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## Chapter 2

### Legislative framework

#### Purpose of the religious discrimination legislative package

2.1 The stated purpose of the Religious Discrimination Bill 2021 (the bill) is to promote the rights to freedom of religion, and equality and non-discrimination (on the ground of religion), by prohibiting discrimination on the basis of religious belief or activity in specified areas of public life, including work, education and in the provision of goods, services and facilities.<sup>1</sup> The bill seeks to give effect to three recommendations made by the Expert Panel into Religious Freedom, including the recommendation that legislation be introduced to render discrimination on the basis of religion unlawful.<sup>2</sup> The explanatory memorandum notes that existing protections for discrimination on the basis of religion in federal and state and territory anti-discrimination legislation are piecemeal, have limited application and are inconsistent across jurisdictions.<sup>3</sup> This bill seeks to address this legislative gap by introducing comprehensive federal legislative protections for discrimination on the basis of religious belief or activity.<sup>4</sup> In addition, the explanatory memorandum notes that the bill is intended to promote attitudinal change, to ensure that people are judged on their capacity and ability, rather than on generally unfounded negative stereotypes about people who hold religious beliefs or undertake religious activities.<sup>5</sup>

2.2 The other bills in the religious discrimination legislative package seek to make consequential amendments necessary to support the implementation of the

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1 Religious Discrimination Bill 2021, statement of compatibility, p. 8.

2 Religious Discrimination Bill 2021, explanatory memorandum, p. 2. The bill seeks to implement recommendations 3, 15 and 19. Recommendation 3 states: 'Commonwealth, State and Territory governments should consider the use of objects, purposes or other interpretive clauses in anti-discrimination legislation to reflect the equal status in international law of all human rights, including freedom of religion'. Recommendation 15 states: '[t]he Commonwealth should amend the *Racial Discrimination Act 1975*, or enact a Religious Discrimination Act, to render it unlawful to discriminate on the basis of a person's "religious belief or activity", including on the basis that a person does not hold any religious belief. In doing so, consideration should be given to providing for appropriate exceptions and exemptions, including for religious bodies, religious schools and charities'. Recommendation 19 states: '[t]he Australian Human Rights Commission should take a leading role in the protection of freedom of religion, including through enhancing engagement, understanding and dialogue. This should occur within the existing commissioner model and not necessarily through the creation of a new position'. See Expert Panel, [Religious Freedom Review: Report of the Expert Panel](#), May 2018, pp. 1–7.

3 Religious Discrimination Bill 2021, explanatory memorandum, p. 2.

4 Religious Discrimination Bill 2021, explanatory memorandum, p. 2.

5 Religious Discrimination Bill 2021, explanatory memorandum, p. 3.

bill and give effect to various recommendations made by the Expert Panel on Religious Freedom. In particular, the Religious Discrimination (Consequential Amendments) Bill 2021 would extend the Australian Human Rights Commission's functions of inquiring into, and attempting to conciliate, complaints of unlawful discrimination, to discrimination on the basis of religion.<sup>6</sup> The Human Rights Legislation Amendment Bill 2021 seeks to make amendments to a number of federal Acts to better protect the right to freedom of religion.<sup>7</sup> In particular, this bill would amend the objects clauses of federal anti-discrimination legislation to recognise the indivisibility and universality of all human rights, and their equal status in international law, and the principle that every person is free and equal in dignity and rights.<sup>8</sup> The explanatory memorandum states that the amended objects clauses would recognise that, so far as is possible, anti-discrimination law should be interpreted in a manner which is consistent with all human rights.<sup>9</sup> In addition, the Human Rights Legislation Amendment Bill 2021 would make some other amendments to the *Charities Act 2013* and the *Marriage Act 1961*, including:

- clarifying that an entity that encourages or promotes the view of marriage as a union of a man and woman is presumed to be undertaking those activities for the public benefit and not contrary to public policy; and
- allowing religious educational institutions to refuse to provide facilities, goods or services in relation to the solemnisation of a marriage in accordance with their religious beliefs.<sup>10</sup>

### **Key provisions of the Religious Discrimination Bill 2021**

2.3 The bill comprises nine parts. Key parts of the bill include:

- Part 2, which sets out conduct that is not discrimination under the bill, including certain conduct engaged in by religious bodies and the expression of certain statements of belief;
- Part 3, which sets out the concept of discrimination on the ground of religious belief or activity;
- Part 4, which sets out when discrimination is unlawful, noting that certain conduct engaged in by religious bodies and the expression of certain statements of belief would not be discrimination under this bill; and

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6 Religious Discrimination (Consequential Amendments) Bill 2021, explanatory memorandum, p. 1.

7 The Human Rights Legislation Amendment Bill 2021 would amend the *Age Discrimination Act 2004*, *Charities Act 2013*, *Disability Discrimination Act 1992*, *Marriage Act 1961*, *Racial Discrimination Act 1975* and *Sex Discrimination Act 1984*.

8 Human Rights Legislation Amendment Bill 2021, items 2, 5, 7 and 9.

9 Human Rights Legislation Amendment Bill 2021, explanatory memorandum, p. 1.

10 Human Rights Legislation Amendment Bill 2021, items 3 and 6.

- Part 6, which would establish the Religious Discrimination Commissioner.<sup>11</sup>
- 2.4 The bill has four objects, namely:
- (a) to eliminate, so far as is possible, discrimination against persons on the ground of religious belief or activity in a range of areas of public life; and
  - (b) to ensure, as far as practicable, that everyone has the same rights to equality before the law, regardless of religious belief or activity; and
  - (c) to promote the recognition and acceptance within the community of the principle that people of all religious beliefs, including people with no religious belief, have the same fundamental rights in relation to those beliefs; and
  - (d) to ensure that people can, consistently with Australia's obligations with respect to freedom of religion and freedom of expression, and subject to specified limits, make statements of belief.<sup>12</sup>

2.5 In giving effect to these objects, subclause 3(2) of the bill requires regard is to be had to:

- (a) the indivisibility and universality of human rights, and their equal status in international law; and
- (b) the principle that every person is free and equal in dignity and rights.<sup>13</sup>

2.6 In interpreting this objects clause, referencing section 15AA of the *Acts Interpretation Act 1901*, the Attorney-General's Department stated that the bill should be 'interpreted in accordance with [its] objects' and 'all the other provisions...are to be read as being designed to carry out these objects as far as is possible'.<sup>14</sup> While submitters generally supported the objects clause, some raised concerns that, despite subclause 3(2), the objects clause privileges freedom of religion above other human rights.<sup>15</sup>

2.7 As to the concept of 'religious belief or activity', the bill defines this to mean holding or not holding a religious belief; or engaging in, or not engaging in or refusing to engage in, religious activity.<sup>16</sup> A religious activity does not include an unlawful activity, although noting an activity is not unlawful merely because a local by-law

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11 See Religious Discrimination Bill 2021, clause 4, which provides a simplified outline of the bill.

12 Religious Discrimination Bill 2021, subclause 3(1).

13 Religious Discrimination Bill 2021, subclause 3(2).

14 Attorney-General's Department, answer to written questions on notice, question 1 (received 11 January 2022).

15 See, e.g., Law Council of Australia, *Submission 28*, p. 15.

16 Religious Discrimination Bill 2021, subclause 5(1).

prohibits the activity.<sup>17</sup> The explanatory memorandum notes that the term 'religious belief or activity' is defined broadly and is not intended to be an exhaustive definition.<sup>18</sup> Further consideration of this is set out in Chapter 3.

***Conduct by religious bodies that is classified as not constituting discrimination***

2.8 Part 2 of the bill sets out the circumstances in which conduct by a religious body is not discrimination under the bill. The characterisation of conduct under part 2 as 'not discrimination' as opposed to conduct falling within an exception to ensure such conduct will not be *unlawful* discrimination is noteworthy. The explanatory memorandum states that this distinction 'ensures that nothing in this Bill affects the ability for inherently religious organisations to manifest their religious belief and operate in accordance with their religious ethos in good faith'.<sup>19</sup> It notes that the effect of framing the bill in this way is that '[b]ecause conduct is not discrimination, it is not unlawful under the Bill in any area of public life, whether or not it comes within an exception in Division 4 of Part 4'.<sup>20</sup> On this point, the Attorney-General's Department clarified that the 'practical effect of Part 2 is that it is not necessary to first consider whether the conduct is discrimination and then whether the conduct falls within the terms of an exception', noting that framing the bill in this way is 'intended to simplify the Bill and assist understanding'.<sup>21</sup> Some submitters supported the framing of part 2 of the bill. Professor Mark Fowler, for example, submitted that in his view 'clause 7 is correct when it states that a religious body "does not discriminate" when it exercises rights as outlined therein'.<sup>22</sup> The Australian Catholic Bishops' Conference also supported the framing of part 2, stating that:

To avoid the perception that religious freedom is a lesser right, and recognising that exemptions are often under review, our strong preference is that the law recognise religious freedom as a positive right in religious discrimination law, alongside other rights. The way that the [bill] is drafted gives effect to this by making clear that actions by religious bodies, for example preferencing the appointment of staff who adhere to the faith or support its values, does not constitute discrimination at all.<sup>23</sup>

2.9 Other submitters, however, did not support the framing of part 2 of the bill. Liberty Victoria, for example, stated that:

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17 Religious Discrimination Bill 2021, subclauses 5(2) and (3).

