



Getting the balance right

Submission on the Religious Discrimination Bill – Exposure Draft

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Freedom. Respect. Equality. Dignity. **Action.**

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Human Rights Law Centre

The Human Rights Law Centre works with people and communities to eliminate inequality and injustice. We use strategic legal action, policy solutions and advocacy to build a fairer, more compassionate Australia.

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The Human Rights Law Centre acknowledges and pays our deep respects to the traditional custodians of the lands and waters across Australia and we acknowledge that those lands and waters were never ceded. We recognise the ongoing, unrelenting work of Aboriginal and Torres Strait Islander peoples, communities and organisations to demand equality, justice and self-determination and we commit to standing with them in this work.

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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.

The exposure draft of the *Religious Discrimination Bill 2019* (Cth) (the **Bill**), and associated amendments, seeks to protect Australians from discrimination 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. This is welcome. Australian discrimination laws do not adequately protect people of faith from discrimination. People of faith should have legal protection from discrimination on the basis of their religion and other people should be free from having the religious beliefs of others imposed on them.

However, in seeking to achieve this, the Bill goes too far and fails to strike a fair balance between freedom of religion and the rights of other people. In a range of the circumstances the Bill licenses discrimination against other groups and includes provisions which are unorthodox and unprecedented in federal and Australian anti-discrimination law. The Bill should not be introduced to Parliament in its current form.

The HRLC's key concerns are that the Bill will:

- undermine access to health care by making it harder for health services to require staff who conscientiously object to providing a lawful and medically appropriate health service, such as an abortion or contraception, to refer patients to another health provider that can provide that service;
- undermine the ability of large employers to enforce codes of conduct that seek to limit harmful speech by employees in certain circumstances;
- override other anti-discrimination laws and license certain religious speech that is discriminatory and harmful; and
- entrench overly broad exemptions from religious discrimination by religious bodies.

We are also concerned that the Australian Government is not progressing Prime Minister Morrison's commitment to address discrimination against children in religious schools in this package of reforms, and has instead delayed it further. The Government is effectively prioritising the rights of religious bodies over the rights and interests of children. The Government should act on the Prime Minister's commitment now and ensure that no Australian school can discriminate against lesbian, gay, bisexual, transgender, intersex and queer (**LGBTIQ+**) children.

This Bill and associated amendments should be a positive reform. This submission outlines ways that the Australian Government can amend the Bill to ensure that this reform can be welcomed. More broadly, this submission recommends that the Australian Government should consolidate and modernise Australia's equality laws and adopt an Australian Charter of Human Rights.

The HRLC endorses the submission of Justice Connect in relation to the amendments to the *Charities Act 2013* (Cth).

2. Summary of recommendations

1. The Australian Government should delete clauses 8(5) and (6) that regulate conscientious objections by health practitioners. The related clause 31(7) should also be deleted.
2. The Australian Government should consider including a provision in the Bill that provides that the obligation to refer in cases of conscientious objection is reasonable.
3. The Australian Government should delete clauses 8(3) and (4) and rely on the standard indirect discrimination test to balance the rights of employees expressing good faith religious statements against the interests of employers in regulating that speech in certain circumstances. The related clause 31(6) should also be deleted.
4. The Australian Government should delete clause 41. Whether or not religious statements of belief constitute discrimination on the basis of attributes such as sex, sexual orientation or gender identity, should be determined under existing anti-discrimination laws.
5. At a minimum, the words “reasonably be regarded” should be deleted from the exemption for religious bodies in clause 10.
6. Clause 10 should be replaced with a general limitations defence that only allows religious bodies to discriminate where there is a legitimate aim, and where reasonable, necessary and proportionate.
7. The Australian Government should address religious exemptions for schools now through these legislative reforms by introducing laws that prohibit discrimination against LGBTIQ+ children in all Australian schools.
8. The Australian Government should incorporate an objects clause into the Racial Discrimination Act, the Bill and other anti-discrimination statutes which reflects the objective of substantive equality.
9. The Australian Government should introduce federal anti-vilification laws which prohibit public advocacy of religious hatred that incites discrimination, hostility or violence.
10. Australia should consolidate and modernise its anti-discrimination laws.
11. The Australian Government should move to enact a legislative Charter of Human Rights.

3. Positive aspects of the Bill

We commend the Australian Government for proposing to make religious belief and activity, as well as the absence of religious belief and activity, a protected attribute in discrimination laws at the federal level.

According to the 2016 Census, a clear majority of Australians identify as religious. 52% of Australians identified as Christian, with the next most common religions being much smaller in number – with

Islam at 2.6% and Buddhism at 2.4%. However, there has been a rapid decline in religious belief in Australia in recent years, with 30% of Australians reporting no religion.¹

The right to freedom of thought, conscience, religion or belief (referred to in this submission as the right to freedom of religion or belief) is a fundamental, non-derogable right under international law² and should be protected under Australian law. This right to form, hold or change inner convictions extends to beliefs that may be objectionable or offensive to others.

The right to equality and non-discrimination is also a fundamental human right³ that has been confirmed time and time again by a wide range of UN treaty bodies,⁴ and international jurisprudence.⁵ As a party to the ICCPR, Australia has committed to prohibiting discrimination and guaranteeing 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”.⁶

Australia has an obligation under international human rights law to ensure all people in Australia are protected from discrimination on the basis of their religious and other beliefs. Including religious belief (and not holding a religious belief) as an additional protected attribute in federal discrimination law would reduce inconsistencies between federal and state and territory laws and strengthen protections for people with religious beliefs, and without religious beliefs, in Australia.

