

Executive Council of Australian Jewry Inc.

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יהודי אוסטרליה

The Representative Organisation of Australian Jewry

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31 January 2020

Human Rights Unit, Integrity Law Branch, Integrity and Security Division
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Dear Sir/Madam

Second exposure drafts - 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 second 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 second Exposure Draft of the *Religious Discrimination Bill 2019* and the expression "the HRLA Bill" refers to the second Exposure Draft of the *Human Rights Legislation Amendment (Freedom of Religion) Bill 2019*, both as released by the Attorney-General on 10 December 2019. A list of Recommendations appears in the final section of this document.

1. Executive Summary

The Bill contains some important improvements to the first draft, which are in accordance with recommendations made in our [submission](#) dated 27 September 2019, and are welcome. For example, sub-clauses 11(2) and 11(4) of the Bill now make it explicit that an organisation which falls within the definition of a "religious body" may give preference to adherents of its own religion. However, the freedom to preference remains hedged with problematic limitations. Hence there remains an unfortunate lack of clarity whether several categories of institution within the Jewish community will continue to be allowed to give preference to members of the Jewish community in various aspects of their operations, as outlined in our earlier submission.

If religious institutions generally, and Jewish institutions in particular, are to be left no worse off than they are under the existing law, as the Government has indicated is its intention, then their ability lawfully to give preference to adherents of their own faith needs to be clarified in the Bill, and the definition of “religious body”, and the protections that will apply to such an organisation, need to be extended equally to all faith-based charities and other not-for-profit organisations. In **section 2** of this submission we have suggested an alternative formulation of the scope for preferencing that should be allowed to religious institutions and also an alternative definition of “religious body”. We have also suggested some possible exceptions to the freedom to preference in service delivery that would otherwise extend to certain institutions falling within that alternative definition.

If the changes recommended in section 2 are not made, then at the very least we believe the Bill needs some extra “guardrails” to make explicit that faith-based charities and not-for-profit organisations that fall outside the Bill’s definition of a “religious body” will continue to be as free as they are now under the current law to maintain their long-standing practices of preferencing people of their own faith not only in employment (as the Bill allows in some cases) but also, in certain cases, in service delivery, membership and on their governing boards and committees, in order to give effect to and preserve their faith-based ethos. These matters are addressed in detail in **sections 3 to 6** of this submission.

In **section 7** of this submission we address two aspects of the Bill’s standard for determining whether conduct is “in accordance with the doctrines, tenets, beliefs or teachings” of a religion, which are of continuing concern. Firstly, although the Explanatory Notes say that the relevant standard will be that of a person of the same religion “*or relevant religious denomination, sect, stream or tradition*” of the religion, the Bill itself is silent about recognising intra-religious doctrinal differences. We believe the Bill needs to provide explicitly for the fact that there can be significant differences in belief and practice between different denominations, sects, streams or traditions of a religion. Secondly, even *within* different denominations, sects, streams or traditions of a religion there can be a diversity of doctrines, tenets, beliefs, teachings and practices. Having to choose which of them is or is not in accordance with the religion, or a movement within the religion, will in effect leave the civil courts to be arbiters of religious doctrine. A different approach to this problem - a “genuine belief” test - has been developed in the case law in Australia and other common law countries, together with protections against abuse, and we believe the Bill should adopt this approach.

The Bill now provides protections for a person who is discriminated against because of the religion of another person with whom the first person has an “association”. We believe the Bill needs to clarify further what is meant by an “association” with another person, the nexus that needs to be established between the association and the discriminatory conduct, and the protections that will be provided in each of the areas of public life to which these provisions extend. These matters are addressed in **section 8** of this submission.

In our [submission](#) dated 27 September 2019 we dealt at some length with the provisions of the first exposure draft for protecting statements of belief generally, and statements of belief outside the workplace specifically. These provisions have changed very little in the Bill. We have added some additional analysis in **section 9** and **section 10** of this submission.