18 Religious Discrimination Bill 2021, explanatory memorandum, pp. 34–35.

19 Religious Discrimination Bill 2021, explanatory memorandum, p. 5.

20 Religious Discrimination Bill 2021, explanatory memorandum, p. 41.

21 Attorney-General's Department, answer to written questions on notice, question 3 (received 11 January 2022).

22 Professor Mark Fowler, *Submission 20*, p. 3.

23 Australian Catholic Bishops Conference, *Submission 185*, pp. 5–6.

[Part 2] is unique in Australian law in aiming to declare various aspects of conduct associated with a single type of attribute (in this case religious belief or activity) as pre-emptively not discrimination, in defiance of practice in every other jurisdiction. It should be omitted.<sup>24</sup>

2.10 The Law Council of Australia also described part 2 as 'unorthodox' insofar as it departs from the 'standard approach' in other federal anti-discrimination laws, which 'set out the key concepts of discrimination, followed by prohibitions on unlawful discrimination, followed by general and specific exceptions to those prohibitions'.<sup>25</sup> The Law Council raised concerns that part 2 'will not ensure that all Australians are protected from discrimination, and will instead enable such discrimination, including on the grounds of religious belief or activity'.<sup>26</sup> The Australian Discrimination Law Experts Group similarly described clause 7 as:

unorthodox, extremely wide in scope, and far easier to satisfy than any religious body exception test found in any other federal, state or territory discrimination law in Australia.<sup>27</sup>

2.11 As to the substantive provisions of part 2, the bill defines a religious body as an educational institution (including a school, college, university, and child care or early learning centre), a registered charity or any other kind of body (other than a body that engages solely or primarily in commercial activities) that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion.<sup>28</sup> Subclause 7(1) provides that because conduct by a religious body 'is not discrimination, it is therefore not unlawful under this Act in any area of public life, including work, education, access to premises and the provision of goods, services and accommodation'.<sup>29</sup> Note 1 to subclause 7(1) illustrates this with an example:

it is not discrimination for a religious primary school to require all of its staff and students to practice that religion, if such a requirement is necessary to avoid injury to the religious susceptibilities of people of that religion.<sup>30</sup>

2.12 Specifically, subclauses 7(2) and (4) provide that a religious body does not discriminate against a person on the ground of religious belief or activity 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,

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24 Liberty Victoria, *Submission 186*, p. 5.

25 Law Council of Australia, *Submission 28*, p. 16.

26 Law Council of Australia, *Submission 28*, p. 17. See also Ms Katherine Eastman, Law Council of Australia, *Committee Hansard*, 14 January 2022, p.31.

27 Australian Discrimination Law Excerpts Group, *Submission 33*, p. 13.

28 Religious Discrimination Bill 2021, subclause 5(1).

29 Religious Discrimination Bill 2021, subclause 7(1)

30 Religious Discrimination Bill 2021, clause 7, note 1.

beliefs or teachings of that religion; and/or engaging in conduct in order to avoid injury to the religious susceptibilities of adherents of the same religion as the religious body.<sup>31</sup> Conduct in this context includes giving preference to persons of the same religion as the religious body.<sup>32</sup> The bill notes that while such conduct would not be discrimination under this bill, it may still constitute direct or indirect discrimination under other federal anti-discrimination laws.<sup>33</sup>

2.13 In addition, in relation to conduct by a religious educational institution in the context of employment, subclause 7(6) provides that such conduct must be in accordance with a publicly available policy; and in compliance with any requirements determined by the minister by legislative instrument.<sup>34</sup> Further, clause 11 provides that conduct relating to employment engaged in by religious educational institutions does not contravene a prescribed state or territory law if the institution gives preference, in good faith, to persons who hold or engage in a particular religious belief or activity; and the conduct is in accordance with a publicly available written policy.<sup>35</sup>

2.14 In relation to conduct engaged in by religious hospitals, aged care facilities, accommodation providers and disability service providers, only certain conduct in the context of employment and partnerships would not be discrimination under this bill.<sup>36</sup> Specifically, if the body is either an employer or a partnership or partner, it would not discriminate against a person on the ground of religious belief or activity by:

- engaging in conduct in good faith; and
- a person of the same religion as the body could reasonably consider the conduct to be in accordance with the doctrines, tenets, beliefs or teachings of that religion, or the body engages, in good faith, in the conduct to avoid injury to the religious susceptibilities of adherents of the same religion as the body; and
- the conduct is in accordance with a publicly available policy; and
- the conduct complies with any requirements determined by the minister.<sup>37</sup>

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31 Religious Discrimination Bill 2021, subclauses 7(2) and (4).

32 Religious Discrimination Bill 2021, subclauses 7(3) and (5).

33 Religious Discrimination Bill 2021, note 1 to subclauses 7(2) and (4). For example, the *Sex Discrimination Act 1984*.

34 Religious Discrimination Bill 2021, subclauses 7(6) and (7).

35 Religious Discrimination Bill 2021, subclause 11(1).

36 Religious Discrimination Bill 2021, clause 9.

37 Religious Discrimination Bill 2021, subclauses 9(3) and (5).

2.15 Conduct in this context would include giving preference to persons of the same religion as these bodies.<sup>38</sup> However, other conduct engaged in by religious hospitals, aged care facilities, accommodation providers and disability service providers, as specified in clause 8, would not be exempted by clause 7 and so would be covered by part 4 of this bill, which deals with unlawful discrimination.<sup>39</sup> The explanatory memorandum notes that given these religious 'institutions generally provide services to the public at large and most often they do so on a commercial basis, it is not appropriate for their conduct in all areas of public life to not be covered by the Bill'.<sup>40</sup>

2.16 Further, clause 10 provides that a person does not discriminate against another person by engaging in conduct that is reasonable in the circumstances; and is consistent with the purposes of the bill; and either is intended to meet a need arising out of a religious belief or activity of a person or group of persons, or is intended to reduce a disadvantage experienced by a person or group of persons on the basis of their religious beliefs or activities.<sup>41</sup> This provision is stated to apply despite anything else in the bill.<sup>42</sup>

2.17 The provisions providing that certain conduct by religious bodies is not discrimination is considered further in Chapters 4 and 5.

### ***Statements of belief***

2.18 Clause 12 of part 2 of the bill deals with statements of belief. A statement of belief is a statement that:

- is of a religious belief held by a person, or is of a belief held by a person who does not hold a religious belief; and
- is made, in good faith, by written or spoken words or other communication (other than physical contact) by the person; and
- is of a belief that the person genuinely considers to either be in accordance with the doctrines, tenets, beliefs or teachings of that religion, or relate to the fact of not holding a religious belief.<sup>43</sup>

2.19 Subclause 12(1) provides that a statement of belief, in and of itself, does not constitute discrimination for the purposes of this bill and other specified federal,

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38 Religious Discrimination Bill 2021, subclauses 9(4) and (6).

39 Religious Discrimination Bill 2021, clause 8.

40 Religious Discrimination Bill 2021, explanatory memorandum, p. 46.

41 Religious Discrimination Bill 2021, subclause 10(1).

42 Religious Discrimination Bill 2021, subclause 10(2).

43 Religious Discrimination Bill 2021, subclause 5(1).

state and territory anti-discrimination laws.<sup>44</sup> However, a statement of belief would not be protected if:

- it is malicious; or
- a reasonable person would consider that it would threaten, intimidate, harass or vilify a person or group (noting that a moderately expressed religious view that does not incite hatred or violence would not constitute vilification); or
- it is an expression of religious belief that a reasonable person, having regard to all the circumstances, would conclude counsels, promotes, encourages or urges conduct that would constitute a serious offence.<sup>45</sup>

2.20 The bill notes that clause 12 does not protect statements that have no relationship to religious belief.<sup>46</sup> Statements of belief are considered further in Chapter 6.

### ***Concept of discrimination on the ground of religious belief or activity***

2.21 Part 3 of the bill sets out the concepts of direct and indirect discrimination. Direct discrimination on the ground of religious belief or activity would occur if the person treats, or proposes to treat, another person less favourably than someone else (in circumstances that are not materially different) because of the other person's religious belief or activity.<sup>47</sup> Indirect discrimination against another person on the ground of their religious belief or activity would occur where a person imposes a condition, requirement or practice that is not reasonable and that has the effect of disadvantaging persons who hold or engage in the same religious belief or activity as the other person.<sup>48</sup> Whether a condition, requirement or practice is reasonable will depend on the circumstances of the case, including the nature and extent of the disadvantage, the feasibility of overcoming or mitigating the disadvantage, and whether the disadvantage is proportionate to the result sought by the person imposing the condition, requirement, or practice.<sup>49</sup>

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44 Religious Discrimination Bill 2021, subclause 12(1).

45 Religious Discrimination Bill 2021, subclause 12(2).

46 Religious Discrimination Bill 2021, note to subclause 12(1) and note 1 to subclause 12(2).

47 Religious Discrimination Bill 2021, clause 13.

48 Religious Discrimination Bill 2021, subclause 14(1).

49 Religious Discrimination Bill 2021, subclause 14(2).



2.22 The bill also sets out specific circumstances in which a qualifying body conduct rule (a condition, requirement or practice imposed by a qualifying body)<sup>50</sup> would not be reasonable, including where it restricts or prevents a person from making a statement of belief other than in the course of the person practising in the relevant profession, trade or occupation (unless compliance with the rule is an essential requirement of the profession, trade or occupation).<sup>51</sup> This provision would not, however, protect a statement of belief that is malicious; threatens, intimidates, harasses or vilifies a person or group; or counsels, promotes, encourages or urges conduct that would constitute a serious offence.<sup>52</sup>

2.23 Further, the bill extends discrimination to persons associated with individuals who hold or engage in a religious belief or activity. Clause 16 makes it unlawful under the proposed Act to discriminate against a person on the basis of the person's association with someone else. It sets out that an association with another individual includes situations where a person is a near relative of another person, or is someone a person lives with or has an ongoing business or recreational relationship with, or where both are members of the same unincorporated association.<sup>53</sup> A 'person' is not defined in the bill, and as such the usual interpretation is that this includes a body politic or corporate as well as an individual.<sup>54</sup> Subclause 16(3) also provides that a person that is a body corporate will be considered to have an association with an individual if a reasonable person would closely associate the body corporate with that individual. This means a body corporate would be able to make a claim for religious discrimination if it has experienced unlawful discrimination due to the religious beliefs or activities of a natural person that it is closely associated with.<sup>55</sup> This is considered further in Chapter 3.