The attribute of religious belief or activity in the Bill will encompass the traditional religious beliefs or activities of Aboriginal and Torres Strait Islander peoples. The protection of Aboriginal and Torres Strait Islander peoples’ religious, spiritual and cultural beliefs and practices has been woefully inadequate in Australia.⁷ The Bill will provide additional protection in this regard. We are not aware of consultation with Aboriginal and Torres Strait Islander people and groups in the preparation of this Bill,

¹ Australian Bureau of Statistics, “Religion in Australia”, 2011.0 - Census of Population and Housing: Reflecting Australia - Stories from the Census, 2016 (28 June 2017) <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/2011.0~2016~Main%20Features~Religion%20Data%20Summary~70>.

² *International Convention on Civil and Political Rights*, opened for signature 16 December 1966 (entered into force 23 March 1976) (ICCPR) art 4(2). ICCPR art 18(1) provides: “Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.”

³ UN Human Rights Committee, *General Comment No 18: Non-discrimination*, UN Doc HRI/GEN/1/Rev.6 (1989) 146. These obligations arise under the ICCPR, the *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966 (entered into force 3 January 1976) (ICESCR), the *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965 (entered into force 4 January 1969), the *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979 (entered into force 3 September 1981), the *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006 (entered into force 3 May 2008), and the *Convention on the Rights of the Child*, opened for signature 20 November 1989 (entered into force 2 September 1990) (CRC).

⁴ See e.g. UN Human Rights Committee, *General Comment No 28: Equality of Rights between Men and Women*, UN Doc CCPR/C/21/Rev.1/Add.10 (2000); UN Human Rights Committee, *General Comment No 18: Non-discrimination*, UN Doc HRI/GEN/1/Rev.6 (1989) 146; UN Committee on Economic, Social and Cultural Rights, *General Comment No 16: The Equal Rights of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights*, UN Doc E/C.12/2005/4 (2005); UN Committee on Economic, Social and Cultural Rights, *General Comment No 20: Non-Discrimination in Economic, Social and Cultural Rights*, UN Doc E/C.12/GC/20 (2009); UN Committee on the Elimination of Discrimination against Women, *General Recommendation No 25*, UN Doc A/59/38 (2004).

⁵ See e.g. *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.LV/II.111, doc. 20 rev (2001); *Schuler-Zraggen v Switzerland*, Ser. A No. 263 (1993).

⁶ ICCPR art 26.

⁷ 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).

and would strongly urge the Australian Government to meaningfully engage with Aboriginal and Torres Strait Islander people and groups on these reforms.

We also note evidence of discrimination and vilification against religious minorities in Australia, and in particular Muslim people.⁸ The Bill will provide welcome protection for these faith communities.

4. A framework for getting the balance right

While all human rights are universal, indivisible, interdependent and interrelated, human rights are rarely absolute⁹ and can be limited in certain circumstances.

While the freedom to *hold* religious beliefs is absolute,¹⁰ a person's right to outwardly display or *manifest* a religious belief through actions can be limited. Manifesting a religious belief can only 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."¹¹

According to Manfred Nowak, an eminent international law human rights scholar, practitioner and author, the limitations on this right exercise an important corrective function due to the potential for freedom of religion to suppress not merely the freedom of religion of others but other rights as well.¹² This is because of the inherently controversial character of freedom of religion – the fact that most religious faiths believe their faith to represent the "absolute truth" and thus reject the faiths or beliefs of others. It is the interplay between the principle of freedom of religion and its restrictions that truly determines the actual scope of the individual's right.¹³

Not all acts that a person claims to be a manifestation of their religion will necessarily be covered by the freedom of religion. 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 that, to fall within the potential protection of the freedom of religion, 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 (e.g. temples, mosques and churches), items connected to the observance of a particular religion (e.g.

⁸ See e.g. Professor Andrew Markus, *Mapping Social Cohesion: The Scanlon Foundation Surveys 2018* (2018) 62-63, accessible at <https://www.monash.edu/mapping-population/public-opinion/social-cohesion-report>.

⁹ The rights to freedom from torture and other cruel, inhuman or degrading treatment or punishment, freedom from slavery and servitude, freedom from imprisonment for inability to fulfil a contractual obligation, prohibition against the retrospective operation of criminal laws and the right to recognition before the law, are the only human rights which cannot be restricted under any circumstance: ICCPR arts 1, 8(1), 11, 15 and 16.

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]. At [3]: "Article 18 distinguishes the freedom of thought, conscience, religion or belief from the freedom to manifest religion or belief. It does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one's choice". Limitations on freedom of religion are also similarly expressed in CRC art 14(3), *International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families* art 12(3) of the, and *European Convention on Human Rights* art 9.

¹¹ ICCPR art 18(3).

¹² Manfred Nowak, *UN Convent on Civil and Political Rights: CCPR Commentary (2nd revised edition)* (2005) 408.

¹³ Manfred Nowak, *UN Convent on Civil and Political Rights: CCPR Commentary (2nd revised edition)* (2005) 409.

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].

candles, incense, ritual ornaments, a chuppah) and religious ceremonies are examples of public expressions of religious belief clearly protected under this right.

Drawing a line as to which religious practices should be accommodated in a plural society that fairly respects the rights of diverse groups is not a simple exercise. It is properly a subject for discussion and debate and each country has a “margin of appreciation” to decide where that line is to be drawn in its national circumstances.

International law however, provides a very helpful structured process for drawing this line.¹⁶ In order for a limitation on a human right to be justified, the limitation must be necessary, pursue a legitimate aim and be proportionate to that aim. This is known as the proportionality test.¹⁷

The proportionality test is an effective means of arbitrating between justified and unjustified limitations. The test is designed to ensure that a human right can only be limited for a legitimate aim and where a right is limited to achieve a legitimate aim, the right is not limited more than is reasonably necessary to accomplish that aim.

