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27 September 2019

Human Rights Unit, Integrity Law Branch, Integrity and Security Division
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By email: FoRConsultation@ag.gov.au

Dear Sir/Madam

Religious Discrimination Bill 2019
Religious Discrimination (Consequential Amendments) Bill 2019
Human Rights Legislation Amendment (Freedom of Religion) Bill 2019

The Executive Council of Australian Jewry (ECAJ) makes the following submission in response to the Federal government's Exposure Drafts of the above Bills. We consent to this submission being made public.

The ECAJ is the peak elected representative body of the Australian Jewish community. This Submission is also made on behalf of the ECAJ's Constituent and Affiliate organisations throughout Australia.

For the purposes of this submission, the expression "the Bill" refers to the Exposure Draft of the *Religious Discrimination Bill 2019* and the expression "the HRLA Bill" refers to the Exposure Draft of the *Human Rights Legislation Amendment (Freedom of Religion) Bill 2019*, both as released by the Attorney-General on 29 August 2019. A list of Recommendations appears in the final section of this document.

1. The need for new legislation

We note from the Attorney General's overview statement that the Bill is intended to give effect to Recommendations 3, 15 and 19 in the Report of the Expert Panel on Religious Freedom which was released in December 2018. In essence, the Bill would make it unlawful to discriminate against others on the basis of their religious belief or activity, while seeking to provide some general protection to individuals for "statements of belief" that might be attacked as discrimination, and to allow religious bodies to continue to operate in accordance with their beliefs. This attempts to plug a gap in the current law. As stated in para 6 of the Explanatory Memorandum to the Bill:

“current protections in Commonwealth, state and territory laws for discrimination on the basis of a person’s religious belief or activity are piecemeal, have limited application and are inconsistent across jurisdictions”.

We agree with that observation. We are also mindful of changing attitudes towards religion that have been occurring over time in the wider community.

“The growing percentage of Australia’s population reporting no religion [in the Census] has been a trend for decades, and is accelerating. Those reporting no religion increased noticeably from 19 per cent in 2006 to 30 per cent in 2016. The largest change was between 2011 (22 per cent) and 2016, when an additional 2.2 million people reported having no religion.”¹

The significant and continuing decline that has occurred in the proportion of Australians who identify themselves in the Census as an adherent of a religion suggests that there has been an erosion of the standing of religion in our society. Whenever there has been public debate about the balance our society strikes between religious freedom and other freedoms and rights, there have been calls from human rights and other groups, outside faith communities themselves, to shift that balance further away from, not further towards, religious freedom.

In that fluid context, and to create a level of consistency between different State and Territory jurisdictions, we think there is merit in introducing new Federal legislation aimed at clarifying where the balance between religious freedom and other freedoms and rights should be struck in contemporary Australia and at bringing greater consistency to this area of the law between jurisdictions.

2. Freedom of religion

Our organisation called for freedom of religion to be affirmed as a positive right, rather than as a negative “exception to the rule” in the exemptions to various anti-discrimination laws of the States and Territories. The Bill in effect, if not in terms, achieves this in clauses 8(3), 10, 11 and 41(1).

As para 160 of the Explanatory Memorandum to the Bill notes, these provisions are “*not framed as an exception to the prohibition of discrimination under Part 3*”. Rather, they are over-riding provisions affirming that persons of faith do not in general engage in discrimination simply by professing their faith, nor do religious bodies engage in discrimination simply by operating according to their ethos. It is the affirmation that these acts are not discrimination which is made the rule, and the limited circumstances where such acts might constitute discrimination which are made the exceptions.

¹ Media Release 074/2017, Australian Bureau of Statistics, *2016 Census data reveals “no religion” is rising fast*, 27 June 2017:
<https://www.abs.gov.au/AUSSTATS/abs@.nsf/mediareleasesbyReleaseDate/7E65A144540551D7CA258148000E2B85>

This is the reverse of the structure adopted in the current anti-discrimination laws of the States and Territories with regard to religion, and in our view comes as close to creating an explicit legislative affirmation of freedom religion as is possible, without opening up a much broader debate about introducing a Bill of Rights for all fundamental freedoms.