### ***Unlawful discrimination***

2.24 Part 4 of the bill sets out the areas of public life in which it would be unlawful to discriminate against a person because of their religious belief or activity. The specified areas include: work (in relation to employment decisions, the formation of partnerships, and decisions by qualifying bodies, registered organisations and

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50 Religious Discrimination Bill 2021, paragraph 15(1)(a) defines a qualifying body conduct rule to mean a condition, requirement or practice that is imposed by a qualifying body on those seeking or holding an authorisation or qualification from the qualifying body and that relates to standards of behaviour of those persons. Subclause 5(1) defines a qualifying body as an authority or body that is empowered to confer, renew, extend, revoke, vary or withdraw an authorisation or qualification that is needed for, or facilitates, the practice of a profession; the carrying on of a trade; or the engaging in of an occupation by an individual.

51 Religious Discrimination Bill 2021, subclauses 15(1) and (2).

52 Religious Discrimination Bill 2021, subclause 15(3).

53 Religious Discrimination Bill 2021, subclause 16(2).

54 *Acts Interpretation Act 1901* (Cth), section 2C.

55 Religious Discrimination Bill 2021, explanatory memorandum, p. 66.

employment agencies); education (in relation to prospective students and students); access to premises; the provision of goods, services and facilities; accommodation; land; sport; and clubs.<sup>56</sup> It would also be unlawful for a person to request or require another person to provide information for the purposes of engaging in conduct that would constitute unlawful discrimination in these areas of public life.<sup>57</sup> Additionally, it would be unlawful for a person to discriminate against another person on the ground of their religious belief or activity in the administration of Commonwealth laws and programs.<sup>58</sup>

### ***Exceptions and exemptions***

2.25 Division 4 of part 4 of the bill sets out a number of exceptions to the prohibition of discrimination on the ground of religious belief or activity, noting that certain conduct engaged in by religious bodies would not be discrimination and so does not need to come within an exception.<sup>59</sup> Division 4 includes general exceptions as well as specific exceptions relating to particular areas of public life. Clause 35, for example, would introduce a general exception to make it not unlawful to discriminate against a person on the ground of their religious belief or activity if:

- the person has expressed a particular religious belief; and
- a reasonable person, having regard to all the circumstances, would conclude that, in expressing the belief, the person is counselling, promoting, encouraging or urging conduct that would constitute a serious offence; and
- it is reasonable to assume the person holds the particular belief at the time of the discrimination.<sup>60</sup>

2.26 It would also not be unlawful to discriminate on the ground of religious belief or activity if the discrimination is in direct compliance with certain legislation.<sup>61</sup>

2.27 Division 4 also contains specific exceptions relating to work, accommodation and facilities, land, clubs and voluntary bodies.<sup>62</sup> For example, in the context of work, it would not be unlawful to discriminate against a person on the ground of their religious belief or activity if the discrimination is in connection with their position as

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56 Religious Discrimination Bill 2021, clauses 19–30.

57 Religious Discrimination Bill 2021, clause 31. The example under clause 31 states that it would be 'unlawful to ask a person in a job interview if they are religious if the question is asked for the purposes of determining whether to employ the person'.

58 Religious Discrimination Bill 2021, clause 32.

59 Religious Discrimination Bill 2021, clause 34.

60 Religious Discrimination Bill 2021, clause 35. A serious offence is one that involves harm or financial detriment that is punishable by imprisonment for 2 years or more under a law of the Commonwealth, a state or a territory.

61 Religious Discrimination Bill 2021, clause 37.

62 Religious Discrimination Bill 2021, clauses 39–43.

an employee or partner, and because of their religious belief or activity, they are unable to carry out the inherent requirements of the employment or partnership.<sup>63</sup> In the context of accommodation and facilities, it would not be unlawful for a person (the first person) to discriminate against another person on the ground of their religious belief or activity if:

- the discriminatory conduct (which includes preferential treatment) is undertaken in the course of establishing, directing, controlling or administering a camp or conference site that provides accommodation and is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion; and
- the conduct is engaged in good faith; and
- a person of the same religion as the first person could reasonably consider the conduct to be in accordance with the doctrines, tenets, beliefs or teachings of that religion, or the first person engages, in good faith, in the conduct to avoid injury to the religious susceptibilities of adherents of the same religion as the first person; and
- the conduct is in accordance with a publicly available policy; and
- the policy complies with any requirements determined by the minister by legislative instrument.<sup>64</sup>

2.28 In addition, clause 44 would allow the Australian Human Rights Commission (Commission), by notifiable instrument, to grant to a person or body an exemption from the operation of provisions making discrimination in work and other areas of public life unlawful.<sup>65</sup> The exemption may be granted for a period not exceeding five years and may be granted subject to such terms and conditions as are specified in the instrument, and may be expressed to apply only to certain circumstances or certain activities.<sup>66</sup> This power to grant exemptions, as well as any other power or function of the Commission under this bill, may be delegated to any person or body of persons.<sup>67</sup>

2.29 These exceptions and exemptions are considered further in Chapter 3.

### **Offences**

2.30 Part 5 of the bill would introduce a number of offences. For example, it would be an offence to commit an act of victimisation on the basis of religious belief

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63 Religious Discrimination Bill 2021, subclause 39(2).

64 Religious Discrimination Bill 2021, subclauses 40(2)–(7).

65 Religious Discrimination Bill 2021, clause 44.

66 Religious Discrimination Bill 2021, subclauses 44(2) and (3).

67 Religious Discrimination Bill 2021, clause 69.

involving actual detriment and an act of victimisation involving threat of detriment.<sup>68</sup> It is noted that victimisation may also be addressed as a civil matter under the bill.<sup>69</sup> It would also be an offence for a person to publish or display an advertisement or notice that indicates, or could reasonably be understood to indicate, an intention to engage in unlawful discriminatory conduct.<sup>70</sup>

### ***The Australian Human Rights Commission***

2.31 Part 6 of the bill would establish the office of the Religious Discrimination Commissioner and part 7 would confer on the Commission various functions relating to discrimination on the basis of religious belief or activity, such as promoting an understanding and acceptance of, and compliance with, this bill.<sup>71</sup> The Religious Discrimination (Consequential Amendments) Bill 2021 would make the necessary consequential amendments to allow the Commission to inquire into, and attempt to conciliate, complaints of discrimination on the basis of religious belief or activity.<sup>72</sup>

### ***Relationship with other laws***

2.32 There are several provisions contained in the bill which interact with other federal, state and territory laws. As noted above, clause 11 provides that conduct engaged in by religious educational institutions in the context of employment does not contravene a prescribed state or territory law if the institution gives preference, in good faith, to persons who hold or engage in a particular religious belief or activity; and the conduct is in accordance with a publicly available written policy.<sup>73</sup> The minister may prescribe one or more state or territory laws for the purpose of this provision if satisfied the law has the effect of both prohibiting discrimination on the ground of religious belief or activity; and preventing religious educational institutions from giving preference, in good faith, to persons who hold or engage in a particular religious belief or activity when engaging in employment related conduct.<sup>74</sup> The Religious Discrimination (Consequential Amendments) Bill 2021 seeks to make contingent amendments to this bill in order to include the *Equal Opportunity Act 2010* (Vic) within the meaning of a prescribed state or territory law for the purposes of this provision.<sup>75</sup> Further, subclause 11(4) states that this provision is

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68 Religious Discrimination Bill 2021, clause 50.

69 Religious Discrimination Bill 2021, clause 33.

70 Religious Discrimination Bill 2021, clause 51.

71 Religious Discrimination Bill 2021, clauses 52–61.

72 Religious Discrimination (Consequential Amendments) Bill 2021, schedule 1, items 2 and 3.

73 Religious Discrimination Bill 2021, subclause 11(1).

74 Religious Discrimination Bill 2021, subclause 11(3).

75 Religious Discrimination (Consequential Amendments) Bill 2021, schedule 2, items 1–3. The effect of these contingent amendments would be to include the *Equal Opportunity Act 2010* (Vic) in the definition of a prescribed State of Territory law and to repeal subclause 11(4) (including the note).

intended to apply to the exclusion of a prescribed state or territory law insofar as it would otherwise apply in relation to the conduct of a religious educational institution. It notes that if a state or territory law is not prescribed, this provision is intended to operate concurrently to the extent that it is capable of doing so.<sup>76</sup>

2.33 Clause 12 would also affect the operation of other laws insofar as it provides that a statement of belief, in and of itself, does not constitute discrimination for the purposes of this bill and other specified federal, state and territory anti-discrimination laws as well as any provision of a law prescribed by the regulations.<sup>77</sup> The explanatory memorandum states that clause 12 'operates to create a federal exception to certain complaints under state and territory anti-discrimination law concerning a statement of belief'.<sup>78</sup>

2.34 More generally, subclause 68(1) of the bill provides that the bill is not intended to exclude or limit the operation of a state or territory law to the extent that the law is capable of operating concurrently, although noting that this provision does not detract from the operation of clause 12.<sup>79</sup> Subclause 68(2) provides that where a person has made a complaint, instituted a proceeding or taken any other action under a state or territory anti-discrimination law, they are not entitled to make a complaint to the Commission alleging unlawful discrimination under this bill in relation to the same conduct.<sup>80</sup> Additionally, where a person engages in conduct that constitutes an offence under both this bill and a state or territory anti-discrimination law, clause 68 would allow them to be prosecuted and convicted for that conduct either under either this bill or the state or territory law, but the person would not be punished more than once for the same conduct.<sup>81</sup>

### **Key human rights principles**

2.35 This section outlines the key human rights principles under international human rights law that are relevant to the religious discrimination legislative package, particularly the Religious Discrimination Bill 2021 (the bill). It sets out the key rights that may be promoted and limited, and how those rights apply, noting that rights

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76 Religious Discrimination Bill 2021, note to subclause 11(4).