The “Limitations Criteria” in the *Guide to Human Rights* published by the Parliamentary Joint Committee on Human Rights provides further explanation of these key concepts.¹⁸

The European Court of Human Rights decision in *Eweida and others v UK*¹⁹ provides useful examples of the proportionality test in action. *Eweida* involved four applications concerning freedom of religion brought to the Court.

In the first two applications, the Court ruled that a company ban on wearing religious symbols at work was justified for health and safety reasons for a geriatrics nurse, but not to maintain a corporate image for a British Airways employee. The restriction on nurses was held to pursue a legitimate aim (protecting the health and safety of nurses and patients) and was enforced equally (including requiring that Sikh nurses remove a bangle or kirpan and prohibiting flowing hijabs at work).

In the final two applications, the Court considered policies implemented by two organisations that required their staff to perform services in a non-discriminatory way. The services were the registration of civil partnerships by a local government authority, and sex therapy and relationship counselling services by a private company. An employee in each organisation objected because of their religious belief to performing the services for same-sex couples. In both cases, applying the proportionality test, the Court decided that aims that each organisation was pursuing were legitimate and the limitation of the employees’ freedom of religion was lawful.

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. 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; Australian Government Attorney-General’s Department, *Permissible limitations*, <https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Permissiblelimitations.aspx>.

¹⁸ Parliamentary Joint Committee on Human Rights, *Guide to Human Rights* (June 2015), accessible at https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources.

¹⁹ *Eweida & Ors v The United Kingdom* [2013] ECHR 37.

5. Key issues requiring amendment

5.1 The right to conscientiously object to providing health services must be balanced with a duty to refer

The right of health professionals to freedom of conscience and religion extends to a right to conscientiously object to performing health services in some circumstances. The Australian Medical Association describes a conscientious objection as a practitioner refusing to provide or participate in a *legal, legitimate and medically appropriate* health procedure because it conflicts with their own personal beliefs or values.²⁰ This is fundamentally different to a refusal to provide treatment based on legitimate medical or legal reasons.

The right of health professionals to freedom of religion must be balanced against the rights of their patients to life, health, autonomy and non-discrimination.²¹ Health practitioners choose their profession and their specialty and are in a position of power and authority in relation to their patients and the public. This is especially true for doctors who practice in regional and remote locations. Doctors have a duty of care to all their patients, which requires them to act in their patients' best interests.

A person can suffer serious physical, mental, financial and social harm if they encounter a doctor with a conscientious objection to providing a health service, especially if that doctor refuses to disclose their objection or provide information or direction about where the patient can go to receive the healthcare they need.

A recent study in Victoria identified incidents of doctors with a conscientious objection to abortion subverting, misusing or directly contravening their duty, in law, to refer patients, with some reporting that it was "common practice" for doctors in rural areas to refuse to refer women seeking an abortion to someone who could advise them.²²

The duty to disclose a conscientious objection and to refer patients to another health professional who can provide the health service is vital in ensuring timely, unbiased access to healthcare and information. In this submission, we describe this duty as a duty to "refer".

Cases concerning healthcare, conscientious objection and freedom of religion have been considered by courts overseas. In the case of *Pichon and Sajous v France*, the European Court of Human Rights rejected a "manifestly ill-founded" application from pharmacists who refused to sell contraceptives because of their religious beliefs.²³ The Court stated that "the applicants cannot give precedence to their religious beliefs and impose them on others as justification for their refusal to sell such products, since they can manifest those beliefs in many ways outside the professional sphere."²⁴

²⁰ Australian Medical Association, *Conscientious Objection - 2019* (Position Statement, 2019).

²¹ Note that freedom of conscience and religion can be limited in certain circumstances, including to protect health and to protect the rights and freedoms of others: ICCPR art 18(3); Committee on the Elimination of Discrimination Against Women, *General Recommendation 24 on Women and Health*, UN Doc A/54/38/Rev.1 (1999) chap 1.

²² Louise Anne Keogh et al, "Conscientious objection to abortion, the law and its implementation in Victoria, Australia: perspective of abortion service providers", *BMC Medical* (31 January 2019).

²³ *Pichon and Sajous v. France*, Application no 49853/99 (2 October 2001).

²⁴ *Pichon and Sajous v. France*, Application no 49853/99 (2 October 2001).

More recently, a Canadian appeal court found that a duty, in professional policies, on doctors with a conscientious objection to provide an effective referral to their patients struck the right balance between equitable access to healthcare and freedom of religion.²⁵ The duty to refer applied to abortion, contraception, infertility treatment, erectile dysfunction medication, gender reassignment surgery and voluntary assisted dying.

The UN's Committee on the Elimination of Discrimination against Women has specifically addressed the issue of conscientious objection to providing reproductive health services. It has stated that governments must introduce measures which ensure that women are referred to alternative health services if a health provider conscientiously objects to providing a service.²⁶

Patients must be able to access the health services they require without discrimination or delay.

5.2 The Bill needs amendment to ensure that the duty to refer is not undermined

Clauses 8(5) and 8(6) of the Bill would, in many circumstances, undermine the important duty for health practitioners to refer their patients. In doing so, the Bill may restrict access to health procedures that health professionals conscientiously object to including abortion, voluntary assisted dying, contraception, emergency contraception, fertility treatment, pre-exposure and post-exposure prophylaxis (to prevent HIV infection), and medical treatment for transgender or intersex patients.

Hypothetical case study: Horatia is eight weeks pregnant. Her partner has been increasingly abusive towards her and regularly pressures her into having unprotected sex. She wants to escape the relationship and is not in the emotional or financial position to have a child.

Horatia makes an appointment to see Dr T at her local clinic during work hours – she is terrified of what her partner will do if he discovers she is pregnant. Dr T objects to abortion because of his religious beliefs. However, all he tells Horatia is that no one can help her. Horatia is left distraught and alone.