Although it may be less relevant to the Jewish community, the Bill will also need to be considered in light of the Report of the Australian Law Reform Commission (ALRC) when it completes its Review into the Framework of Religious Exemptions in Anti-discrimination Legislation. The terms of reference of that review have now been narrowed. Accordingly, we believe that the timing of the release of the ALRC Report should be brought forward to as early a date as possible, and no later than the date originally set, namely 10 April 2020. Alternatively:

- the government should announce that the Report will be released, and any consequent legislative reform will be enacted, during the life of the present parliament; and
- a provision should be added to the Bill to the effect that a review of its provisions will commence upon release of the Report and it will be completed, and any consequent legislative reform will be enacted, during the life of the present parliament.

3. **Religious bodies**

No act of discrimination occurs under the Bill if “*a religious body*” engages “*in good faith*” in conduct “*that may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion in relation to which the religious body is conducted*” – clause 10(1). A “*religious body*” is defined in clause 10(2). It covers any educational institution, registered charity or other body “*that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion*”, but does not include charities or other bodies that engage solely or primarily in “*commercial activities*”. Clause 10(3) says that the protections given to religious bodies under clause 10 apply “*despite anything else in this Act*”.

In light of para 178 of the Explanatory Memorandum, religious bodies protected under clause 10 would include Jewish places of worship, bodies engaged in the ordination, appointment or training of Jewish clergy or in the selection or appointment of persons to perform duties or functions for, or to participate in, any Jewish religious observance or practice. Jewish educational institutions and charities and other communal bodies which operate according to a religious ethos and are not engaged solely or primarily in commercial activities are also protected. The intention of the Bill seems to be to provide that all of these bodies would be free to continue operating in accordance with their religious beliefs in all their operations – including enrolment of students in the case of educational institutions, their employment practices, and the hiring out of their facilities - without this being considered discriminatory.

Under clause 29 of the Bill, a religious charity which has been set up to benefit persons of a specific religion may continue to do so.

We believe that, as regards religious bodies, the Bill requires clarification in several respects.

- (i) Religious bodies are defined in clause 10(2) as those which operate in accordance with the doctrines etc of a “*religion*”. The definitions of several other key terms in clause 5 (such as “statement of belief”) also refer to “*religion*”. Yet the Bill contains no definition of “*religion*”. There is important case law to suggest that a religion must be a system of belief and worship that is held in good faith and is “neither fictitious, nor capricious” and “not an artifice”. The absence of a definition of religion in the Bill potentially raises questions as to whether a denomination or stream of a particular religion is itself a religion for the purposes of the Bill. In his speech when he released the Bill, the Attorney-General spoke of the desirability of the judiciary being “*guided and narrowed by a set of legislative guardrails*” in interpreting the Bill’s provisions. For that reason it would be desirable for the Bill to include a definition of so fundamental a concept as religion. The definition would incorporate the case law, and make clear that a religion includes a denomination or stream of a religion. A definition of “*religion*” would also be desirable in order to give greater clarity to the meaning of “*religious belief or activity*” (see Part 4 below).
- (ii) Under clause 10(1), the conduct of the religious body will only be protected if it “*may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion*”. What standard of reasonableness will apply? If it is to be the standard of the ordinary reasonable person, how would a reasonable member of the general Australian community have the knowledge and experience to assess whether a particular act is in accordance with Judaism? On what basis would a judge or jury in a civil court be able to determine what conclusion a reasonable member of the general Australian community would reach on such a question? Civil courts in English-speaking jurisdictions have long declined to rule on questions of religious doctrine. To do so would trespass across the well-recognised divide between religion and state. Yet this is precisely what Australia’s civil courts will have to do if an issue arises as to whether or not certain conduct is in accordance with a particular religion, even if the word “reasonably” were to be deleted.

A solution might be to define the standard of reasonableness as that of a reasonable person who is observant in that religion or the relevant denomination or stream of that religion. The question might then at least be determined on the basis of expert evidence from recognised faith leaders and teachers. Even this solution could present problems in the case of Judaism, with its well-established tradition of argument, dissent and, on occasions, conflicts of views between relevant religious authorities that occur even within each stream of Judaism. For this reason we would also recommend that the word “*ethos*” be added to the words “*doctrines, tenets, beliefs or teachings* so that the final phrase of clause 10(1) reads: “*in accordance with the doctrines, tenets, beliefs, ethos or teachings of the religion, or a denomination or stream of the religion,*” in relation to which the religious body is conducted.”

