
- An employer who expresses humiliating commentary about an employee’s divorce, which he opposes on the basis of his religion.

These are just a few examples of what clause 12 appears to allow. All that the person making the comment needs to show is that their statement was made in good faith and is one that they genuinely consider to be in accordance with their religion, however they interpret that.

Below is a more detailed hypothetical example of the type of conduct that section 12 would authorise by overriding existing anti-discrimination laws.

Hypothetical case study: Lawful offensive statements at work

Hayley works as a mechanic in Hobart. She is in a same-sex relationship. A month ago, Hayley’s boss John pulled her aside and said “I really care about you Hayley, I consider you to be like the daughter I never had, which is why I need to tell you this. Last week, you told me that you had just gotten engaged to another woman. This is wrong in the eyes of God. Have you heard about conversion therapy? There’s still a chance for you to find the right path.”

John then made similar comments telling Hayley he is worried that she will go to hell if she doesn’t end her engagement. Last week, he made a comment in front of customers and other employees. Hayley says that she finds this offensive, insulting and humiliating and is feeling increasingly unsafe at work.

Hayley would be protected under the current Tasmanian legislation. However, clause 12 of the Bill would override the Tasmanian law and would likely make John’s conduct lawful.

⁴⁷ Clause 5 states that “vilify, in relation to a person or group of persons, means incite hatred or violence towards the person or group.”

⁴⁸ *Religious Discrimination Bill 2021* (Cth) cl 12(2). Cl 35(1)(b) and 12(2)(c) refer to the criminal standard of harm and financial detriment punishable by at least two years imprisonment in the *Criminal Code*.

⁴⁹ See *Eatock v Bolt* [2011] FCA 1103 (28 September 2011) [186], [243].

⁵⁰ Legislative Note 1 in clause 12(2) states that “a moderately expressed religious view that does not incite hatred or violence would not constitute vilification”.

Section 12 is dangerous and should be removed

The HRLC recommends the removal of section 12 in its entirety, in particular because it:

- takes away vital anti-discrimination protections for all in order to privilege the statements of belief of some, thereby breaching Australia’s obligation to protect the right to equality and non-discrimination for all;
- authorises the making of prejudiced, humiliating, derogatory and intolerant statements of belief (or about not having a belief), while creating a higher bar for people hurt by harmful religious speech to jump over to seek protection and relief;
- will undermine efforts by schools, workplace, business, charities, councils and many others to create and promote safe, inclusive and supportive spaces for everyone;
- is legally convoluted and introduces new levels of unfairness in access to justice – the complexity of the Bill and costs associated with testing its scope will benefit wealthy individuals and institutions;
- is completely unnecessary – there is no need to go further than extending existing anti-discrimination laws to include religious belief and non-belief as a protected attributes.

It will be women, LGBTIQ+ people, people with disability, people of minority faiths, people of colour and others who disproportionately suffer the consequences – not only of the direct harm of being on the receiving end of a statement of belief, but also because this type of law contributes to unsafe and intolerant workplaces, schools, services and public spaces.

Statements of belief that target and challenge a person’s identity, however politely they are expressed, will cause serious harm. Already, discrimination that is entrenched in laws, policies and practices in workplaces, schools and homes, contribute to alarmingly high rates of suicide, self-harm and depression among LGBTIQ+ people.⁵¹

The Australian Government should be looking at ways to make our workplaces, schools, business and public spaces more inclusive, friendly and diverse, not to make it easier for people to make harmful and discriminatory statements with impunity.

Recommendation 8: *The Committee should recommend that clause 12, the related definition of “statement of belief” in clause 5, and the related objects clause 3(1)(d), be deleted.*

5.3 The Bill undermines industry efforts to promote diversity and inclusion

We live in a diverse, pluralistic society. All people are entitled to equal protection under the law and to protection from discrimination. Employers, businesses, licencing bodies and regulatory bodies all have a critical role to play, including by setting policies and programs that promote equality of opportunity, inclusion and safety – for workers and the people they provide goods and services to.

The HRLC welcomes the deletion of the ‘employer conduct rule’ (or ‘Folau clause’) since the second exposure draft of the Bill. Any restriction on a worker’s freedom to express their beliefs outside of work must be reasonable and carefully tailored to achieve a legitimate aim and we believe that the standard

⁵¹ The Human Rights Law Centre, *End the Hate Report* (December 2018) 14.

indirect discrimination provision set out in clause 14 of the Bill appropriately allows for a careful balancing exercise.