Weeks later, after discovering that Dr T should have referred her to a doctor or health service who could advise her about all her options, Horatia complains to the director of the local clinic. The clinic has a policy that requires Dr T to refer. The policy is consistent with public health policies. The clinic instructs Dr T to comply with the policy and commences disciplinary proceedings against him for not following the policy in Horatia's case. Dr T claims he is being discriminated against on the grounds of his religious belief by being required to refer patients to another health service that can provide abortions.

Under the Bill, a health service would appropriately be prohibited from *directly* discriminating against a health professional because of their religion.²⁷ For example, a health clinic that provides abortion services could not refuse to employ someone because they were Catholic.

²⁵ *Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario* [2019] ONCA 393.

²⁶ This is consistent with Committee on the Elimination of Discrimination against Women, *General Recommendation 24: Women and Health*, UN Doc A/54/38/Rev 1 (1999) [11].

²⁷ *Religious Discrimination Bill 2019* (Cth) cl 7.

The Bill also has provisions which prohibit *indirect* discrimination against people on the grounds of religion. Indirect discrimination on the grounds of religion occurs where an organisation imposes a condition or requirement that has a disproportionate negative impact on people who have a particular religion and that is not *reasonable*.²⁸

Clauses 8(1) and (2) of the Bill are orthodox indirect discrimination provisions. Clause 8(2) provides guidance on the factors impacting on when a condition or requirement will be reasonable.

The Bill undermines patient access to healthcare

However, the Bill has additional clauses, clauses 8(5) and (6), that deal specifically with indirect discrimination in the context of conscientious objection to providing health services. These provisions are highly problematic and should be removed from the Bill.

Clauses 8(5) and (6) seek to prescribe when specific conduct will not be reasonable and will therefore constitute indirect discrimination. The clauses specifically target “health practitioner conduct rules” that restrict or prevent a conscientious objection on religious grounds. Health practitioner conduct rules are defined very broadly to cover pharmacy, psychology, physiotherapy, optometry and other health services.

Across Australia, the obligations of health practitioners are set out in health professional conduct rules, legislation and in the policies of different health providers. For example, the Australian Medical Association guidelines state that a doctor can refuse to participate in medical treatments to which they have a conscientious objection, provided they have informed the patient of their “right to see another doctor” and ensure that the patient had sufficient information to enable them to exercise that right.²⁹

In addition, in each state and territory, there are some laws that recognise that certain health practitioners may conscientiously object to certain procedures, such as abortion or assisted dying. Some of those laws, such as abortion laws in Victoria, Queensland, the Northern Territory, Tasmania and NSW, also impose a clear duty to disclose the conscientious objection and to refer or provide certain information to patients.³⁰ However, some laws, such as abortion laws in Western Australia, the ACT and South Australia, are silent on those duties. In the case of other reproductive healthcare issues, such as contraception, there are no laws regulating conscientious objection.

Clause 8(5) will override state and territory laws protecting patient health

Clause 8(5) of the Bill provides that a “health practitioner conduct rule” that is *not consistent* with a state or territory law allowing conscientious objection is *not reasonable* (and therefore will constitute indirect discrimination). It is very unclear how this would operate in practice, for example in Western Australia, where the relevant abortion legislation allows conscientious objection but is silent on referral.³¹ It creates a real risk that a government policy directive requiring referral, in the interests of

²⁸ *Religious Discrimination Bill 2019* (Cth) cl 8(1).

²⁹ See Australian Medical Association, *Conscientious Objection – 2019* (27 March 2019), accessible at <https://ama.com.au/position-statement/conscientious-objection-2019>. Another example is the Medical Board of Australia’s code of conduct which provides that a practitioner’s religious views should not deny access to medical care for a patient: *Good medical practice: a code of conduct for doctors in Australia* (March 2014), accessible at <https://www.medicalboard.gov.au/Codes-Guidelines-Policies/Code-of-conduct.aspx>.

³⁰ In relation to abortion, the term “refer” is used in three jurisdictions: *Abortion Law Reform Act 2008* (Vic) s 8(1)(b); *Termination of Pregnancy Act 2018* (Qld) s 8(3) and *Termination of Pregnancy Law Reform Act 2017* (NT) s 11(2)(b). NSW law now provides for a duty to provide certain information, as does Tasmania: *Reproductive Health (Access to Terminations) Act 2013* (Tas) s 7(2) and *Abortion Law Reform Act 2019* (NSW) s 9(3).

³¹ See *Health (Miscellaneous Provisions) Act 1911* (WA) s 334(2).

patient health, would be deemed unreasonable and unlawful because it is “not consistent” with the legislation.

It is not clear whether clause 8(5) would apply to conscientious objection to abortion in Victoria. Victorian abortion legislation does not specifically allow or create a right to conscientiously object, but it does require doctors to make a referral if they conscientiously object to providing an abortion. If clause 8(5) does not apply, the situation in Victoria will be covered by clause 8(6).

Clause 8(6) will override professional and government guidelines protecting patient health

Clause 8(6) is also problematic. It provides that if clause 8(5) “does not apply”, a health practitioner conduct rule is unreasonable *unless* compliance with the rule is necessary to avoid an “unjustifiable adverse impact” on:

- the ability of the person imposing the rule to provide the health service; or
- the health of any person who would otherwise be provided with the health service by the health practitioner.

Clause 8(6) would apply to situations in which there is no state or territory law that allows a conscientious objection. Professional and government guidelines and policies written to ensure patients are not adversely impacted would, under clause 8(6), be presumed to be unreasonable.³² This presumption would only be displaced by an individualised assessment of each situation where compliance with the rule is sought.

Accordingly, whether or not a health service can require its staff to comply with the obligation to refer will require a specific individualised assessment of the impact of enforcing the rule on the particular health service and on the health of the patient.