- (iii) The definition of “*educational institution*” in clause 5 of the Bill refers to “*a school, college, university or other institution at which education or training is provided*”. It is not entirely clear from this definition whether faith-based preschools, kindergartens and creches would meet this definition and would therefore enjoy the Bill’s protection as a “*religious body*” under clause 10. We recommend that the definition of “*educational*

institution” be amended to make it explicit that it also includes a preschool, kindergarten and crèche.

- (iv) From paras 172-175 of the Explanatory Memorandum, it appears that aged care facilities, retirement homes and hospitals which operate according to a religious doctrine or ethos are excluded from the definition of a “*religious body*” and therefore would not enjoy the protections afforded to religious bodies under the Bill. This is because they engage in “*commercial activities*” – see clause 10(2)(b) and (c). “*Commercial activities*” is another crucial concept in the Bill which is not defined.

Such bodies may be afforded some protection to operate according to their religious ethos under, for example, clauses 28 and 29 of the Bill. To be protected under clause 28, the body would be required to be a registered charity, and the protection would be limited to (i) preserving the operation of the body’s governing rules to the extent that those rules involve conferring benefits on people of a particular faith, and (ii) permitting the body to engage in conduct to give effect to those rules. To be protected under clause 29, each particular form of discrimination on religious grounds engaged in by the body would be required to be in compliance with legislation.

These clauses may not provide adequate, or in some cases any, protection to a range of aged care facilities, retirement homes and hospitals which have been established by the Jewish community to operate according to Jewish religious ethos.

For example, a Jewish organisation in NSW operates two retirement villages under the *Retirement Villages Act 1999* (NSW). The organisation’s Mission Statement commits it to “*providing financially accessible accommodation in Sydney for members of the Jewish community able to live independently in a community environment*”, but this aim is not mandated by any legislation, and the organisation is not a charity. Access in one retirement village is limited to Jewish residents, but there is no such limitation at the other village. There is no requirement for staff to be Jewish. These retirement villages have operated in this way for many years and are highly reputable facilities. If the Bill is enacted in its present form it appears that the retirement village that is limited to Jewish residents will no longer be able to operate in that way because of clause 21 of the Bill.

A second example concerns a Jewish aged care facility, which is a registered charity. It has operated for many years in the following way:

“Whilst we do not refuse non Jewish resident admissions we do prioritise those from the Jewish faith. We ask non Jewish staff, residents and all visitors to respect and abide by the rules of Kashrut. Our whole mission is based on providing a warm Jewish environment. This is also documented in our resident agreement and the staff standard of practice manual. This has affected our staff when displaying stickers on their cars that have an offensive meaning to the Jewish Faith. (eg staff who display a Swastika on their vehicle as a symbol of spirituality from their Indian Faith in Sanskrit and is mistaken for a Swastika of the offensive interpretation. When identified they are asked to remove these stickers which they may find offensive to their Faith.)”

This example raises questions about the degree of specificity that would be required in the governing rules of a faith-based aged care facility in order for the facility to be protected in preferencing the admission of residents of that faith, requiring staff not to bring food into the facility in violation of the dietary laws of that faith, and banning the display of a religious symbol of another faith within the facility.

A third example concerns a Jewish hospital which is a registered charity. It provides care to people of all faiths and approximately 90% of its staff are not Jewish. However, its constitution requires that members of the organisation need to be of the Jewish faith and approved by the Board. This is not a provision about the conferral of benefits. Further, only kosher food is supplied to all patients. There is a religiously-based prohibition against any food being brought into the hospital by patients or their visitors other than uncut fruit. Staff are allowed to eat non-kosher food in their staff dining room only. Patients are permitted to eat non-kosher food in the garden. Again, there would be a question about the degree of specificity that would be required in the governing rules of the hospital to enable these practices to be protected under clause 28 of the Bill.

To overcome the possibility that these reputable, long-established institutions will no longer be able to operate in accordance with their religious ethos, we recommend that these types of institutions be included in the definition of religious bodies, but with a further provision that the protection given to them by the Bill does not extend to their commercial activities except to the extent that is reasonable to prevent their facilities from being used in a manner that detracts from their giving effect to, or is inconsistent with, their religious ethos.