We are concerned however that clause 15 of the Bill imposes a convoluted, unnecessary and counter-productive rule on ‘qualifying bodies’ (those conferring professional, trade or occupational qualifications and licences, such as for the medical profession). This rule renders discriminatory any professional standards that have, or are “likely to have”, the effecting of restricting a person from making a “statement of belief” outside of their professional work, unless compliance with the rule can be shown to be an essential requirement.

Our opposition to the Bill’s “statement of belief” provisions is outlined above and relevant here. These provisions come at the cost of established and hard-fought anti-discrimination laws and are inconsistent with Australia’s international human rights obligations. Clause 15 also sets a dangerous precedent that runs counter to efforts in many professions and occupations to put in place policies designed to foster diverse and inclusive industries and workplaces.

Clauses 15, together with clause 12, are unprecedented in Australian law and will undermine efforts by qualifying bodies, business, and employers to build public trust and to create diverse, tolerant, safe and inclusive spaces, workplaces, industries and communities.

Qualifying bodies play a key role in regulating a range of professions and trades, including medicine, law and construction, and need to be able to set standards of behaviour that promote public confidence in their profession. They need clear and consistent laws to do this, such as the well-accepted indirect discrimination test, which is already reflected in clause 14 of the Bill. Clause 14 would make unlawful any *unreasonable* rules that limit the expression of religious beliefs or activities, whether at work or outside of work.

Recommendation 9: *The Committee should recommend that clause 15 and related definitions are deleted.*

5.4 The Bill should protect people of faith from hate speech

Hate speech and vilification undermines the right of every person in our society to be treated equally and to live free from abuse, discrimination, intimidation or violence. If left unchecked, perceived acceptance or tolerance of vilification can embolden and encourage discrimination by providing an “authorising environment” for the escalation to violence.⁵²

Australia’s national laws are not protecting religious minorities from hate

Hateful conduct towards people of faith, and particularly minority faiths, is on the rise and going largely unchecked in Australia. In recent years, a Jewish school student in a Melbourne school was verbally abused, physically assaulted and forced to kiss the feet of another student.⁵³ In another

⁵² See e.g. Gelber, Katharine & McNamara, Luke, “Anti-Vilification laws and public racism in Australia: Mapping the gaps between the harms occasioned and the remedies provided” (2016) 39(2) *University of New South Wales Law Journal* 44; Ronald Sackville, “Anti-Semitism, hate speech and Pt IIA of the Racial Discrimination Act” (2016) 90(9) *Australian Law Journal* 631.

⁵³ Rebecca Davis, ‘A rapidly spreading crisis’, *Australian Jewish News* (online), 3 October 2019 <ajn.timesofisrael.com/a-rapidly-spreading-crisis/>.

incident, a child was reportedly called “Jewish vermin”, “the dirty Jew” and a “Jewish cockroach”.⁵⁴ Nazi flags have been flown over a homes.⁵⁵

Islamophobia in its various manifestations is rife, as documented in the *Islamophobia in Australia* reports.⁵⁶ In the first report, 243 incidents were reported in a 16-month period, while in the second report 349 incidents were reported over a 24 month time period. When looking at offline incidents, the most recent report found that half of the cases considered involved hate speech, while one-quarter consisted of vandalism and physical attacks.⁵⁷ Muslim women and children are particularly susceptible to hate conduct. Of the 113 female victims, 96 percent were wearing a headscarf (hijab), 57 percent were unaccompanied and 11 percent were with their children.⁵⁸

Article 20 of the ICCPR explicitly requires countries to prohibit advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence. Yet there are very limited federal protections. While protections in the *Racial Discrimination Act 1975* may extend to religious groups on the basis of ‘ethnic origin’, this is uncertain and inadequate and leaves faith communities without clear protections. State and territory laws provide differing levels of protection.⁵⁹ The Government’s Bill fails to address these gaps.