This will create significant complexity and uncertainty for health systems and health services in relation to the enforcement of rules and policies that require disclosure of an objection and referral. It would essentially replace a consistent, reasonable state-wide policy with a case by case analysis. It would harm the ability of health providers to adopt and enforce referral policies that seek to ensure safe and timely access to health services.

Clauses 8(5) and (6) are complex and should be removed

Clauses 8(5) and (6) are unclear, uncertain and complex. We have focussed in this submission on the operation of these clauses in relation to abortion because the HRLC has significant expertise of abortion law and policy from our work across Australia. Noting the very broad definition of “health practitioner conduct rule”, clauses 8(5) and (6) are likely to create similar issues in other areas of health care like voluntary assisted dying, prescription of contraception, emergency contraception, fertility treatment, pre-exposure and post-exposure prophylaxis, and medical treatment for transgender or intersex patients.

³² See e.g. *RANZCOG Code of Ethical Practice* (last ratified May 2015), accessible at https://ranzocg.edu.au/RANZCOG_SITE/media/RANZCOG-MEDIA/Governance/Policies%20and%20Guidelines/RANZCOG-code-of-ethical-practice.pdf; *AMA Position Statement: Conscientious Objection* (27 March 2019), accessible at <https://ama.com.au/system/tdf/documents/AMA%20Position%20Statement%20on%20Conscientious%20Objection%202019.pdf?file=1&type=node&id=50323>; SA Health, *Clinical Directive: Standards for the Management of Termination of Pregnancy in South Australia* (March 2014), accessible at https://www.sahealth.sa.gov.au/wps/wcm/connect/f5f823804376068390b0dfc9302c1003/Standards+for+Mgt+of+Termination+of+Pregnancy+in+SA_ppg_v1.0.pdf?MOD=AJPERES&CACHEID=ROOTWORKSPACE-f5f823804376068390b0dfc9302c1003-mN5V50b.

Clauses 8(5) and 8(6) should be removed so that these issues are regulated by the standard indirect discrimination provisions, consistent with other federal anti-discrimination laws. It follows that the related clause 31(7) should also be deleted. Consideration could also be given to including a provision in the Bill that clarifies that compliance with professional conduct, government policy or legislative obligations to provide information about health services that can assist or to refer, is reasonable.

Recommendation 1: The Australian Government should delete clauses 8(5) and (6) that regulate conscientious objections by health practitioners. The related clause 31(7) should also be deleted.

Recommendation 2: The Australian Government should consider including a provision in the Bill that provides that the obligation to refer in cases of conscientious objection is reasonable.

5.3 The Bill undermines employer codes which promote diversity and equality

We live in a diverse, pluralistic society. All people are entitled to equal protection under the law and to protection from discrimination on grounds such as sexual orientation, gender identity, sex, race and religion. Employers should have policies and programs in place that promote employment opportunity and workplace diversity.

For example, the Australian Public Service Commission provides information on diversity and inclusion practices on its public facing website to support persons with disability, gender equality and indigenous employment.³³ The Australian Government's APS Jobs website explains the conditions of employment in the APS:³⁴

The APS is a leader in diversity of opportunities. The diversity of the people in the APS is one of its greatest strengths. Diversity in this context covers gender, age, language, ethnicity, cultural background, sexual orientation, religious belief and family responsibilities. Diversity also refers to the other ways in which people are different, such as educational level, life experience, work experience, socio-economic background, personality and marital status. Workplace diversity involves recognising the value of individual differences and managing them in the workplace.

Regrettably, the Bill undermines the ability of some employers to foster diverse and inclusive workplaces, prioritising freedom of religion over the equality rights of others who may be harmed by religious speech. In doing so, the Bill introduces unnecessary complexity into the regulation of speech by employers outside of work.

The issue of when an employer can lawfully regulate what employees say or do when they are not performing work needs to be approached with care. Any restriction on an employee's freedom of expression must be for a legitimate aim and must be carefully tailored to achieve that aim. The standard indirect discrimination provisions set out in clauses 8(1) and (2) of the Bill allow this careful balancing exercise to be undertaken in the context of freedom of religion.

However the Bill contains additional unorthodox provisions that afford undue additional protection to religious "statements of belief", defined in clause 5.

³³ Australian Government Australian Public Service Commission, *Diversity and Inclusion*, accessible at <https://www.apsc.gov.au/diversity-and-inclusion>.

³⁴ Australian Government APS Jobs, *About the Australian Public Service (APS)*, accessible at <https://www.apsjobs.gov.au/about.aspx>.

Clause 8(3) alters the standard indirect discrimination provisions by providing it will be unreasonable, and therefore unlawful indirect discrimination, if an employer with an annual turnover of at least \$50 million imposes a rule that restricts employees from making a statement of belief “other than when the employee is performing work on behalf of the employer”, *unless* compliance with the rule is necessary to avoid “unjustifiable financial hardship” to the employer.

Essentially this means that it will be unlawful for a large employer to limit the religious speech of an employee when they are not working, unless they can show unjustifiable financial hardship.

Clause 8(4) provides that clause 8(3) does not apply to statements of belief that are malicious or likely to harass, vilify or incite hatred or violence against another person or group of people (or that would constitute certain offences as set out in clause 27(1)(b)).

Clause 8(3) is bad for several reasons.

Firstly, as set out above, it introduces unnecessary complexity. This issue should be dealt with by the standard indirect discrimination provisions, with lawfulness assessed on the basis on reasonableness and the criteria in clause 8(2).

Secondly, the distinction on this issue between large employers and smaller employers is arbitrary and unjustified.