The qualification in the Bill that persons are protected from religious discrimination only in respect of “lawful” religious activity seems reasonable on its face. However, this could operate to legitimise conduct that would otherwise be prohibited as discrimination, if religious behaviour which is currently within the law is made unlawful in the future. **Section 11** of this submission addresses these matters.

Section 12 of this submission expresses our reservations about the Bill’s provisions concerning conscientious objection by health professionals to providing or participating in certain types of health services and procedures.

Section 13 of this submission repeats what was in our previous [submission](#) about bodies which currently enjoy charitable status being at risk of losing that status if they continue to express a traditional view of marriage.

Section 14 of this submission again makes the case for bringing forward the date for the release 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.

2. The freedom to preference and the definition of “religious body”

Under sub-clauses 11(1) and (2), it is not discrimination for a religious body to give preference to persons of the same religion if it does so “*in good faith*” and “*in accordance with the doctrines, tenets, beliefs or teachings of that religion*”. If challenged, it appears that the religious body would bear the onus of proving that both these requirements have been met.

As an alternative to the “*good faith*” requirement, we favour the adoption of the genuineness of belief test developed at common law. We deal with this question in section 7 of this submission.

The requirement that any preferencing practice by a religious body be “*in accordance with the doctrines, tenets, beliefs or teachings of that religion*” is in our view misconceived. A preferencing practice may be necessary or desirable as a matter of practicality, but it may be difficult to demonstrate that the practice is in accordance with a particular religious doctrine, tenet, belief or teaching.

For example, having to find a religious basis for preferring persons of a faith community in the provision of aged care, accommodation and social services is not straightforward. Nor should it be required of Jewish communal institutions which look after our ageing community, and not only the remaining Shoah survivors in our midst.

Similarly, in order to preserve and safeguard the ethos of a member-based religious body, especially one serving a numerically small faith community, it may be a practical necessity, but not a matter of religious doctrine, for the institution to restrict membership generally, or membership of its governing board and committees, to persons of the same religion, or to give preference to such persons, as a safeguard against takeover by persons who are not adherents of the religion and have no commitment to preserving the religious ethos and practices of the institution. These matters are addressed in sections 3 to 6 of this submission.

Under sub-clauses 11(3) and (4), another basis for preferencing by a religious body is “*to avoid injury to the religious susceptibilities of adherents of the same religion as the religious body*”. This formulation is regrettably uncertain in meaning and application and does not appear to capture all circumstances when preferencing may be a matter of practical necessity or is reasonable for meeting the specific needs of the faith community that is served by a religious body. There is further uncertainty about how these provisions would interact with State and Territory laws, including anti-discrimination laws, the effect of which is preserved by clause 62 of the Bill.

We stress that we are seeking only to preserve the *existing* freedom of faith-based organisations to preference people of their own faith in service delivery, membership and governance, to the extent that this is allowed under the current law. We are not arguing for any *additional* freedom to preference in these areas.

There is no evidence to suggest that faith-based organisations are abusing whatever freedom they have under the current law to preference people of their own faith. On the contrary, in the case of hospitals, aged care facilities and accommodation providers, among other kinds of faith-based institutions, this freedom must be exercised within the framework of an array of legislative, regulatory and professional ethical controls which require these institutions to meet community standards and expectations. No case has been made to suggest that the freedom of faith-based organisations under the current law to preference people of their own faith is at present being exercised unjustly, and the presumption should therefore be that when they do give such a preference they do so reasonably. Further, the preferencing policies of faith-based bodies are often publicly disclosed, or may be accessed on request.

We therefore strongly recommend that a subsection be added to clause 11 to the effect that 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, unless it is not reasonable to do so in furtherance or in aid of the purposes of the religious body. (**Recommendation 1**). The expression “in furtherance or in aid of” is used in sections 5, 12 and 15 of the *Charities Act 2013* (Cth).

In addition to the need for the Bill to clarify the allowable scope for preferencing by religious bodies, we remain especially concerned at the express exclusion of faith-based hospitals, aged care facilities and accommodation providers from the Bill’s definition of a “religious body” in sub-clause 11(5), and from the protections conferred by the Bill on organisations falling within the definition.