77 Religious Discrimination Bill 2021, subclause 12(1).

78 Religious Discrimination Bill 2021, explanatory memorandum, p. 107.

79 Religious Discrimination Bill 2021, subclause 68(1) (including note).

80 Religious Discrimination Bill 2021, subclause 68(2). See also explanatory memorandum, p. 107.

81 Religious Discrimination Bill 2021, subclauses 68(3) and (4).

that are marginally engaged will not be the focus of this Chapter.<sup>82</sup> For those rights that may be limited, this section outlines the approach taken by the committee in assessing whether the limitation is permissible under international human rights law, such that it is prescribed by law, pursues a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective. Chapters 3–6 provide a more detailed assessment of the application of international human rights law to the various measures contained in the bill (including, where relevant, the views of submitters and witnesses on this question). As will be discussed below, the compatibility of the religious discrimination legislative package with international human rights law appears to be directly relevant to the constitutional validity of the package, noting that the stated constitutional basis of the bill is to give effect to Australia's international human rights law obligations.<sup>83</sup>

### ***Key human rights engaged***

2.36 In general terms, the bill promotes the right to freedom of religion, particularly the right to manifest one's religion, and the rights to freedom of expression and equality and non-discrimination (on the grounds of religious belief) in a number of ways, including by:

- making it unlawful to discriminate against a person on the ground of their religious belief or activity in various areas of public life;
- specifying conduct that is not discrimination, including conduct engaged in by religious bodies in accordance with their faith (which would include preferencing persons of the same religion as the religious body) and reasonable conduct intended to meet a need or reduce a disadvantage; and
- specifying that it may not be reasonable for a qualifying body conduct rule to prevent or restrict a person from making a statement of belief in their personal capacity.

2.37 The right to freedom of religion is protected by article 18 of the International Covenant on Civil and Political Rights, which provides that:

1. 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 [their] choice, and freedom, either individually or in

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82 The religious discrimination legislative package promotes, and engages and may limit, a number of human rights, including freedom of religion or belief; freedom of expression; equality and non-discrimination; work; privacy and private life; and education. The statement of compatibility acknowledges that these rights are engaged. Additionally, insofar as the bill applies to various areas of public life, including education, and health, disability and aged care services, and may consequently have a disproportionate impact on certain groups, such as children, people with disability and older persons, it may also engage the rights of the child and rights of people with disability. Noting that some of these rights are marginally engaged, they will not be the focus of this Chapter.

83 Religious Discrimination Bill 2021, clause 64.

community with others and in public or private, to manifest [their] religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

2.38 The right to freedom of religion 'encompasses freedom of thoughts on all matters, personal conviction and the commitment to religion or belief' and protects equally the freedom of thought, conscience, religion and belief.<sup>84</sup> The United Nations (UN) Human Rights Committee has stated that 'the terms belief and religion are to be broadly construed' and not limited to traditional religions or beliefs.<sup>85</sup> The right protects religious, non-religious and atheist beliefs equally, as well as the right not to profess any religion or belief. Similarly, the freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts, including ritual and ceremonial acts, the building of places of worship, the wearing of religious dress, including distinctive clothing or head coverings,<sup>86</sup> and the observance of dietary regulations.<sup>87</sup> The terms 'observance' and 'practice' do not contain 'any spatial or institutional specificities and must be broadly applied', including in the workplace.<sup>88</sup> The practice and teaching of religion or belief includes acts undertaken by religious groups in conducting their affairs, such as choosing religious leaders, establishing religious schools, and preparing and distributing religious texts or publications.<sup>89</sup> The UN General Assembly has observed that the right to freedom to

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84 UN Human Rights Committee, *General Comment No. 22: Article 18 (Freedom of thought, conscience or religion)* (1993) [1].

85 UN Human Rights Committee, *General Comment No. 22: Article 18 (Freedom of thought, conscience or religion)* (1993) [2].

86 See *Yaker v France*, UN Human Rights Committee Communication No.2747/2016 (2018) [8.3]; *Türkan v Turkey*, UN Human Rights Committee Communication No.2274/2013 (2018) [7.2]–[7.3]; *FA v France*, UN Human Rights Committee Communication No.2662/2015 (2018) [8.3].

87 UN Human Rights Committee, *General Comment No. 22: Article 18 (Freedom of thought, conscience or religion)* (1993) [4].

88 UN General Assembly, *Elimination of all forms of religious intolerance: Interim report of the Special Rapporteur on freedom of religion or belief*, A/69/261 (2014) [31].

89 UN Human Rights Committee, *General Comment No. 22: Article 18 (Freedom of thought, conscience or religion)* (1993) [4].

manifest religion 'includes the right to establish a religious infrastructure which is needed to organize and maintain important aspects of religious community life'.<sup>90</sup> The European Court of Human Rights has also observed that protection of religious groups is necessary for the realisation of the individual right to freedom of religion.<sup>91</sup>

2.39 In addition, the right to freedom of religion requires the state to respect the convictions of parents and guardians of children in the provision of education, and respect the liberty of parents to ensure the religious and moral education of their children in conformity with their own convictions.<sup>92</sup> This allows public schools to teach particular religions or beliefs, but only if it is taught in a neutral and objective way or there is a non-discriminatory alternative for those children whose parents or guardians do not wish them to be educated in that religion or belief. On this matter, the UN Human Rights Committee has stated:

The Committee is of the view that article 18(4) permits public school instruction in subjects such as the general history of religions and ethics if it is given in a neutral and objective way. The liberty of parents or legal guardians to ensure that their children receive a religious and moral education in conformity with their own convictions, set forth in article 18(4), is related to the guarantees of the freedom to teach a religion or belief stated in article 18(1). The Committee notes that public education that includes instruction in a particular religion or belief is inconsistent with article 18(4) unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians.<sup>93</sup>

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90 UN General Assembly, *Elimination of all forms of religious intolerance: Interim report of the Special Rapporteur on freedom of religion or belief*, A/69/261 (2014) [41].

91 *Fernández Martínez v Spain*, European Court of Human Rights (Grand Chamber), Application No. 56030/07 (2014). At [127] the Court stated: '[w]here the organisation of the religious community is in issue, Article 9 [freedom of thought, conscience and religion] of the [European Convention on Human Rights] must be interpreted in the light of Article 11 [freedom of assembly and association], which safeguards associative life against unjustified State interference. Seen in that perspective, the right of believers to freedom of religion encompasses the expectation that they will be allowed to associate freely, without arbitrary State intervention. The autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 of the Convention affords. It has a direct interest, not only for the actual organisation of those communities but also for the effective enjoyment by all their active members of the right to freedom of religion. Were the organisational life of the community not protected by Article 9 of the Convention, all other aspects of the individual's freedom of religion would become vulnerable'.

92 International Covenant on Civil and Political Rights, article 18(4). See also International Covenant on Economic, Social and Cultural Rights, article 13(3).

93 United Nations Human Rights Committee, *General Comment No 22: Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion* (1993) [6].



2.40 The Convention on the Rights of the Child also recognises children themselves as rights holders of the right to freedom of religion or belief and the associated rights and duties of a child's parents or legal guardians to provide direction to their child in the exercise of this right in a manner consistent with the evolving capacities of the child.<sup>94</sup> It also recognises the right of children from a minority religious or indigenous origin to profess or practise their religion and to do so in community with other members of their group.<sup>95</sup> The UN Special Rapporteur has observed that the concept of 'evolving capacities of the child' 'means that the child should always be respected...as having the gradually evolving capacities of forming his or her own thoughts, ideas and religious or belief-related convictions and taking his or her own decisions in that area'.<sup>96</sup> For instance, where a child has developed their own self-understanding on issues of religion or belief and has exercised their right to adopt a particular religion or belief, that decision must be respected and the child should not receive religious instructions against their will.<sup>97</sup> The UN Special Rapporteur acknowledged that the 'rights of children and parental rights in the area of freedom of religion or belief, although in practice not always consonant, should generally be interpreted as being positively interrelated', and cautioned against unjustified state interference with parental rights as such interference often simultaneously amounts to violations of the rights of the child.<sup>98</sup>

2.41 Further, when considering the rights of the child in the area of freedom of religion, it is also necessary to apply the principle of the best interests of the child. The Convention on the Rights of the Child requires States parties to ensure that the best interests of the child are taken as a primary consideration in all actions concerning children, including in the area of freedom of religion or belief.<sup>99</sup> This requires legislative, administrative and judicial bodies and institutions to systematically consider how children's rights and interests are or will be affected directly or indirectly by their decisions and actions.<sup>100</sup> The UN Committee on the Rights of the Child has explained that:

the expression "primary consideration" means that the child's best interests may not be considered on the same level as all other

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94 Convention on the Rights of the Child, article 14.

95 Convention on the Rights of the Child, article 30.

96 United Nations General Assembly, *Interim report of the Special Rapporteur on freedom of religion or belief*, A/70/286 (2015) [26].

97 United Nations General Assembly, *Interim report of the Special Rapporteur on freedom of religion or belief*, A/70/286 (2015) [54].

98 United Nations General Assembly, *Interim report of the Special Rapporteur on freedom of religion or belief*, A/70/286 (2015) [76].