Finally, and most importantly, the clause will make it harder for large organisations to set standards that promote equality. It is legitimate in some circumstances for organisations to seek to prevent public comments by staff, and particularly senior staff, that undermine equality when they are not performing work. Whether or not such a restriction is reasonable, under the standard indirect discrimination test, would depend on issues such as the nature of the comments, the position of the staff member, the proximity of the comment to work (e.g. was it in a lunch break?) and the extent to which the employee is identifiable as an employee of the organisation (e.g. were they in uniform or did they post on social media account that identifies them as an employee?).

Clause 8(3) however, assesses these issues only through the prism of unjustifiable *financial* hardship. There are many good reasons, unrelated to finances, as to why an organisation may seek to restrict public comments that undermine equality. The organisation may be a large not-for-profit organisation. The organisation may be seeking to ensure a safe and inclusive workplace culture for all staff. The organisation may be seeking to lead efforts to promote equality.

While clause 8(4) provides some protection for large employers, it does not cover statements that are offensive or insulting to particular groups of people.

The reality is that clause 8(3) is incoherent, unjustified and harmful. The real reason for its inclusion in the Bill appears to be that it is seen to be necessary to provide some kind of legislative response to Rugby Australia’s decision to terminate Israel Folau’s contract following his public comments which undermined equality.

Clauses 8(3) and 8(4) should be deleted and this issue should be regulated by the standard indirect discrimination provisions in the Bill. It follows that the related clause 31(6) should also be deleted.

Recommendation 3: The Australian Government should delete clauses 8(3) and (4) and rely on the standard indirect discrimination test to balance the rights of employees expressing good faith religious statements against the interests of employers in regulating that speech in certain circumstances. The related clause 31(6) should also be deleted.

5.4 The Bill undermines other laws which regulate harmful religious speech

Clause 41 of the Bill overrides provisions of state, territory and other federal discrimination laws that would otherwise render certain religious “statements of belief” unlawful.

Clause 41 provides that a religious statement of belief does not constitute discrimination under any federal, state or territory anti-discrimination law and specifically does not contravene section 17(1) of the Tasmanian *Anti-Discrimination Act 1998*. There is an exception for statements of belief that are malicious or that harass, vilify or incite hatred, violence or that constitute certain offences.³⁵

Clause 41(3) creates an open-ended regulation making power that would allow an Australian Government to prescribe other laws that clause 41 would override.

Section 17(1) of the Tasmanian legislation protects people in Tasmania from conduct which “offends, humiliates, intimidates, insults or ridicules” a person on grounds such as race, age, sexual orientation, lawful sexual activity, gender, gender identity, intersex variations of sex characteristics, marital or relationship status, pregnancy, breastfeeding, parental status or family responsibilities.

Accordingly, clause 41 would produce two negative practical consequences.

Firstly, it would create a higher threshold for discrimination complaints arising out of religious speech. It would mean that discriminatory religious statements in Tasmania and potentially elsewhere that offend, humiliate, intimidate, insult or ridicule on prohibited grounds, but that are not malicious, harassing, vilifying or that do not incite hatred or violence, are not unlawful.

Hypothetical case study: Hayley works as a mechanic in Hobart. She identifies as a lesbian. 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 there’s something I’ve been meaning to talk to you about. Last week, you told me that you had just gotten engaged to another woman. 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 believes 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.

Hayley would be protected under the current Tasmanian legislation. However, clause 41 of the Bill would override the Tasmanian law and would likely make John’s conduct lawful.

³⁵ *Religious Discrimination Bill 2019* (Cth) cl 41(2). Cl 27(1)(b) and 41(2)(c) refer to the criminal standard of harm and financial detriment punishable by at least two years imprisonment in the *Criminal Code*.

Secondly, it would introduce completely unnecessary legal complexity and cost to cases that relate to the issues covered by clause 41 by imposing a new legal test over the top of other discrimination laws. This would require people experiencing discrimination, people alleged to have committed discrimination, dispute resolution bodies, courts and tribunals to assess whether conduct is unlawful under two separate tests arising under two separate pieces of legislation.

It is clear that statements drawn from religious belief that are not malicious can still cause serious harm to people. Discrimination entrenched in laws and policies or experienced at work, school or home, contributes to alarmingly high rates of suicide, self-harm and depression among LGBTIQ+ people. Federal law should not create a higher threshold for discrimination complaints arising from harmful religious speech.

Clause 41 should be deleted.

Recommendation 4: The Australian Government should delete clause 41. Whether or not religious statements of belief constitute discrimination on the basis of attributes such as sex, sexual orientation or gender identity, should be determined under existing anti-discrimination laws.

5.5 The exemption allowing religious discrimination by religious bodies is too broad and should be replaced

Clause 10 of the Bill provides that it is not unlawful for a religious body to discriminate against someone under the Bill on the grounds of religious belief or activity if the discriminatory conduct is in good faith and may *reasonably be regarded* as being in accordance with the religious belief or teaching of the body's religion.

This clause would appropriately protect religious bodies from claims of unlawful discrimination if, for example, they sought to exclude people of other religions from becoming priests or religious leaders or from participating in worship.

However, the clause is drafted too broadly.

The words “reasonably be regarded” are broad and unprecedented. Existing equality laws require a direct link between religious acts and the religious belief. For example, the *Sex Discrimination Act 1984* (Cth) defines an act or practice of a religious body as one “that *conforms* to the doctrines, tenets or beliefs” of the religion.³⁶ The *Equal Opportunity Act 2010* (Vic) defines religious bodies as those “conducted *in accordance* with religious doctrines, beliefs or principles”.³⁷

Clause 10 also goes well beyond protecting religious bodies in the conduct of worship or the training or appointment of priests or religious leaders. It extends to religious charities that deliver public social services, including those funded by governments. Many of these organisations provide critical welfare and social services to the Australian community and contribute greatly to reducing poverty and disadvantage. However, it is inappropriate to grant them a licence to discriminate. This clause would enable these charities to lawfully refuse to provide services to people from other religions, or with no

³⁶ *Sex Discrimination Act 1984* (Cth) s 37.