The government’s stated rationale for excluding faith-based hospitals, aged care facilities and accommodation providers from the protections afforded to religious bodies is set out in para 232 of the Explanatory Notes:

232. Given religious hospitals, aged care facilities and accommodation providers 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. For example, it would not be appropriate for a religious hospital to discriminate against a potential or existing patient on the basis of the patient's religious belief or activity. Instead, the Act includes specific, more limited, exceptions to the prohibition of discrimination in employment and partnerships for religious hospitals, aged care facilities and accommodation providers in subclauses 32(8) and (10). This recognises that religious hospitals, aged care providers or accommodation providers, such as retirement villages, may legitimately seek to preserve a religious ethos amongst their staff.

We do not believe that this distinction can be sustained. Faith-based educational institutions are expressly *included* within the definition of a “religious body”, and yet many of them also “*provide services to the public at large*” (as indicated in their public advertising) and, when one compares the fees they charge to those charged by private, for-profit educational institutions, “*do so on a commercial basis*”. It strains credulity to suggest that many prestigious, faith-based schools provide their services to the public at large, or on a commercial basis, to any lesser degree than, say, a faith-based aged care facility that is a registered charity.

The inconsistency of the Bill's approach is highlighted by the fact that the definition of “religious body” also expressly includes “*a registered public benevolent institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion*”. In point of fact, every provider of a Jewish aged care facility in Australia is a registered public benevolent institution, yet aged care facilities are expressly excluded from the definition. There seems to be no reason in principle or in logic why providers of such facilities should be treated any less favourably under the Bill than other kinds of registered public benevolent institutions.

These and other anomalies could be avoided if the Bill treated all faith-based charities and other not-for-profit institutions as religious bodies and, in accordance with Recommendation 1, allowed them to continue to give preference to people of their own faith, to the extent that the law currently allows, in service provision, membership and governance. We are assuming that it is not the intention of the government that such institutions would be left worse off under the Bill than under the current law in respect of their existing, long-standing preferencing policies and practices.

Accordingly, we recommend (**Recommendation 2**) that the definition of “religious body” in the Bill be replaced with the definition below, and that the exclusion in clause 11(5) of any institution that is a hospital, or aged care facility, or solely or primarily provides accommodation, be removed. However, we would also agree that in defining the *protections* for bodies which fall within the definition, there should be exceptions providing, for example, that the Bill does not allow a faith-based public hospital or a faith-based hospital which is the only hospital located within a large rural or regional district, from preferencing people of the same faith in service delivery. The matter could also be dealt with by way of a regulation under the Act excluding named charities and not-for-profit bodies, or certain sub-categories of them, from preferencing in service delivery.

On that basis, we propose that sub-clause 11(5) of the Bill be amended by adding the underlined words as below:

“(5) **Religious body** means:

- (a) a body which has the purpose of advancing religion, whether or not the body is, or is eligible to be, registered under the *Australian Charities and Not-for-profits Commission Act 2012* as the sub-type of entity mentioned in column 2 of item 4 of the table in subsection 25-5(5) of that Act; or
- (b) an educational institution that is established or conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion; or
- (c) a registered charity (including, but not limited to, a public benevolent institution) that is established or conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion; or
- (d) any other not-for-profit body that is established or conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion; or
- (e) a club that is established or conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion.

Note: A body may qualify as a religious body under any one or more of the foregoing paragraphs.”

A body having the purpose of advancing religion is a well-developed concept at common law.¹ It would include a body that provides or facilitates religious gatherings, worship, prayer, observance, a religious community, education in the religion and religious activities (for any age group), proselytising, pastoral care, or other religious activities, including the production of materials and programs associated with such activities.

The expression “not-for-profit entity” is used, but not defined, in the *Charities Act 2013* and in the *Australian Charities and Not-for-profits Commission Act 2012*. At common law, an entity is treated as “not-for-profit” if it is prohibited from distributing income or assets to its members, including upon winding up.