- (v) From paras 180-181 of the Explanatory Memorandum, it appears that clause 10 would only protect a religious body in hiring staff and recruiting volunteers if it had a policy of requiring *all* staff and volunteers to be adherents of the religion according to which the body is conducted. A mere *preference* for adherents of the religion would apparently not be protected. As already noted, the same might apply with regard to a policy of providing services, or making membership of an organisation available, exclusively or preferentially to adherents of the religion.

Further, the onus would appear to be on the religious body to demonstrate that the policy could reasonably be regarded as in accordance with the doctrines, tenets, beliefs and teachings of the religion. That could be a difficult test to satisfy if there is no explicit religious rule mandating such a policy, and the purpose of the policy is simply to maintain the religious ethos of the organisation. This is a further reason to add the word “*ethos*” to clause 10.

For the removal of doubt, and to implement the government’s intention as stated in the opening sentence of paragraph 180 of the Explanatory Memorandum, a further subsection should be added to clause 10 to the effect that, without limiting the generality of the clause, it is not discrimination for a religious body to provide services or prefer to provide services to, or to appoint or prefer to appoint as employees and volunteers, or to make, or prefer to make, membership or a position or office of an organisation available

to, persons who are adherents of the religion according to which the organisation is conducted. A similar protection should be added for accommodation providers, clubs and voluntary bodies which have a religious ethos, to the extent that such protection is not already provided in clauses 32, 34 and 35 of the Bill respectively. Unincorporated entities such as Jewish youth movements, which offer social facilities and camps, should have the same protections.

4. **Protection of persons from religious discrimination**

The Bill aims to protect a person from being discriminated against on the grounds of religious belief or activity. The term ‘religious belief or activity’ is defined broadly in clause 5 as holding or not holding a religious belief, or engaging, not engaging or refusing to engage in lawful religious activity.

Neither the concept of “*religious belief*” nor the concept of “*religious activity*” is defined in the Bill. The Attorney-General’s overview says that “*religious belief*” is intended to cover the Abrahamic religions, Buddhism, Hinduism as well as smaller and emerging faith traditions.

Religious activity is expressly limited to “**lawful** religious activity”. This means that a person is not protected from being discriminated against on the basis of that person’s religious activity if the activity is not “*lawful*”. On the surface, this seems to be a reasonable requirement. As the Explanatory Memorandum notes, the Bill does not seek to protect people from being discriminated against for engaging in child marriage, to pick one example.

However, it seems that the lawfulness or otherwise of the religious activity will be gauged at the time that the person was allegedly discriminated against. If that is so, then if at some future time *shechita* (kosher slaughter of animals for consumption) and *brit milah* (infant male circumcision) were to become unlawful, it would then be permissible to discriminate against Jews on the basis that they had previously eaten kosher meat, or participated in a *brit milah* ceremony, even if at the time they had done so such activities were lawful.

This would be a harsh and unfair, and we assume unintended, consequence of the Bill as presently worded. Religious activity that was lawful ***at the time it occurred*** should expressly be deemed to be included in the meaning of “religious belief or activity”.

More broadly, the limitation of protection against discrimination to “*lawful*” religious activities does open up the potential for abuse. The protection would cease if, for example, a State or Territory government, or a local Council, were to come under the control or influence of an extremist group with an anti-religious agenda and which passed laws banning certain activities which might be regarded as core religious behaviour of a particular faith community.

A possible solution would be to add a provision to clause 5 that for the purposes of the Bill a religious activity is lawful unless it involves the commission of a serious offence within the meaning of clause 27(2) ie “*an offence involving harm (within the meaning of the Criminal Code), or financial detriment, that is punishable by imprisonment for 2 years*”.

It should also be made clear that the preservation of State and Territory legislation in clause 29(3) of the Bill does not extend to local Council by-laws.

5. **Statements of religious belief do not constitute discrimination**

Clause 41(1) of the Bill provides that a statement of religious belief does not constitute discrimination under Commonwealth, state or territory anti-discrimination laws and does not contravene subsection 17(1) of the *Anti-Discrimination Act 1998* (Tas) (the Tasmanian ADA).

This provision will mean that persons cannot be found to have discriminated against others under any anti-discrimination law merely for expressing their genuinely held religious beliefs in good faith. This could include, for example, merely stating a biblical view of marriage or an atheist view on prayer.

The provision is intended to address the kind of problem created when Tasmania's Catholic Archbishop Julian Porteus was accused of behaving unlawfully by circulating to Catholic schools material spelling out the Catholic view on marriage in a manner which LGBTIQ people said disparaged them in contravention of subsection 17(1) of the Tasmanian ADA.