99 Convention on the Rights of the Child, article 3(1).

100 UN Committee on the Rights of Children, *General Comment 14 on the right of the child to have his or her best interest taken as primary consideration* (2013).

considerations. This strong position is justified by the special situation of the child.<sup>101</sup>

2.42 The child's best interests includes the enjoyment of the rights set out in the Convention on the Rights of the Child, and, in the case of individual decisions, 'must be assessed and determined in light of the specific circumstances of the particular child'.<sup>102</sup>

2.43 The right to freedom of religion intersects with the right to hold opinions without interference and the right to freedom of expression, which includes the freedom to seek, receive and impart information and ideas of all kinds, either orally, in writing or print, in the form of art, or through any other media of an individual's choice.<sup>103</sup> This right protects '[a]ll forms of opinion, including opinions of a political, scientific, historic, moral or religious nature' and includes the expression and receipt of religious discourse.<sup>104</sup> The UN Special Rapporteur has emphasised the 'mutually reinforcing nature' of the rights to freedom of religion and freedom of expression, stating that:

Freedom of expression is necessary for the meaningful enjoyment of the freedoms of thought, conscience, and religion or belief...One [right] cannot be fully enjoyed without the other or in the absence of the right to privacy, freedom of association and peaceful assembly. This suggests that the two rights are not only interdependent, but also exist in a legal continuum with myriad other rights.<sup>105</sup>

2.44 The UN Special Rapporteur has further noted that the right to manifest one's religion relies on the degree of protection afforded to freedom of expression and likewise, respect for freedom of thought and conscience is necessary for to ensure respect for freedom of opinion and expression.<sup>106</sup>

2.45 By prohibiting discrimination on the ground of religion, the bill also promotes the right to equality and non-discrimination on the ground of religion. This right provides that everyone is entitled to enjoy their rights without discrimination of any

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101 UN Committee on the Rights of the Child, *General comment 14 on the right of the child to have his or her best interests taken as a primary consideration* (2013); see also *IAM v Denmark*, UN Committee on the Rights of the Child Communication No.3/2016 (2018) [11.8].

102 UN Committee on the Rights of the Child, *General comment 14 on the right of the child to have his or her best interests taken as a primary consideration* (2013) p. 3.

103 International Covenant on Civil and Political Rights, article 19.

104 UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [9], [11].

105 UN Human Rights Council, *Freedom of religion or belief: Report of the Special Rapporteur on freedom of religion or belief*, A/HRC/40/58 (2019) [5], [14]. See also UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion or belief*, A/HRC/31/18 (2015).

106 UN Human Rights Council, *Freedom of religion or belief: Report of the Special Rapporteur on freedom of religion or belief*, A/HRC/40/58 (2019) [7].

kind, including on the grounds of religion,<sup>107</sup> and that all people are equal before the law and entitled without discrimination to equal and non-discriminatory protection of the law.<sup>108</sup> The UN Human Rights Committee has stated that:

the term 'discrimination' as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.<sup>109</sup>

2.46 The UN Human Rights Committee has further stated that discrimination is prohibited 'in law or in fact in any field regulated and protected by public authorities' and States parties have an obligation to ensure that all legislation and the application thereof is not discriminatory.<sup>110</sup>

2.47 However, affording greater protection to religious institutions to manifest their religion would also necessarily have the effect of limiting the rights to freedom of religion, freedom of expression and equality and non-discrimination for persons who do not share the same religion as the religious institution. The UN Special Rapporteur has noted that the rights to freedom of religion or belief and equality and non-discrimination are 'inextricably linked'.<sup>111</sup> In this way, Parts 2 and 4 (in relation to exceptions and exemptions) of the bill may have the effect of simultaneously promoting and weakening the above protections of the rights to freedom of religion,

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107 For jurisprudence of the European Court of Human Rights in relation to discrimination on the grounds of religion see *Yaker v France*, UN Human Rights Committee Communication No.2747/2016 (2018) [8.13]–[8.17]; *Türkan v Turkey*, UN Human Rights Committee Communication No.2274/2013 (2018) [7.7]–[7.8]; *FA v France*, UN Human Rights Committee Communication No.2662/2015 (2018) [8.10]–[8.13].

108 International Covenant on Civil and Political Rights, articles 2 and 26. Article 2(2) of the International Covenant on Economic, Social and Cultural Rights also prohibits discrimination specifically in relation to the human rights contained in the International Covenant on Economic, Social and Cultural Rights.

109 UN Human Rights Committee, *General Comment 18: Non-discrimination* (1989) [7].

110 In considering the interaction between articles 2 and 26 of the International Covenant on Civil and Political Rights, the UN Human Rights Committee has stated: 'article 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory'. See UN Human Rights Committee, *General Comment 18: Non-discrimination* (1989) [12].

111 UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion and belief*, A/HRC/37/49 (2018) [33].

freedom of expression and equality and non-discrimination as they would allow religious bodies to treat people differently on the basis of religion and, in the case of exceptions, would make lawful conduct that would otherwise be unlawful on the grounds that it was discriminatory=.

2.48 Additionally, some measures in the bill may have the effect of indirectly discriminating against persons on the basis of other protected attributes (namely, attributes other than religion). The right to equality encompasses both 'direct' discrimination (where measures have a discriminatory intent) and 'indirect' discrimination (where measures have a discriminatory effect on the enjoyment of rights).<sup>112</sup> Indirect discrimination occurs where 'a rule or measure that is neutral at face value or without intent to discriminate', exclusively or disproportionately affects people with a particular protected attribute.<sup>113</sup> Indirect discrimination may occur, for example, if a religious body were permitted to refuse to hire a woman who was divorced, or dismiss a female employee who gets divorced while employed, on the ground that doing so is in accordance with the body's religious belief and/or to avoid injury to the religious susceptibilities of adherents of the same religion as the body (assuming that such conduct is also in accordance with any other legislative requirements, such as a publicly available policy). As a matter of international human rights law, such conduct may constitute indirect discrimination against the person on the basis of gender and marital status, as well as limit their rights to work, privacy and family life.<sup>114</sup> While the bill itself does not explicitly permit differential treatment on the basis of protected attributes other than religion, in practice, it may be difficult to differentiate between differential treatment on the basis of religion and other protected attributes such as sex and gender. On this issue, the Attorney-General's Department acknowledged that issues of sexuality may be relevant to religion, stating:

While a religious educational institution is not permitted by the Bill to discriminate on the basis of a protected attribute (such as the sexual

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112 UN Human Rights Committee, *General Comment 18: Non-discrimination* (1989).

113 *Althammer v Austria*, UN Human Rights Committee Communication no. 998/01 (2003) [10.2]. The prohibited grounds of discrimination are race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Under 'other status' the following have been held to qualify as prohibited grounds: age, nationality, marital status, disability, place of residence within a country and sexual orientation. The prohibited grounds of discrimination are often described as 'personal attributes'.

114 Under the Convention on the Elimination of All Forms of Discrimination Against Women, article 11(2) provides that: 'In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures: (a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status'. See generally Anja Hilkemeijer, *Submission 5*, p. 2 and Anja Hilkemeijer and Amy Maguire, 'Religious Schools and Discrimination against Staff on the basis of Sexual Orientation: Lessons from European Human Rights Jurisprudence', *ALJ*, 93, 2019, pp. 752–765.

orientation of a current or prospective teacher), the Bill would allow a religious school to consider a person's religious beliefs about issues such as sexuality (irrespective of the person's own sexuality) where the religious school could show that this was part of the doctrines, tenets, beliefs or teachings of their religion (see clause 7(2)). For example, a school could require holders of religious offices within the school such as a school chaplain to conform to the doctrines, tenets, beliefs and teachings of the religion in question with respect to marriage or sexuality.<sup>115</sup>

2.49 As discussed below (at paragraph [2.55]), differential treatment on the basis of a protected attribute, such as religion, gender or sexuality, will not constitute unlawful discrimination if the differential treatment is based on reasonable and objective criteria such that it serves a legitimate objective, is rationally connected to that objective and is a proportionate means of achieving that objective.<sup>116</sup>

2.50 It is noted that, for the purposes of assessing the permissibility under international human rights law of possible indirect discrimination under this bill, it is not relevant whether such differential treatment may be lawful or unlawful under other federal anti-discrimination laws. In particular, it is acknowledged that under the *Sex Discrimination Act 1984* (Sex Discrimination Act) religious bodies are excepted from the prohibition of discrimination on the basis of sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, or breastfeeding in certain areas of public life, including accommodation and education.<sup>117</sup> This means that it is not unlawful under the Sex Discrimination Act for religious educational institutions (the employer) to discriminate against another person on certain grounds, such as sexual orientation or gender identity, in connection with their employment as a member of the staff or as

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115 Attorney-General's Department, *Submission 191*, p. 8.

116 UN Human Rights Committee, *General Comment 18: Non-Discrimination* (1989) [13]; see also *Althammer v Austria*, UN Human Rights Committee Communication No. 998/01 (2003) [10.2]. Under international human rights law, where a person possesses characteristics which make them particularly vulnerable to intersectional discrimination, such as on the grounds of both gender or sex and religion or other belief, the UN Committee on Economic, Social and Cultural Rights has highlighted that 'particularly special or strict scrutiny is required in considering the question of possible discrimination'. See *Marcia Cecilia Trujillo Calero v. Ecuador*, UN Committee on Economic, Social and Cultural Rights, Communication No. 10/2015, E/C.12/63/D/10/2015 (26 March 2018) [19.2]. See also *Rodriguez v Spain*, UN Committee on Economic, Social and Cultural Rights, Communication No. 1/2013 E/C.12/57/D/1/2013 (20 April 2016) [14.1]; UN Committee on Economic, Social and Cultural Rights, *General Comment 20: non-discrimination in economic, social and cultural rights* (2009) [17] and *General Comment 16: the equal right of men and women to the enjoyment of all economic, social and cultural rights* (2005) [5]; and Committee on the Elimination of Discrimination against Women, *General Recommendation No. 28: The Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/GS/28 (16 December 2010) [28].