We have included a faith-based club as a separate category. Even though clubs operate on a not-for-profit basis as generally understood, their provision of services and benefits to members could conceivably lead a court to conclude otherwise.²

If the foregoing recommendations are not adopted, then at the very least we believe the Bill needs some extra “guardrails” to make explicit that faith-based charities and not-for-profit organisations that fall outside the Bill’s definition of a “religious body” will continue to be as free as they are under the current law to maintain their long-standing practices of preferencing people of their own faith not only in employment (as the Bill now allows in some cases) but also, in certain cases, in service delivery, membership and on their governing boards and committees, in order to give effect to and preserve their faith-based ethos. These matters are addressed in detail in sections 3 to 6 of this submission.

¹ See the judgment of Dixon J in *Roman Catholic Archbishop of Melbourne v Lawlor* (1934) 51 CLR 1 at 33.

² See The Australian Government the Treasury, *Strengthening for purpose: Australian Charities and Not-for-Profits Commission, Legislation Review 2018*, Commonwealth of Australia 2018, pp. 91-92:
<https://treasury.gov.au/sites/default/files/2019-03/p2018-t318031.pdf>

3. The preferencing needs of small faith communities

Like other numerically small faith communities, the Jewish community would be very much the poorer if it did not have its own institutions to cater, not only to the needs of its community members for educational, hospital, aged care and accommodation services, but also to the religious and cultural needs of Jewish users of those services. Institutions in the wider community usually do not, and cannot realistically be expected to, accommodate these religious and cultural needs.

It would hardly be possible to speak in any meaningful sense of a Jewish community if we did not have the option of sending our children to Jewish day schools, long day care centres and pre-schools, or if our community members in need of hospital care did not have the option of attending a Jewish hospital, or if frail or elderly Jews did not have the option of residing in a Jewish aged care centre or retirement village.

These charitable Jewish institutions were established many decades ago with significant financial contributions from the Jewish community. Although many (but not all) faith-based institutions which provide charitable benefits receive some level of government funding, this is at a far smaller cost than the government would incur if it were forced to provide substitute services, either by taking over these institutions itself, or by overburdening existing government institutions.

In providing their services, most charitable Jewish institutions have a stated policy of giving priority to meeting the needs of members of the Jewish community. Consequently, students at Jewish schools are mostly, and in some cases, exclusively, Jewish. Residents at Jewish aged care facilities are almost all Jewish. Residents at one Jewish retirement village are all Jewish. There is only one Jewish hospital in Australia. It welcomes patients of all backgrounds. At times, depending on the circumstances, it gives admission priority to Jewish patients and at other times to non-Jewish patients.

It is fatuous to suggest that these long-standing practices somehow disadvantage people who are not Jewish. People who are not Jewish do not need to be provided with kosher food, Jewish prayer facilities and observance of the Jewish Sabbath and festivals, *in addition to* the educational, hospital, aged care and accommodation services they require. There is a plethora of quality service-providers in the wider community which are more than capable of meeting their needs. In contrast, religiously-observant Jewish patients or residents often will not have the totality of their needs met in other institutions, which is a key reason why Jewish institutions were established as an alternative in the first place.

Another issue for Jewish and other faith-based hospitals, aged care facilities and accommodation providers, among other charities and not-for-profit institutions, is that many of them are member-based organisations, and currently have constitutions which restrict their membership (or a class of membership), or that of their governing boards and committees, wholly or mainly to people of their own faith, or give preferential treatment to people of their own faith (e.g. in eligibility for life membership).

This is especially important for numerically small faith communities like the Jewish community (and also, for example, the Greek Orthodox community). If these Jewish institutions were to be

prohibited from giving preference to Jewish people in their membership and that of their governing boards and committees, they may eventually find themselves with a non-Jewish majority of members or governors who would be free to vote to abandon the organisation's Jewish ethos and religious practices.

It would be a tragic irony if the religious values which the Jewish community is currently free to live by were to be restricted in operation by legislation that is motivated by the desire to preserve religious freedoms.