Clause 41(1) of the Bill seems to rule out similar material being challenged in the future under that subsection. Clause 41(1) of the Bill expressly does not protect statements that are malicious, would harass, vilify or incite hatred or violence against a person or group or which advocate for the commission of a serious criminal offence. (See clause 41(2)). Subject to the need to define the word "vilify" (see below), we fully support the exclusion of such statements from protection under the Bill.

Concerns have been raised that clause 41 would provide legal protection to people who, purportedly on the basis of their religious beliefs, make statements that disparage or are disrespectful of adherents of other faiths, or LGBTIQ people, but which fall short of being statements that are malicious, would harass, vilify or incite hatred or violence against a person or group or which advocate for the commission of a serious criminal offence.

However, with the exception of subsection 17(1) of the Tasmanian ADA, no anti-discrimination law currently prohibits such conduct **as discrimination**, and clause 41 is limited to providing that statements of religious belief are not "discrimination" under an anti-discrimination law. Clause 41 expressly does not preclude such statements from being found to constitute vilification under an anti-discrimination law, and does not seem to preclude such statements from being found to constitute other forms of conduct prohibited by anti-discrimination laws, for example victimisation.² Anti-discrimination laws generally treat vilification and these other forms of prohibited conduct separately to their treatment of discrimination.

² Clause 41 would not provide protection, for example, against a claim of "victimisation" under section 18 of the Tasmanian *Anti-Discrimination Act*, which essentially prohibits reprisals against a person for having brought a discrimination complaint, or for having given evidence, if the reprisal consists of some form of "humiliation or denigration" (see definition of "detriment" in section 3 of that Act).

It is difficult to envisage a situation where a mere **statement** of religious belief (as distinct from other types of action based on a religious belief) might constitute discrimination (as distinct from other forms of conduct which are prohibited under anti-discrimination laws). Other than excluding certain kinds of claims under subsection 17(1) of the Tasmanian ADA, it appears clause 41 will have very little work to do.

Subsection 17(1) of the Tasmanian ADA was originally enacted to prohibit “*conduct which offends, humiliates, intimidates, insults or ridicules another person*” on the basis of **gender** “*in circumstances in which a reasonable person...would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed*” (emphasis added). The subsection was later amended to prohibit such conduct on the basis of 12 other attributes, including race, sexual orientation, religious belief or affiliation and religious activity.

No provision that is comparable to subsection 17(1) of the Tasmanian ADA is found in any other State or Territory legislation. All other State and Territory anti-discrimination laws prohibit incitement of hatred, serious contempt and severe ridicule on the basis of race and other attributes (or use some closely similar formulation), as does section 19 of the Tasmanian ADA. Lower level kinds of disparagement and disrespect on the basis of race, religion, sexual orientation and other attributes, which fall short of statements that are malicious, would harass, vilify or incite hatred or violence against a person or group or which advocate for the commission of a serious criminal offence, are not prohibited as discrimination, if they are prohibited at all.

Section 17 of the Tasmanian ADA is therefore very much an outlier provision. The only other provision which prohibits conduct in similar terms to subsection 17(1) is section 18C of the *Racial Discrimination Act* which is limited in its application to the attribute of race, and which has been interpreted by the courts as being limited to situations where the offence, insult, humiliation or intimidation is found by a court to have “*profound and serious effects, not to be likened to mere slights*”.³ No such limitation appears to apply with regard to subsection 17(1) of the Tasmanian ADA.

The use of the word “vilify”, in particular, would seem to minimise, if not rule out, the prospect of a person successfully relying on the Bill for protection of a statement that expresses religiously-based antisemitism and would otherwise itself constitute unlawful discrimination. (As already noted, it is difficult to conceive of a concrete example). Further, in virtually all such cases we have encountered in Australia, the statement of “religious belief” has been accompanied by other statements which are laced with malice, or amount to incitement of hatred, or are race-based.⁴ Such statements may not even meet the reasonableness and good faith criteria necessary to satisfy the definition of “religious belief” in the first place. Nevertheless, it would be desirable in our view for the matter to be put beyond doubt. A phrase should be added to the end of the definition of “*religious belief*” in clause 5 to the effect that the making of the statement is not unlawful, other than as discrimination, under an anti-discrimination law.