117 See *Sex Discrimination Act 1984*, paragraph 23(3)(b) and subsection 38(1).

a contract worker of that educational institution, if the employer discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion.<sup>118</sup> The Attorney-General's Department submitted that this bill 'does not affect the operation of the Sex Discrimination Act', including the existing exemptions in section 38.<sup>119</sup> Notwithstanding this, and irrespective of what is lawful under other federal anti-discrimination law, for the purposes of this inquiry, the committee must assess whether this bill would have the effect of allowing indirect discrimination on the grounds of protected attributes other than religion and if so, whether such differential treatment is a permissible limitation on the right to equality and non-discrimination under international human rights law.

2.51 Further, international human rights law requires States parties to relevant international treaties to guarantee human rights to all persons without discrimination of any kind, including on the grounds of sex, religion and political or other opinion.<sup>120</sup> Thus, insofar as the bill prohibits discrimination on the ground of religious belief or activity in various areas of public life, including work and education,<sup>121</sup> it would not only promote the right to equality and non-discrimination, including Australia's obligation to guarantee rights in a non-discriminatory way, but it would also promote the substantive rights in question, such as the rights to work and education. The right to work provides that everyone must be able to freely accept or choose their work and includes a right not to be unfairly deprived of work.<sup>122</sup> The right to education provides that education should be accessible to all.<sup>123</sup>

2.52 However, if allowing religious bodies to treat persons differentially on the basis of religion were to have the effect of restricting access to certain areas of public life, such as employment or education, there is a risk that the rights to work and education may be limited in these circumstances. For instance, by allowing religious employers to treat employees differentially, including by preferencing individuals who share the same religion as the employer and thereby potentially depriving others of work on the basis of their religious belief, this measure may limit the right to work.<sup>124</sup> Likewise, allowing religious schools to treat students differentially on the

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118 *Sex Discrimination Act 1984*, subsections 38(1) and (2).

119 Attorney-General's Department, *Submission 191*, p. 8.

120 See, e.g., International Covenant on Economic, Social and Cultural Rights, article 2; International Covenant on Civil and Political Rights, article 2; Convention on the Rights of the Child, article 2.

121 See, e.g., Religious Discrimination Bill 2021, clauses 19 and 24.

122 International Covenant on Economic, Social and Cultural Rights, articles 6–7. See also, UN Committee on Economic, Social and Cultural Rights, *General Comment No. 18: the right to work (article 6)* (2005) [4].

123 International Covenant on Economic, Social and Cultural Rights, article 13; Convention on the Rights of the Child, article 28.

124 See Religious Discrimination Bill 2021, clauses 7, 9 and 11.

basis of religion may limit the right to education and the rights of the child if it had the practical effect of restricting access to education for certain students, noting that in some remote locations in Australia the only available school may be a religious school.<sup>125</sup> To the extent that the bill removes protections against discrimination in the areas of education and work, for example by overriding protections under state and territory laws,<sup>126</sup> some provisions in the bill may constitute retrogressive measures.<sup>127</sup> Australia has obligations to progressively realise economic, social and cultural rights (including the rights to work and education) using the maximum of resources available,<sup>128</sup> and has a corresponding duty to refrain from taking retrogressive measures, or backwards steps with respect to their realisation.<sup>129</sup> Retrogressive measures, a type of limitation, may be permissible under international human rights law providing that they address a legitimate objective, are rationally connected to that objective and are a proportionate way to achieve that objective (as further discussed at paragraph [2.55]).

2.53 The statement of compatibility acknowledges that while the bill would promote the rights to freedom of religion, freedom of expression and equality and non-discrimination, it may also limit these rights. It states that the bill promotes these rights by prohibiting discrimination on the basis of religious belief or activity; allowing religious bodies to engage in conduct in accordance with their faith; and protecting the ability of individuals to express their religious beliefs or beliefs about not holding a religious belief.<sup>130</sup> The statement of compatibility notes that without the provisions allowing religious bodies to act in accordance with their faith as well as the other exceptions contained in the bill, the bill could restrict or interfere with the observance or practice of particular religions or the ability for religious bodies to conduct their affairs in accordance with their religious beliefs.<sup>131</sup> However, the statement of compatibility acknowledges that these provisions limit the right to

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125 See Northern Territory Anti-Discrimination Commission, *Submission 69*, p. 5. The Northern Territory Anti-Discrimination Commission stated that in the Northern Territory, 'there are a number of locations where there are no options but religious schools'. They were concerned that the 'reforms will impact on Aboriginal people whose communities this occurs in, by limiting employment opportunities in communities that already have very limited employment opportunities, and impacting on teaching a diverse curriculum, that reflects the need of maturing students, particularly in relation to sexuality and gender identity'.

126 See, e.g., Religious Discrimination Bill 2021, clause 11.

127 See Australian Discrimination Law Experts Group, *Submission 33*, p. 10.

128 UN Committee on Economic, Social and Cultural Rights, *General Comment No. 3: The nature of States parties obligations (Art. 2, par. 1)* (1990) [9]. The obligation to progressively realise the rights recognised in the ICESCR imposes an obligation on States to move 'as expeditiously and effectively as possible' towards the goal of fully realising those rights.

129 International Covenant on Economic, Social and Cultural Rights, article 2.

130 Religious Discrimination Bill 2021, statement of compatibility, pp. 8–10.

131 Religious Discrimination Bill 2021, statement of compatibility, pp. 8–28.

equality and non-discrimination (on the ground of religious belief) of others.<sup>132</sup> The bill itself also acknowledges that certain conduct, while not discriminatory under this bill, may amount to discrimination under other federal anti-discrimination legislation, such as the Sex Discrimination Act.<sup>133</sup>

2.54 In addition, it is noted that the rights to freedom of religion and expression usually intersect with other human rights, and manifestations of religion and expressions of beliefs or opinions have the potential to adversely impact on the rights and freedoms of others. In this regard, those measures in the bill that afford greater protection to the right to manifest religion necessarily engage and may limit the rights and freedoms of others. Where the manifestation of religion or the expression of a religious opinion or belief limits the rights or freedoms of others, each right must be balanced against each other. As noted by the UN Special Rapporteur, manifestations of religion or belief 'must comply with the duty to respect the fundamental rights and freedoms of others and may be subject to limitations on those grounds'.<sup>134</sup> The applicable limitation criteria under international human rights law, including the approach to balancing rights in this context, is outlined below. The extent to which an appropriate balance has been struck between the right to freedom of religion and other rights in the context of specific measures in the bill is considered in Chapters 3–6.

### ***Limitation criteria***

2.55 International human rights law recognises that reasonable limits may be placed on most rights and freedoms – there are very few absolute rights which can never be legitimately limited.<sup>135</sup> All other rights may be limited provided the limitation meets certain standards. This reflects the general understanding that States Parties have the power to regulate the exercise of human rights, but not extinguish them.<sup>136</sup> Noting that the measures in the bill engage multiple human rights and these rights intersect with, and may have the effect of limiting, each other, it is necessary to consider what may be a permissible limit on the rights to freedom of religion and expression, as well as the broader limitation criteria in relation to other human rights.

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132 Religious Discrimination Bill 2021, statement of compatibility, pp. 10–12, 14–25.

133 See e.g., Religious Discrimination Bill 2021, subclause 7(2), note 2.

134 UN Human Rights Council, *Freedom of religion or belief: Report of the Special Rapporteur on freedom of religion or belief*, A/HRC/40/58 (2019) [16].

135 Some human rights obligations are absolute under international law, that is, a State cannot lawfully limit the enjoyment of an absolute right in any circumstances. For example, the right not to be subjected to torture, cruel, inhuman or degrading treatment or punishment may never be permissibly limited.

136 See, Nihal Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence*, Cambridge University Press, Cambridge, 2002, pp. 184–185.



2.56 In general, human rights may be subject to permissible limitations where the limitation:

- (a) is prescribed by law (that is, it satisfies the 'quality of law' test);
- (b) pursues a legitimate objective (one that is necessary and addresses an issue of public or social concern that is pressing and substantial enough to warrant limiting the right);
- (c) is rationally connected to (that is, likely to achieve) that objective; and
- (d) is a proportionate means of achieving that objective.

2.57 With respect to proportionality, some matters that are necessary to consider include whether a proposed limitation: is sufficiently circumscribed, is flexible enough to treat different cases differently and is accompanied by sufficient safeguards; whether any less rights restrictive alternatives could achieve the same stated objective; and whether there is the possibility of oversight and the availability of review. Another relevant factor in assessing proportionality in the context of this bill is the degree to which an appropriate balance has been struck between competing limitable rights, noting that affording greater protection to the right to freedom of religion may have the effect of limiting other human rights and vice versa.

2.58 The application of this general test is further qualified by specific requirements that apply to the rights to freedom of religion and freedom of expression.

2.59 While the right to *hold* a religious or other belief or opinion is an absolute right and cannot be subject to any limitations,<sup>137</sup> the freedom to *manifest* one's religion or beliefs may be limited so long as such limitations are prescribed by law and are necessary to protect public safety,<sup>138</sup> order, health or morals,<sup>139</sup> or the fundamental rights and freedoms of others. The right to freedom of expression may also be subject to limitations that are necessary to protect the rights or reputations of others,<sup>140</sup> national security, public order, or public health or morals.<sup>141</sup>

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137 UN Human Rights Committee, *General Comment No. 22: Article 18 (Freedom of thought, conscience or religion)* (1993) [3]; UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [9].

138 See *Yaker v France*, UN Human Rights Committee Communication No.2747/2016 (2018) [8.6]–[8.7].

139 The UN Human Rights Committee has stated 'that the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition'. See *General Comment No. 22: Article 18 (Freedom of thought, conscience or religion)* (1993) [8].

140 Restrictions on this ground must be constructed with care. See UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [28].