4. Preferring in service provision

The Bill provides expressly that an educational institution that is conducted in accordance with a particular religion falls within the definition of a "religious body" (sub-clause 11(5)). However, the extent to which it, or any related body, may give preference in providing its educational or related services to persons of the same religion as that of the institution, or in matters of membership or governance, remains in doubt for the reasons outlined in section 2 of this submission. We reiterate our Recommendation 1 in this regard.

Paragraph 306 of the Explanatory Notes say that the expression "educational institution" "may include preschools or other early learning centres to the extent that they provide early childhood education". However, preschools and the like may not be treated as educational institutions elsewhere in Commonwealth law (for example the *Charities Act 2013*). To avoid confusion, clarification that such bodies are educational institutions should be made in the Bill itself. This should include long day care centres and crèches. **(Recommendation 3)**.

We remain concerned that faith-based hospitals, aged care facilities and accommodation providers, and other faith-based charities and not-for-profit institutions are excluded from the Bill's definition of a "religious body", and will need to look elsewhere in the Bill for confirmation that they are allowed, to the extent that the current law permits, to continue to give preference in providing their services to persons of the same religion as that of their respective institutions.

One part of the Bill which might assist them in this regard is clause 12. Clause 12 provides that it is not unlawful for a person to engage in conduct that is (a) reasonable in the circumstances, (b) is consistent with the purposes of the Bill, and (c) is either:

- "a. intended to meet a need arising out of a religious belief or activity of a person or group of persons; or*
- b. intended to reduce a disadvantage experienced by a person or group of persons on the basis of the person or group's religious beliefs or activities."*

For the purposes of clause 12 we believe that a genuine attempt to meet a need or reduce a disadvantage should at least *prima facie* be regarded as reasonable.

We also believe that the requirement of consistency with the purposes of the Bill is inappropriate in a provision like clause 12, which deals expressly with an exception to the Bill's overall purpose in prohibiting discrimination on the ground of religion.

As the Explanatory Notes say (para 257), clause 12 recognises the concept of legitimate differential treatment to meet needs or reduce disadvantage. There is even an example given of services that are provided to meet the special needs of Holocaust survivors. However, doing so may not necessarily be to prefer persons “*on the basis of the person or group’s religious beliefs or activities*”.

Accordingly, if requirement (c) is met, we question the need for requirements (a) and (b), and recommend that they be deleted. **(Recommendation 4)**

A further concern is that the benefit of the clause does not extend to cultural or linguistic needs of the person or group who is given preference. As the Jewish community is both an ethnic and a faith community, institutions with a Jewish ethos often need to accommodate not only specific religious practices but also cultural and, in some cases, linguistic needs which are specific to the Jewish community. For example, Jewish institutions may hold cultural events such as a Jewish or Israeli film festival, which are of specific interest to Jewish users of their services, or provide Yiddish-speaking staff for elderly Jews who were born overseas and prefer to communicate in that language. We therefore recommend that paragraph 12(1)(i) of the Bill be amended by adding the underlined words below:

“is intended to meet a need arising out of a religious belief or activity of a person or group of persons or, if religious beliefs and activities are shared by a group of persons, a cultural or linguistic need of the person or group”. **(Recommendation 5)**

Clause 12 also makes no allowance for conduct that is intended to reduce a disadvantage experienced by a faith community which is not necessarily based on the community’s religious beliefs or activities - for example, the effects of racially or ideologically-based antisemitism.

We therefore recommend that sub-clause 12(1)(ii) of the Bill be amended by adding the underlined words below:

“is intended to reduce a disadvantage experienced by a person or group of persons on the basis of the person’s or group’s religious beliefs or activities or, if religious beliefs and activities are shared by a group of persons, on the basis of any other attribute or perceived attribute of the group.” **(Recommendation 6)**

Finally, clause 12 regrettably does not include an equivalent provision to the additional provision we have recommended be added to clause 11, which would make it explicit that in meeting a relevant need or reducing a disadvantage, a faith-based institution may give preference to people of the same faith.