³⁷ *Equal Opportunity Act 2010* (Vic) s 81(b).

religion, if that may “reasonably be regarded” as being in accordance with the charities’ religious doctrine.

The HRLC has long been concerned about the breadth of permanent exemptions to anti-discrimination laws for religious bodies. The lack of knowledge and transparency surrounding the operation of religious exemptions means that many Australians do not know whether they will face discrimination and can be unaware of the risk of discrimination when seeking out services, going to school or applying for a job. The existence of such exemptions operate as a barrier to those who fear discrimination accessing services from faith-based service providers.

The HRLC has consistently advocated for replacing existing religious exemptions in anti-discrimination with a general defence of justification enshrining the international human rights law principles of necessity, reasonableness, and proportionality.³⁸ This would ensure that religious bodies could only discriminate if there was a genuine legitimate need and any actions they took were appropriately tailored to that need.

Recommendation 5: At a minimum, the words “reasonably be regarded” should be deleted from the exemption for religious bodies in clause 10.

Recommendation 6: Clause 10 should be replaced with a general limitations defence that only allows religious bodies to discriminate where there is a legitimate aim, and where reasonable, necessary and proportionate.

5.6 Religious exemptions for schools should be addressed in this legislative reform package

All schools – whether religious or non-religious – have a duty of care to their students to provide an environment that is safe and welcoming, including for LGBTIQ+ students attending a school in accordance with their parents’ wishes rather than through their choice. 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 religious teaching to protect fundamental rights and freedoms of others, for example, where necessary to ensure the best interests of the child or the right of the child to an education appropriate to their needs.⁴⁰

³⁸ See e.g. HRLC, “A simpler, fairer law for all: Submission on the *Human Rights and Anti-Discrimination Bill 2012*” (December 2012) 45.

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.

Last year, Prime Minister Morrison committed to:⁴¹

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.

The Prime Minister did not implement this commitment. Now, instead of implementing it in this reform package, the Government has delayed the Australian Law Reform Commission's report on the framework of religious exemptions in anti-discrimination legislation across Australia until December 2020.⁴² The Government is prioritising the rights of religious bodies over the rights and interests of children. The Government should act on the Prime Minister's commitment now and ensure that no Australian school can discriminate against LGBTIQ+ children.

Recommendation 7: The Australian Government should address religious exemptions for schools now through these legislative reforms by introducing laws that prohibit discrimination against LGBTIQ+ children in all Australian schools.

5.7 Strengthening the objects clauses

The HRLC welcomes the proposed inclusion of an objects clause in the *Racial Discrimination Act 1975* (Cth). Objects clauses are important – they affect how legislation is interpreted and applied by the courts.⁴³ We also welcome the additions to the objects clauses in the *Age Discrimination Act 2004* (Cth), *Disability Discrimination Act 1992* (Cth) and *Sex Discrimination Act 1984* (Cth) that recognise the indivisibility and universality of rights.

These objects clauses, and the objects clause in this Bill, should be strengthened further by recognising the goal of advancing substantive equality.

Discrimination laws aim to protect people from being treated less favourably because of an attribute that is central to their identity and sense of self. Strong discrimination laws promote equality and foster happy, healthy and safe societies.

Australia has a positive duty to provide effective protections against discrimination, which incorporates an obligation to strive towards achieving substantive equality. Substantive equality recognises that formal equality before the law may not always result in fair outcomes.

As the Committee on Economic, Social and Cultural Rights explains, substantive equality is concerned “with the effects of laws, policies and practices and with ensuring that they do not maintain, but rather alleviate, the inherent disadvantage that particular groups experience”.⁴⁴

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/>.

⁴³ *Acts Interpretation Act 1901* (Cth) s 15AA.

⁴⁴ UN Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights*, UN Doc E/C.12/GC/20 (2009) [7]. The UN has confirmed that the obligation to guarantee ICESCR rights without discrimination in art 2(2) extends to ensuring substantive equality: Economic and Social Council, *Report of the High Commissioner for Human Rights on implementation of economic, social and cultural rights*, UN Doc E/2009/90 (2009) [19].

In order to achieve substantive equality, Australia must work to eliminate those forms of discrimination that have become institutionalised in laws, policies, practices and social structures – otherwise known as systemic discrimination. The UN Human Rights Committee has stated that when certain groups of the population have traditionally been subjected to systemic discrimination, then mere statutory prohibitions of discrimination are often insufficient to guarantee true equality.⁴⁵

The proposed objects clauses in the Bill and in the *Racial Discrimination Act* reflects a *formal* notion of equality – “equality before the law”. A broader object of achieving substantive equality could be achieved by removing the words “before the law” or by adopting an objects clause similar to *Equal Opportunity Act 2010* (Vic) which provides:

The objectives of this Act are—

- (a) to eliminate discrimination, sexual harassment and victimisation, to the greatest possible extent;
- (b) to further promote and protect the right to equality set out in the Charter of Human Rights and Responsibilities;
- (c) to encourage the identification and elimination of systemic causes of discrimination, sexual harassment and victimisation;
- (d) to promote and facilitate the progressive realisation of equality, as far as reasonably practicable, by recognising that—
 - (i) discrimination can cause social and economic disadvantage and that access to opportunities is not equitably distributed throughout society;
 - (ii) equal application of a rule to different groups can have unequal results or outcomes;
 - (iii) the achievement of substantive equality may require the making of reasonable adjustments and reasonable accommodation and the taking of special measures; [...]

Recommendation 8: The Australian Government should incorporate an objects clause into the Racial Discrimination Act, the Bill and other anti-discrimination statutes which reflects the objective of substantive equality.