Additionally, limitations on the rights to freedom of religion and expression must be rationally connected to the stated objective, and proportionate and non-discriminatory.<sup>142</sup> Article 20 of the International Covenant on Civil and Political Rights also places limits on the freedom to manifest religion, providing that any manifestation of religion or beliefs must not amount to propaganda for war or advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. The UN Human Rights Committee has observed that the limitation clause in relation to the right to freedom of religion is to be strictly interpreted:

restrictions are not allowed on grounds not specified there [in article 18(3)], even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security. Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated.<sup>143</sup>

2.60 In addition, the UN Special Rapporteur has noted that while limitations on religious manifestations in the context of work must generally satisfy the criteria set out in international human rights law, limitations imposed by religious institutions

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141 In considering the scope of permissible restrictions on the right to freedom of expression in the context of the right to freedom of religion, the UN Human Rights Committee has observed that it would be impermissible for 'laws to discriminate in favour of or against one or certain religions or belief systems, or their adherents over another, or religious believers over non-believers'. It would also be impermissible for laws to prohibit displays of lack of respect for a religion or other belief system, including blasphemy laws, and for such 'prohibitions to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine and tenets of faith'. See UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* (2011) [48].

142 In assessing the permissibility of a restriction on the right to freedom of religion, it is also important to consider the necessity of the measure. See *Yaker v France*, UN Human Rights Committee Communication No.2747/2016 (2018) at [8.5] where the Committee stated that it needed to 'assess whether the restriction, which is prescribed by law, pursues a legitimate objective, is necessary for achieving that objective, and is proportionate and non-discriminatory'. See also UN Human Rights Committee, *General Comment No.34: Article 19: Freedoms of Opinion and Expression* (2011) [21]-[36]. Likewise, the Special Rapporteur has stated that limitations on the rights to freedom of religion and freedom of expression must: '(a) be imposed for permissible reasons; (b) be clearly articulated in law so that individuals can know with certainty what conduct is prohibited; (c) be demonstrably necessary and be the least intrusive measure possible to achieve the aim pursued; and (d) be neither discriminatory nor destructive of the right itself, which must continue to be protected with a guarantee of due process rights, including access to remedy': UN Human Rights Council, *Freedom of religion or belief: Report of the Special Rapporteur on freedom of religion or belief, A/HRC/40/58* (2019) [17].

143 UN Human Rights Committee, *General Comment No. 22: Article 18 (Freedom of thought, conscience or religion)* (1993) [8]. See also UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion and belief, A/HRC/37/49* (2018) [31], [44], [45].

'constitute a special category, as their raison d'être is, from the outset, a religious one'. The UN Special Rapporteur has observed:

Freedom of religion or belief also includes the right to establish a religious infrastructure which is needed to organize and maintain important aspects of religious community life. For religious minorities this can even become a matter of their long term survival. The autonomy of religious institutions thus undoubtedly falls within the remit of freedom of religion or belief. It includes the possibility for religious employers to impose religious rules of conduct on the workplace, depending on the specific purpose of employment. This can lead to conflicts with the freedom of religion or belief of employees, for instance if they wish to manifest a religious conviction that differs from the corporate (i.e., religious) identity of the institution. Although religious institutions must be accorded a broader margin of discretion when imposing religious norms of behaviour at the workplace, much depends on the details of each specific case.<sup>144</sup>

2.61 Further, where the manifestation of religion or the expression of a religious opinion or belief has an adverse effect on the rights or freedoms of others, each right must be balanced against each other.<sup>145</sup> In this regard, the UN Human Rights Committee has stated that:

States parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination...Limitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in article 18 [in relation to freedom of religion]...Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner.<sup>146</sup>

2.62 The UN Special Rapporteur has similarly highlighted the indivisibility of human rights and the need to balance competing rights, stating that:

The nature of a State's obligation to promote and protect the right to freedom of religion or belief must be understood within a wider human rights-based framework that stresses the principles of universality, equality and freedom, and which satisfy the duties to respect, protect and promote all human rights for everyone...there is no hierarchy of human rights and where freedom of religion clashes with the right to non-discrimination and equality, or laws of general effect, the focus should be

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144 UN General Assembly, *Elimination of all forms of religious intolerance: Interim report of the Special Rapporteur on freedom of religion or belief*, A/69/261 (2014) [41].

145 See, e.g., *Ross v Canada*, United Nations Human Rights Committee Communication No. 736/1997 (2000) [11.5]–[11.8].

146 United Nations Human Rights Committee, *General Comment No 22: Article 18 of the ICCPR on the Right to Freedom of Thought, Conscience and Religion* (1993) [8].

on ensuring that all human rights are protected, including through reasonable accommodation.<sup>147</sup>

2.63 In resolving conflicts between the right to freedom of religion and other limitable human rights, the United Kingdom courts and the European Court of Human Rights have undertaken a balancing exercise – often applied as part of a broader proportionality assessment in which the necessity of the measure is also considered.<sup>148</sup> For example, in *Black and Morgan v Wilkinson*, the Court of Appeal of England and Wales considered a conflict between the right of a homosexual person not to suffer discrimination on the grounds of sexual orientation, and the freedom to manifest one's religion or belief. The court stated that:

Neither [right] is intrinsically more important than the other. Neither in principle trumps the other. But the weight to be accorded to each will depend on the particular circumstances of the case.<sup>149</sup>

2.64 The court noted that the balancing exercise to be undertaken depends on the context:

The overall balancing exercise will in many contexts (immigration is an obvious example) require the balancing of the interests of society as a whole with the interests of an individual or group of individuals. In other cases, the overall fair balancing that is required involves the competing rights and interests of groups of individuals.<sup>150</sup>

2.65 The European Court of Human Rights has also approached the balancing exercise differently depending on the circumstances of the case and the competing rights in question. For example, in a case involving a conflict between the right of a religiously motivated political party to manifest their religion and the rights of women not to be differentially treated, the European Court of Human Rights observed that 'very weighty reasons would have to be advanced before a difference of treatment on the ground of sex could be regarded as compatible with the Convention', noting that the 'advancement of the equality of the sexes is...a major

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147 UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion and belief*, A/HRC/37/49 (2018) [30], [81].

148 See Susanna Mancini and Michel Rosenfeld, *The Conscience Wars: rethinking the balance between religion, identity and equality*, Cambridge University Press, Cambridge, 2018, p. 314. The authors state that '[r]eligious freedom may be limited in favour of non-discrimination rules and vice versa, unless either result threatens the foundational values of the Convention or the *forum internum* of religious belief'. In addressing the conflict between these rights, the authors state that the European Court of Human Rights 'employs three tools of proportionality review – the necessity test, the balancing exercise, and the margins of appreciation – to resolve conflicts between limitable rights'.

149 [Black and Morgan v Wilkinson](#), Court of Appeal of England and Wales [2013] EWCA Civ 820, [35].

150 [Black and Morgan v Wilkinson](#), Court of Appeal of England and Wales [2013] EWCA Civ 820, [37].

goal' of European member States.<sup>151</sup> The UN Special Rapporteur has similarly emphasised the relevance of the competing rights in question and the vulnerability of the persons involved, noting that:

the jurisprudence of the Human Rights Committee and the regional human rights courts uphold that it is not permissible for individuals or groups to invoke “religious liberty” to perpetuate discrimination against groups in vulnerable situations, including lesbian, gay, bisexual, transgender and intersex persons, when it comes to the provision of goods or services in the public sphere.<sup>152</sup>

2.66 In relation to the rights of women and girls, the UN Special Rapporteur reiterated that:

freedom of religion or belief can never be used to justify violations of the rights of women and girls, and that it can no longer be taboo to demand that women’s rights take priority over intolerant beliefs used to justify gender discrimination. It would be contrary to both women’s human rights as well as freedom of religion or belief provisions to allow one set of rights (i.e. women’s rights) to be undermined on the basis of claims made in defence of the right to freedom of religion or belief.<sup>153</sup>

2.67 More generally, the UN Special Rapporteur has observed that the specific context of the case is important, stating that generally 'contentious situations should be evaluated on a case-by-case basis' and when developing a set of general criteria to balance competing human rights, 'the competing human rights and public interests put forward in national and international forums need to be borne in

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151 See *Staatkundig Gereformeerde Partij v the Netherlands*, European Court of Human Rights, Application No. 58369/10 (2012) [72]. While the application was ultimately found to be inadmissible on other grounds, the Court did observe that in light of the right to equality and non-discrimination, the political party's position that women should not be allowed to stand for elected officer was unacceptable regardless of the deeply-held religious conviction on which this position was based (see paragraphs [76]–[79]).

152 UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion and belief*, A/HRC/37/49 (2018) [40]. At [39], the Special Rapporteur noted 'with concern the increasing trend by some States, groups and individuals, to invoke “religious liberty” concerns in order to justify differential treatment against particular individuals or groups, including women and members of the lesbian, gay, bisexual, transgender and intersex community. This trend is most often seen within the context of conscientious objection, including of government officials, regarding the provision of certain goods or services to members of the public'.