If faced with a complaint that a non-Jewish person has suffered discrimination because a Jewish consumer of its services has been given preference, a Jewish institution that falls outside the definition of a “religious body” may have to satisfy a court or tribunal that its long-standing preferencing practices in service delivery, to the extent that they are allowed under the existing law, continue to be lawful under the Bill. The institution would bear the evidentiary onus of establishing that the criteria in clause 12 have been met. At present, no such institution has had to

face that prospect. No faith-based institution would wish to be put into that position, and the outcome of the complaint would be uncertain.

To make it clear that the operation of the Bill does not give rise to complaints of this nature, and that faith-based institutions are to remain free to operate as they have been under the existing law, we recommend that a further sub-clause be added to clause 12 of the Bill to the effect that, without limiting the generality of the clause, in meeting a need or reducing a disadvantage it is not discrimination for a person 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 same religion as the first person. It should also be made explicit that the clause may benefit a corporation as well as a natural person. **(Recommendation 7)**

Clause 29 is another part of the Bill under which faith-based, charitable institutions that fall outside the definition of a religious body might be allowed to continue to give preference in providing their services to persons of the same religion as that of their respective institutions. Sub-clause 29(1) would protect any provision of the governing rules of such an institution which “*confers charitable benefits*” or “*enables charitable benefits to be conferred*” on persons who hold or engage in a particular religious belief or activity. Sub-clause 29(1) would also protect “*any conduct engaged in to give effect to such a provision*”.

However, for sub-clause 29(1) to apply:

- (i) the institution must be a registered charity;
- (ii) the governing rules of the institution must include a provision under which the institution’s services are preferentially made available to people of the same faith as that of the institution; and
- (iii) making available those services must constitute a “charitable benefit”.

It is far from clear that faith-based charities and other not-for-profit institutions that fall outside the Bill’s definition of a religious body, and which currently lawfully preference adherents of their own faith when providing their services, would in every case be able to satisfy each of these criteria. For example, such institutions do not always enshrine their preferencing policies and practices in their governing rules.

Further, it is not at all clear that the provision of the service would constitute the provision of a “*charitable benefit*”. The expression “charitable benefit” is not defined in the Bill. The Explanatory Notes (para 386) state: “*Whether or not a particular benefit is charitable is dependent on the Charities Act 2013.*” However, that Act also does not define “charitable benefit”.

We therefore recommend that paragraph 29(1)(b) be amended by adding the underlined words below:

“Nothing in Division 2 or 3:

makes unlawful any conduct engaged in to give effect to such a provision, or any other conduct engaged in by the registered charity which confers charitable benefits or enables charitable benefits to be conferred.” (Recommendation 8)

We also recommend that a definition of “charitable benefit” be added to clause 5 of the Bill:

“Charitable benefit” includes a benefit for a charitable purpose as defined in the Charities Act 2013”. (Recommendation 9)

5. Preferencing in membership

The Bill expressly allows faith-based clubs to restrict their membership to people of their own faith (clause 35). It also allows faith-based voluntary bodies whose membership is restricted to people of their own faith to discriminate against people who are not of that faith in connection with (a) admission to membership of the body and (b) the provision of benefits, facilities or services (clause 36).

Oddly, there is no equivalent allowance in the Bill for faith-based hospitals, aged care facilities and accommodation providers, and other faith-based charities and not-for-profit organisations, which are member-based. Maintaining a majority of members who are adherents of the faith according to which any such organisation is conducted is fundamental to preserving the religious ethos of the organisation. Without the freedom to give preference to people of their own faith in the admission of such persons as members or in the terms on which membership is conferred, organisations which are operated by numerically small faith community are especially vulnerable to takeover by persons who are not adherents of that faith and have no commitment to preserving the religious ethos and practices of the organisation.