³ *Creek v Cairns Post Pty Ltd* [2001] FCA 1007 at [16] per Kieffel J

⁴ The Bill also does not purport to affect acts done on the basis of the “race” of another person or group, and therefore does not seem to affect the operation of Part IIA of the *Racial Discrimination Act* (including s.18C).

The Bill similarly would not protect statements which vilify LGBTIQ people. Nor would it protect discriminatory actions taken on the basis of a religious belief, other than a mere statement of the belief itself. Statements of religious belief which involve lower levels of disparagement and disrespect that do not fall within subclause 41(2) of the Bill would appear to be protected from being found to constitute discrimination under an anti-discrimination law. Such statements can be damaging and hurtful, but as already noted, such statements are not currently prohibited, as discrimination, under any anti-discrimination law other than subsection 17(1) of the Tasmanian ADA.

The word “vilify” has not been defined in the Bill, which means that a court would likely interpret it in accordance with its ordinary, dictionary meaning. Most dictionaries define “vilify” as involving the subjection of a person or group to severe disparagement that is not fair and that damages their reputation. This would appear to be a wider concept than that of incitement of hatred, serious contempt and severe ridicule (or some closely similar formulation), which are the forms of vilification currently prohibited in State and Territory anti-discrimination laws.

On balance, therefore, other than excluding certain kinds of claims under subsection 17(1) of the Tasmanian ADA, it appears that the application, if any, of clause 41 to the substantive operation of current anti-discrimination law will be limited.

There is, however, a procedural question about how clause 41 will interact in practice with current anti-discrimination law. It appears that a respondent to a claim under a State or Territory anti-discrimination law who seeks to rely on the protections of clause 41 of the Bill will not be able to test that point in the proceedings before the relevant Tribunal of that State or Territory, but will have to seek relief in separate proceedings in a court (that is, a federal court or a state supreme court). This is because a claim of protection under clause 41 of the Bill would raise issues under a Federal law (ie the Bill), and under a recent High Court decision⁵ the entire matter can no longer be considered by the Tribunal. It must be removed to a state or federal court.

This would be a less than optimal outcome, especially having regard to the additional legal and other costs that would be incurred by the parties. On the other hand, the risk to each party of incurring an order to pay the other party’s costs in the event that the other party wins the case, would be a powerful deterrent to any party seeking unreasonably to invoke, or resist the invocation of, clause 41. For the reasons we have stated, there would appear to be little if any scope for a statement of religious belief itself being found to constitute unlawful discrimination, and therefore limited scope for clause 41 to take effect, other than to exclude certain kinds of claims under s.17 of the Tasmanian ADA. The prospect of facing an adverse costs order may make it even more unlikely that such matters would ever be tested in litigation.

6. **Protection of persons of faith in their employment**

Clause 8 of the Bill defines and prohibits indirect discrimination on the ground of religious belief or activity, that is, “*where an apparently neutral condition, requirement or practice has the effect*

⁵ *Burns v Corbett; Burns v Gaynor; Attorney General for New South Wales v Burns; Attorney General for New South Wales v Burns; New South Wales v Burns* [2018] HCA 15 (18 April 2018)

of disadvantaging people who have or engage in a particular religious belief or activity”
(Explanatory Memorandum, para 106)

The example given in the Explanatory Memorandum (para 109) is *“a condition of employment that all employees are to attend meetings every Friday afternoon. This would disadvantage Jewish employees who leave early on Fridays to observe the Sabbath”*.

Clause 8 also deals with rules imposed by employers, via company policy or contractual terms, on the conduct of employees as part of the employees’ conditions of employment, such as dress codes and codes of conduct (“employer conduct rules”). To be lawful, these rules must be “reasonable” in all the circumstances and after weighing up various considerations set out in clause 8(2). If any of these rules are not reasonable in all the circumstances, and would operate so as to limit disproportionately the ability of the employee to have or engage in their religious belief or activity, then the rules would to that extent be unlawful.

For example, a dress code which prohibits employees from wearing any form of religious dress, when such a prohibition is not related to the requirements of their job, or which prohibits them from wearing religious dress at all times while in the workplace, could disproportionately limit the ability of employees to engage in their religious activity, and therefore could be held to be unreasonable – (Explanatory Memorandum, para 119). That dress code would be unlawfully discriminatory and therefore invalid.