Anti-vilification laws necessarily restrict some people’s freedom of expression to protect the rights of other people to be free from discrimination and to prevent threats to their physical safety. To ensure free and open debate, vilification laws typically include reasonable exemptions for fair media reporting, privileged communications, and public acts done reasonably and in good faith for a range of purposes.⁶⁰

Recommendation 10: *The Committee should recommend that the Australian Government better protect communities of faith, particularly minority faith communities, from hate speech and violence by consulting carefully and introducing laws to prohibit vilification on the grounds of religious belief or activity.*

5.5 Other concerns with the Bill

There are several other matters in the Bill, and the associated Human Rights Amendment Bill 2021, that are of concern to the HRLC and that have been comprehensively addressed by the submission of Equality Australia. We endorse the following recommendations made in their submission:

⁵⁴ Guardian staff, ‘Josh Frydenberg urges more Holocaust education after antisemitic bullying attacks’, *The Guardian* (online), 4 October 2019 <www.theguardian.com/news/2019/oct/04/josh-frydenberg-urges-more-holocaust-education-after-antisemitic-bullying-cases>.

⁵⁵ Sean Wales and Leonie Thorne, ‘Nazi flag taken down from amid calls to strengthen anti-vilification law’, *ABC News* (online), 15 January 2020 <www.abc.net.au/news/2020-01-14/nazi-flag-flown-in-north-west-victorian-town-of-beulah/11866096>.

⁵⁶ See Derya Iner (ed), *Islamophobia in Australia (2014-2015)*, Charles Sturt University and ISRA (2016), accessible at <www.islamophobia.com.au/Islamophobia-in-Australia-ISRA-Academic-Report.pdf>; Derya Iner (ed), *Islamophobia in Australia Report II (2017-2018)*, Charles Sturt University and ISRA (2019), accessible at <<http://www.islamophobia.com.au/wp-content/uploads/2019/12/Islamophobia-Report-2019-2.pdf>>.

⁵⁷ Derya Iner (ed), *Islamophobia in Australia Report II (2017-2018)*, Charles Sturt University and ISRA (2019) 7, accessible at <<http://www.islamophobia.com.au/wp-content/uploads/2019/12/Islamophobia-Report-2019-2.pdf>>.

⁵⁸ Derya Iner (ed), *Islamophobia in Australia Report II (2017-2018)*, Charles Sturt University and ISRA (2019), 6, accessible at <<http://www.islamophobia.com.au/wp-content/uploads/2019/12/Islamophobia-Report-2019-2.pdf>>.

⁵⁹ See Table 1 (Australian discrimination & vilification protections for religion or belief) in Human Rights Law Centre, ‘Protecting fundamental rights and freedoms on Australia: Submission to the Expert Panel on the Religious Freedom Review’ (14 February 2018), accessible at <<https://www.hrlc.org.au/s/Religious-Freedom-Review-Submission-HRLC-xwh7.pdf>>.

⁶⁰ *Anti-Discrimination Act 1977* (NSW) s 49ZT.

- **Human rights protections should only be granted to humans:** The extension of the Bill's protections to body corporates under clause 16(3) is a disturbing precedent and will have the practical effect of privileging well-resourced religious bodies, as well as encouraging costly litigation. Clause 16(3) should be removed, and the word 'individual' should replace 'person' in clauses 16(1)-(2). Further, if associates of individuals with religious beliefs (who are natural persons) are to be afforded protection in this Bill, the same protection should be extended to other federal anti-discrimination laws, in particular the SDA and ADA.
- **An LGBTIQ+ Commissioner should be established, with responsibility for discrimination based on sexual orientation, gender identity and intersex status:** the introduction of a Religious Discrimination Commissioner (alongside existing Commissioners for Age, Sex, Race, Disability, Children and Aboriginal and Torres Strait Islander peoples) brings into sharp relief the absence of one for LGBTIQ+ communities. This indicates a lack of care by the Federal Government for the discrimination faced by these communities that is unacceptable, particularly given the level of state-sanctioned discrimination experienced by many LGBTIQ+ people in Australia.⁶¹
- **A consistent approach should be taken to the assessment of whether council by-laws impermissibly limit human rights,** rather than the blanket exceptionalism contained in the Bill. Clause 5(3) of the Bill should be removed.
- **Advocating a 'traditional' view on marriage should not be assumed to be a public benefit:** the proposed amendment of the *Charities Act 2013* (Cth) by Human Rights Legislation Amendment Bill 2021 is both discriminatory and unnecessary and should be removed.
- **Exemptions for religious schools from providing facilities, goods and services for marriages are discriminatory and unnecessary:** the proposed amendment to the *Marriage Act 1961* (Cth) by the Human Rights Legislation Amendment Bill 2021 should be removed.

⁶¹ Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation, Gender Identity and Intersex Rights National Consultation Report* (2015) 1.