5.8 Protections from hate speech for people of faith

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 from vilification on the basis of religion or belief and state and territory laws provide differing levels of protection.⁴⁶ The Bill does not address these gaps by introducing any specific anti-vilification protections for people of faith.

Vilification of people because of their religion or belief – or any other protected attribute – diminishes the dignity, self-worth and integration of community members from a diverse range of backgrounds.

⁴⁵ UN Human Rights Committee, *General Comment No. 18: Non-discrimination* (Thirty-seventh session, 1989) [10] in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.6 (12 May 2003). See also UN Human Rights Committee, *General Comment 28: Equality of Rights between Men and Women*, UN Doc CCPR/C/21/Rev.1/Add.10 (2000) [11].

⁴⁶ See Table 1 (Australian discrimination & vilification protections for religion or belief) in HRLC, “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>.

Hate speech and vilification undermines the right of every person in our society to be treated equally and free from abuse, hatred, discrimination, intimidation or violence. If left unchecked, perceived acceptance or tolerance of vilification, such as anti-Semitism or Islamophobia, can embolden or encourage discrimination by providing an “authorising environment” for the escalation to violence.⁴⁷

Anti-vilification laws necessarily restrict some people’s right to free speech to protect the rights of other people to be free from discrimination and to prevent threats to their physical safety. Anti-vilification laws in the context of religion need to be approached in the context of recognising that most religious faiths believe their faith to represent the “absolute truth” and reject the faiths of others. 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 academic, artistic, religious instruction, scientific or research purposes or other purposes in the public interest, including discussion or debate.⁴⁸

The Australian Government should introduce measures in this reform package that prohibit serious vilification on the grounds of religion.

Recommendation 9: The Australian Government should introduce federal anti-vilification laws which prohibit public advocacy of religious hatred that incites discrimination, hostility or violence.

6. Modernised Australian equality laws

There are well-recognised weaknesses in the current framework of Australia’s anti-discrimination laws.⁴⁹ Federal anti-discrimination laws currently provide inconsistent and piecemeal protections and rely on a fault-based system of individual complaints rather than incorporating measures to promote substantive equality and tackle systemic discrimination.

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

The Australian Government should continue the process of modernising and consolidating federal anti-discrimination laws to bring them federal anti-discrimination law in line with our international human rights obligations as recommended by the UN Human Rights Committee in 2017.⁵⁰

⁴⁷ 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.

⁴⁸ *Anti-Discrimination Act 1977 (NSW)* s 49ZT.

⁴⁹ 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].

⁵⁰ UN Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, UN Doc CCPR/C/AUS/CO/6 (1 December 2017) [18].

The HRLC has consistently advocated for a modern, consolidated equality law with the following key features:⁵¹

- 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.
- 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 of the other party if they are not successful.

This Bill, if amended as set out in this submission, will be a positive step forward for Australia’s anti-discrimination laws. However, it will not address the flaws in the federal framework of anti-discrimination laws. The Australian Government should consolidate and modernise federal anti-discrimination laws to ensure more effective protection against discrimination in Australia.

Recommendation 10: Australia should consolidate and modernise its anti-discrimination laws.

7. An Australian Charter of Human Rights

The HRLC has long advocated for the protection of the right to freedom of thought, conscience, religion or belief *within a framework which guarantees robust human rights protections for all Australians*.⁵²

⁵¹ See e.g. HRLC, *Realising the Right to Equality: The Human Rights Law Centre’s Recommendations for the Consolidation and Reform of Commonwealth Anti-Discrimination Laws* (January 2012), accessible at <https://www.ag.gov.au/Consultations/Documents/ConsolidationofCommonwealthanti-discriminationlaws/Consolidation%20-%20Discussion%20Paper%20-%20Submissions%20-%20Human%20Rights%20Law%20Centre%20-%202024%20January%202012.DOC>.

⁵² 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) https://www.alrc.gov.au/sites/default/files/subs/148_org_human_rights_law_centre_submission_.pdf; Human Rights Law Centre, *Striking the right balance: Submission to the inquiry into the status of the human right to freedom of religion or belief* (2017) <https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/593735f8be659441f726306b/1496790524658/FORB+submission+-+Final.pdf>; Human Rights Law Centre, *Protecting fundamental rights and freedoms in Australia: Submission to the Expert Panel on the Religious Freedom Review* (2018) <https://www.hrlc.org.au/s/Religious-Freedom-Review-Submission-HRLC-xwh7.pdf>.

Human rights are indivisible. All human rights have equal status. They cannot be positioned in a hierarchical order and cannot be read in isolation from one another. Rights interact with each other. For example, freedom of expression, freedom of assembly and association and the right to respect for privacy and family life are important aspects of freedom of religion or belief. 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 treaties, but individuals cannot take action under Australian law when their rights are violated. There are many gaps in the protection of human rights in this country.

Instead of addressing these gaps in a comprehensive manner, the Australian Government has chosen to introduce stand-alone legislation that protects against discrimination on the grounds of religious belief or activity. If the Bill is amended as set out in this submission, this will be a step forward.

However, instead of piecemeal steps forward to advance human rights protection in Australia, the Australian Government should comprehensively protect human rights, including freedom of religion, through an Australian Charter of Human Rights.

A Charter of Human Rights would:

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

In 2009-2010, the National Human Rights Consultation found that the adoption of a Human Rights Act or Charter was supported by over 87% of a record 35,000 public submissions. The National Human Rights Consultation Committee recommended adopting a Human Rights Act or Charter⁵³ but the Rudd Government failed to act on the recommendation.

It is time for Australia to comprehensively protect human rights through a Charter of Human Rights.

Recommendation 11: The Australian Government should move to enact a legislative Charter of Human Rights.

⁵³ National Human Rights Consultation Committee, *National Human Rights Consultation: Report* (2009).