An important qualification appears in clause 31(2) of the Bill. It would not be unlawful for a person to discriminate against another person on the ground of religious belief or activity in employment if the other person is unable to carry out the “inherent requirements” of the employment because of their religious belief or activity.

Clause 8(3) of the Bill would prevent large employers (with revenue exceeding \$50 million) from imposing *“standards of dress, appearance or behaviour which would have the effect of restricting or preventing employees from making statements of religious belief outside of work. If compliance with such standards is not necessary to avoid unjustifiable financial hardship, these standards will not be reasonable and therefore will constitute unlawful discrimination”* - (Explanatory Memorandum, para 28).

This provision is intended to prevent a large employer from taking action against an employee similar to the sacking of Rugby player Israel Folau by the Australian Rugby Union when, outside of work, he sent out an Instagram post proclaiming that hell awaits "drunks, homosexuals, adulterers, liars, fornicators, thieves, atheists and idolaters", thereby allegedly breaching the Professional Players' Code of Conduct.

Clause 8(3) of the Bill may deem an employer conduct rule of the kind that was used against Israel Folau in response to his statement of belief to be unreasonable and therefore unlawful for a large employer, *“unless compliance with the rule by employees is necessary to avoid unjustifiable financial hardship to the employer”*.

Further, clause 8(4) says that clause 8(3) will not apply to assist an employee if the statement of belief in question is *“malicious, or likely to, harass, vilify or incite hatred or violence against*

another person or group of persons” or would reasonably be seen to be “*counselling, promoting, encouraging or urging conduct that would constitute a serious offence*”. Lower-level forms of disparagement and disrespect which fall short of these criteria would appear to be open to an employee outside of work hours but, as already noted, these categories of statements are not prohibited as discrimination under current anti-discrimination laws other than s.17 of the Tasmanian ADA.

The expression “*unjustifiable financial hardship*” is not defined in the Bill. Presumably it would include demonstrable damage of a substantial kind to the employer’s brand or the likelihood of significant financial loss.

Permitting people to suffer religious discrimination in their employment simply because their opinions about religion, expressed out of hours, would cause a large employer unjustifiable financial hardship, seems alien to Australia’s tradition of a ‘fair go’.

There is also a larger question of principle as to whether the personal freedom of employees to express their religious beliefs outside the work environment, without facing potential retaliatory action by their employer, should depend on the financial size of the employer, or the potential financial consequences for the employer.

Both the “*unjustifiable financial hardship*” exception for large employers and the limitation of the provisions of clause 8(3) to large employers should therefore be reconsidered.

7. Protections for health practitioners

There are specific protections for health practitioners in clauses 8(5) and (6) which seek to prevent those who govern the activities of such practitioners from imposing a "conduct rule" preventing them from conscientiously objecting to providing certain health services.

Clause 8(5) provides that if there is a State or Territory law which allows conscientious objection, then that law will apply, not the provisions of the Bill. It seems that the Bill will only assist a health practitioner operating in a State or Territory that has no law on the topic. Thus, religious medical practitioners who object, for example, to the Victorian law on abortion (which seems to require a formal “referral” of a patient seeking an abortion to someone who will carry it out), will not be able to rely on the protections in clauses 8(5) and 8(6) of the Bill.

It seems to be contrary to the purposes of the Bill to have different rules applying in different parts of Australia.

One possible solution would be for the Bill to protect the right of medical practitioners to conscientiously object to providing certain health services, but impose an obligation on them in such cases immediately to refer the matter on to a neutral party, such as a professional ethics body, which would then have the responsibility of deciding on providing a referral to another medical practitioner. Strict time limits would apply for each referral. This requires expert consideration, so we have not made it a formal recommendation.

8. Protections for charities

Clause 4 of the HRLA Bill provides that supporting a traditional view of marriage will not be a “disqualifying purpose” that would preclude an organisation from remaining a charity under the *Charities Act 2013*. However, charities must also meet the additional requirement of providing a ‘public benefit’.⁶ The HRLA Bill leaves open the possibility that a charity may lose its status as such by reason of promoting its traditional view of marriage, because a court interpreting this common law test may hold that promoting a traditional view of marriage does not confer a ‘public benefit’. This in fact occurred in a recent case in New Zealand.⁷ The NZ High Court found that it could not be shown that the charity’s “*promotion of the traditional family unit, though no doubt supported by a section of the community, if achieved would be a ‘public benefit’*”. Accordingly an additional provision is needed to the effect that the promotion of a traditional view of marriage will not result in a currently-registered charity losing its charitable status by reason of the ‘public benefit’ test in sections 5 and 6 of the *Charities Act 2013*.