153 UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion and belief*, A/HRC/37/49 (2018) [42]. See also *Rationalist Society of Australia Inc*, *Submission 42*.

mind'.<sup>154</sup> In a more recent report, the UN Special Rapporteur reiterated that when the right to freedom of religion or belief ultimately clashes with other rights, 'every effort must be made, through a careful case-by-case analysis, to ensure that all rights are brought in practical concordance or protected through reasonable accommodation'.<sup>155</sup>

### **Key issues raised by submitters and witnesses**

2.68 A number of submitters to the inquiry, and witnesses at the public hearings, were of the view that the religious discrimination legislative package generally promoted the right to freedom of religion, as well as associated rights. For example, Associate Professor Mark Fowler submitted that the package 'completes the suite of Australian equality protections' and noted that a number of key provisions aligned with international human rights law.<sup>156</sup>

2.69 However, other submitters and witnesses raised concerns that some provisions in the bill may not be consistent with international human rights law. For example, Professor George Williams submitted that the bill 'provides an elevated status to religious speech but fails to protect speech on matters of thought or conscience'. He stated that this approach 'finds no basis in international human rights' law.<sup>157</sup> The Australian Discrimination Law Experts Group also stated that the bill was inconsistent with international human rights law insofar as it inconsistently applied the right to freedom of religion and contained no means by which to balance rights.<sup>158</sup> The Law Council of Australia were similarly of the view that the bill does not consistently implement article 18, stating:

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154 UN Economic and Social Council, *Civil and political rights, including the question of religious intolerance: Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir*, E/CN.4/2006/5 (2006) [51]–[52]. The Special Rapporteur noted some of the different ways in which rights may compete with one another: 'Freedom of religion or belief may be invoked both in terms of the positive freedom of persons who wish to wear or display a religious symbol and in terms of the negative freedom of persons who do not want to be confronted with or coerced into it. Another competing human right may be the equal right of men and women to the enjoyment of all civil and political rights, as well as the principle of the right to be protected from discrimination of any kind, including on the basis of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or other status'.

155 UN Human Rights Council, *Report of the Special Rapporteur on freedom of religion and belief*, A/HRC/37/49 (2018) [47].

156 Associate Professor Mark Fowler, *Submission 20*, p. 7. See also Professor Nicholas Aroney, *Committee Hansard*, 21 December 2021, p. 4.

157 Professor George Williams, *Submission 1*, pp. 1–2. See also Associate Professor Luke Beck, *Submission 38*.

158 Dr Cristy Clark, Australian Discrimination Law Experts Group, *Committee Hansard*, 21 December 2021, p. 16. See also Anna Brown, Equality Australia, *Committee Hansard*, 21 December 2021, p. 71.

It's not a matter of cherrypicking in the sense of taking article 18, giving a tick to article 18(1) and leaving the rest behind; it's that balancing of the rights and the interaction with other rights, particularly the recognition of rights to equality before the law that we're concerned about—that the bill perhaps steps too far in not striking the appropriate balance.<sup>159</sup>

2.70 The views of submitters and witnesses in relation to the compatibility of specific measures in the bill with international human rights law are discussed further in Chapters 3–6.

### **Constitutional context**

2.71 The constitutional basis for the bill is set out in clause 64. It states that the bill gives effect to Australia's obligations under one or more of the following international instruments:

- the International Covenant on Civil and Political Rights;
- the International Covenant on Economic, Social and Cultural Rights;
- the Convention on the Rights of the Child;
- the International Convention on the Elimination of all Forms of Racial Discrimination;
- the ILO Convention (No. 111) concerning Discrimination in respect of Employment and Occupation; and
- the ILO Convention (No. 158) concerning Termination of Employment at the Initiative of the Employer.<sup>160</sup>

2.72 The explanatory memorandum states that this provision clarifies that the external affairs power is the main constitutional basis for the bill.<sup>161</sup> Section 51(xxix) of the Constitution provides Parliament with the power to make laws for the peace, order, and good government of the Commonwealth with respect to external affairs.

2.73 In addition to the external affairs power, clause 65 provides that the bill also has effect to the extent directly supported by a number of other constitutional heads of power, including the corporations power, the Commonwealth and territory matters power, the trade or commerce power, the banking and insurance power, the telecommunications power, and the defence power.<sup>162</sup>

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159 Ms Katherine Eastman, Law Council of Australia, *Committee Hansard*, 14 January 2022, pp. 31–32.

160 Religious Discrimination Bill 2021, clause 64.

161 Religious Discrimination Bill 2021, explanatory memorandum, p. 105.

162 Religious Discrimination Bill 2021, clause 65. See explanatory memorandum, pp. 105–106.

2.74 A number of submitters raised concerns regarding the constitutional validity of the bill.<sup>163</sup> One of these concerns relates to the reliance on the external affairs power as a head of power to support the bill. As Professor Anne Twomey explained, the external affairs power is a 'purposive' power, which means it is directed at, and confined to, the purpose of implementing the treaty.<sup>164</sup> As such, a number of submitters and witnesses noted that the consistency of key provisions in the bill with international human rights law was relevant to the question of constitutional validity. For example, Professor Anne Twomey commented that:

s 51(xxix) would not support the Bill if the provisions of the Bill were **substantially inconsistent** with the ICCPR as a whole, including the other rights and freedoms the ICCPR declares, taking into account that article 18 of the ICCPR states that the right to freedom of religion may **only** be limited where it is **necessary** to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.<sup>165</sup>

2.75 Additionally, Professor Luke Beck submitted that:

To the extent that the statements of belief 'sword' provisions or particular applications of those provisions rely for their validity only on the external affairs power there must be significant constitutional doubt that those provisions or those applications are constitutionally valid.<sup>166</sup>

2.76 Further, queries were also raised in relation to clauses 11 and 12 of the bill regarding the operation of section 109 of the Constitution (which provides that Commonwealth law will prevail over any inconsistent State law, to the extent of the inconsistency). Professor Twomey noted that section 109 of the Constitution does not confer on the Commonwealth a power to repeal or alter state laws, or affect the interpretation of state laws or prohibit the state from enacting certain laws. Rather, the Commonwealth could enact a law to empower a person to do a specified thing, notwithstanding the operation of any state law, and this would create a direct inconsistency and, as a result of section 109, the Commonwealth law would prevail.<sup>167</sup> Professor Twomey submitted that clauses 11 and 12 do not follow this path of creating an inconsistency, stating that clause 11 'purports to alter the effect of the application of a State law' but that 'it is not within the Commonwealth Parliament's power to legislate to control the legal operation of a State law, including

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163 See, e.g., Professor Anne Twomey, *Submission 47*, p. 4; Professor Luke Beck, *Submission 38*, p. 6; Australian Lawyers Alliance, *Submission 2*, pp. 11–12; Ms Anja Hilkeijer, *Submission 5*, p. 2; NSW Council for Civil Liberties, *Submission 181*, p. 17

164 Professor Anne Twomey, *Submission 47*, p. 4.

165 Professor Anne Twomey, *Submission 47*, p. 4 (emphasis in original). The Law Council of Australia endorsed Professor Twomey's submission, see Mr Beckett, Law Council of Australia, *Committee Hansard*, 14 January 2022, p. 39.

166 Professor Luke Beck, *Submission 38*, p. 6.

167 Professor Anne Twomey, *Submission 47*, p. 4.



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what conduct contravenes a State law'. In relation to clause 12, Professor Twomey stated that a Commonwealth law cannot 'dictate the interpretation of what amounts to discrimination under a State law: 'All it can do is enact its own law that gives rise to an inconsistency (e.g. by granting a right or conferring a power to do something, which a State law prohibits, limits or qualifies), rendering the State law inoperative to the extent of that inconsistency'.<sup>168</sup>

2.77 Professor Nicholas Aroney also noted the complexity of these clauses in relation to state law:

the bill does approach the question of its interaction with state and territory laws in an unusual way—in a way that, to my knowledge, is not common in Commonwealth laws. It does raise some questions about how it would operate, and I think that will be an interesting question—to see whether further consideration is given to that—because I think there are some questions about its operation in relation to state and territory laws.

...

To my mind the question is whether the Commonwealth has the power to determine how a state law is to be interpreted or its operation or effect, because when you look at clauses I think 11 and 12 they say that certain conduct does not contravene particular state and territory laws and could be interpreted as evincing an intention to cover the field and thus displace the operation of those laws. If it were interpreted that way, it would be effective under section 109. But, if it were interpreted so as to displace, as it were, the tenor and operation of the state law in and of itself, then that would raise a novel question for the court, in my opinion.<sup>169</sup>

2.78 In contrast, Mr Walter, Acting Deputy Secretary, Integrity and International Group, with the Attorney-General's Department stated:

we are confident, on the basis of the legal advice that we received, that the law is constitutional within the Commonwealth's constitutional power, subject to the current interpretations that the High Court takes to various provisions in the Constitution.<sup>170</sup>

### **Committee view**

2.79 The committee would like to thank the many stakeholders for their engagement in this inquiry, as well as the significant work that has been put into submissions, and from those appearing at the inquiry, to assist the committee in its consideration of the bill.

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168 Professor Anne Twomey, *Submission 47*, pp. 4–5. See also Mr David Mason, *Submission 50*, pp. 6–7.

169 Professor Nicholas Aroney, *Committee Hansard*, 21 December 2021, p. 12.

170 Mr Walter, Attorney-General's Department, *Committee Hansard*, 14 January 2022, p. 67.

2.80 The committee notes that the religious discrimination legislative package seeks to give effect to a number of recommendations made by the Expert Panel into Religious Freedom, including the recommendation that legislation be introduced to render discrimination on the basis of religion unlawful. Noting that existing protections for discrimination on the basis of religion in federal and state and territory anti-discrimination legislation are piecemeal, have limited application and are inconsistent across jurisdictions, the committee considers that it is important to address this legislative gap by introducing comprehensive federal legislative protections for discrimination on the basis of religious belief or activity. Issues raised by submitters and witnesses as to how this has been implemented, and an assessment as to the application of international human rights law to these provisions, is set out in detail in Chapters 3–6 of this report.

2.81 The committee notes that, as set out above, some submitters raised concerns as to the constitutionality of the bill. The committee notes that the main constitutional basis of the bill appears to be the external affairs power, insofar as the bill seeks to give effect to Australia's international human rights law obligations. The committee notes that the compatibility of the religious discrimination legislative package with international human rights law may therefore be relevant to the constitutional validity of the package. While the committee will consider the compatibility of this package with international human rights law in Chapters 3–6, it will not assess its constitutional validity, noting that this line of inquiry is more appropriately undertaken by the Legal and Constitutional Affairs Legislation Committee (who are also conducting an inquiry into the religious discrimination legislative package).