We thank the government for the opportunity to comment on the Bills and for its consultations to date.

Yours sincerely



Peter Wertheim AM
co-CEO

Summary of Recommendations

- 1. The timing of the release of the ALRC Report should be brought forward to as early a date as possible, and no later than the date originally set, namely 10 April 2020. Alternatively:**
 - the government should announce that the Report will be released, and any consequent legislative reform will be enacted, during the life of the present parliament; and
 - a provision should be added to the Bill to the effect that a review of its provisions will commence upon release of the Report and it will be completed, and any consequent legislative reform will be enacted, during the life of the present parliament.
- 2. In clause 5, add a definition of “religion” which incorporates the case law on the meaning of that expression, and which specifies that a religion includes a denomination or stream of a religion.**

⁶ See the definition of “charity” in section 5 of the *Charities Act 2013* (Cth), and the definition of “public benefit” in section 6.

⁷ *Family First New Zealand* [2018] NZHC 2273 (31 August 2018)

3. Add a provision to clause 10(1) of the Bill which states that the standard of reasonableness for determining whether conduct may “reasonably” be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of a religion, will be that of a reasonable person who is observant in that religion or the relevant denomination or stream of that religion.
4. Add the word “*ethos*” to the words “*doctrines, tenets, beliefs or teachings*” in clause 10(1) of the Bill so that the final phrase of clause 10(1) reads: “*in accordance with the doctrines, tenets, beliefs, ethos or teachings of the religion, or a denomination or stream of the religion, in relation to which the religious body is conducted*”.
5. Amend the definition of “*educational institution*” in clause 5 to make it explicit that it also includes a preschool, kindergarten and crèche.
6. In clause 5, add a definition of “commercial activities” which refers to the provision of goods or services, or the making available of facilities, in return for a commercial payment.
7. Remove the bracketed words in paragraphs (b) and (c) in clause 10(1) of the Bill, and add a new subsection to clause 10 to the effect that the protection extended to religious bodies does not extend to their commercial activities except to the extent that is reasonable to prevent their facilities from being used in a manner that detracts from their giving effect to, or is inconsistent with, their religious ethos.
8. Add a subsection to clause 10 to the effect that, without limiting the generality of the clause, it is not discrimination for a religious body to provide services or prefer to provide services to, or to appoint or prefer to appoint as employees and volunteers, or to or make, or prefer to make, membership or a position or office of an organisation available to, persons who are adherents of the religion according to which the organisation is conducted.
9. A similar protection should be added for accommodation providers, clubs and voluntary bodies which have a religious ethos, to the extent that such protection is not already provided in clauses 32, 34 and 35 of the Bill respectively. Unincorporated entities such as Jewish youth movements, which offer social facilities and camps, should have the same protections.
10. Add a provision to the definition of “*religious belief or activity*” in clause 5 to specify that the time for gauging whether a religious activity is “lawful” is the time when the activity occurred.
11. Add a provision to the definition of “*religious belief or activity*” in clause 5 to the effect that for the purposes of the Bill a religious activity is lawful unless it involves the commission of a serious offence within the meaning of clause 27(2) ie “*an offence involving harm (within the meaning of the Criminal Code), or financial detriment, that is punishable by imprisonment for 2 years*”.

- 12. Add a provision to Clause 29(3) to the effect that the preservation of State and Territory legislation does not extend to local Council by-laws.**
- 13. In clause 5, add a definition of “vilify” for the purposes of clauses 8(4)(b) and 41(2).**
- 14. Add to the end of the definition of “*religious belief*” in clause 5 the words: “*and the making of the statement is not unlawful, other than as discrimination, under an anti-discrimination law*”.**
- 15. Both the “unjustifiable financial hardship” exception for large employers and the limitation of the provisions of clause 8(3) to large employers should be reconsidered.**
- 16. Add a provision to the HRLA Bill to the effect that the promotion of a traditional view of marriage will not result in a currently-registered charity losing its charitable status by reason of the ‘public benefit’ test in sections 5 and 6 of the *Charities Act 2013*.**