Under the Bill as presently drafted, if faced with a complaint made under the Bill that a non-Jewish person has suffered a disadvantage because membership is restricted to Jews, institutions of this type which are operated by the Jewish community may have to satisfy a court that they fall within the Bill’s definition of a ‘club’, or that their membership restrictions are not discriminatory, or that their membership rules and practices are not an area of public life affected by the Bill. It is far from self-evident that a court would resolve these questions in favour of the institution. Under the current law, there may be no basis for bringing such a complaint in the first place.

Even faith-based clubs may find that the allowance made for them in clause 35 is not adequate to cover their existing membership rules and practices. Allowing faith-based clubs to “restrict” their membership to people of their own faith does not seem to cover situations in which clubs give membership *preference* to people of their own faith. For example, a faith-based club might have different classes of members, some of which may be open only to people of the same faith (e.g. life membership) and some of which may be open to people of other faiths (e.g. associate membership). Alternatively, a faith-based club might as a general rule restrict membership to people of its own faith, but allow for exceptions if approved by a vote of the governing board of the club or by a vote of the members. In section 6 below, we have made a recommendation as to how these practices might be accommodated in relation to faith-based clubs.

In relation to faith-based charities, we recommend that a new sub-clause 36A(1) be added as follows:

Exception relating to registered charities

It is not unlawful under this Act for an organisation which is a registered charity to discriminate against a person, on the ground of the person's religious belief or activity, if membership (however described), or any class or type of membership, of the organisation is restricted (or, alternatively, restricted subject to exceptions specified in the governing rules of the organisation) to persons who hold or engage in a particular religious belief or activity, and the person does not hold or engage in that religious belief or activity.
(Recommendation 10)

6. Preferencing in governing bodies and committees

For faith-based hospitals, aged care facilities and accommodation providers, and other faith-based charities and not-for-profit organisations, maintaining control of the governance of each such organisation by adherents of the faith according to which any such organisation is conducted is fundamental to preserving the religious ethos and practices of the organisation. Without the freedom to give preference to people of their own faith in the election or appointment of such persons as members of the governing board and executive committees of the organisation, any such organisation which is operated by a numerically small faith community would be especially vulnerable to takeover by persons who are not adherents of that faith, and have no commitment to preserving the religious ethos and practices of the organisation.

There is no express provision in the Bill allowing a faith-based organisation which does not fall within the definition of a religious body to require all or a majority of the members of its governing board and committees to be adherents of the faith according to which the organisation is conducted. Several major charitable institutions of the Jewish community have for many years had such a requirement in their governing rules, or have made provision for a non-Jewish person to serve on the governing board in exceptional cases if the governing board so approves. These rules and practices may currently be allowed under the law. It would be a radical change for the worse if the Bill were to fail to make clear provision allowing these institutions to continue to operate according to these rules and practices to the extent that the law currently allows them to do so.

As the Bill is presently drafted, if faced with a complaint that a non-Jewish person has suffered a disadvantage because of the existence of such a requirement, a Jewish organisation may have to satisfy a court that the requirement is not discriminatory, or that the restriction is not an area of public life affected by the Bill or, if the organisation is a public benevolent institution, that being on a governing board or committee constitutes a form of voluntary 'employment' in respect of which preferencing is permitted under sub-clauses 32(8) and 32 (10) by virtue of sub-clauses 32(9) and 32(11) respectively.

Again, it is far from self-evident that a court would resolve these questions in favour of the organisation, whereas under the current law there may be no basis for bringing such a complaint in the first place.

The definition of “employment” in clause 5 of the Bill includes work that a person is “appointed” to perform, and whether paid or unpaid. Paragraph 277 of the Explanatory Notes says that “employment” in the Bill would extend to “*appointments, such as appointments to company boards*”. Nevertheless, we do not believe it is a foregone conclusion that a court would interpret “employment” to include the performance of the functions of an elected or appointed office on the governing board or a committee of an organisation. Those functions entail not only “work”, but also the exercise of a role and responsibilities which are far closer to the functions performed by an employer than an employee.

Further, the operation of sub-clauses 32(9) and 32(11) in the context of sub-clauses 32(8) and 32(10) is not free from doubt. In particular, it is not apparent whether, for example, under sub-clause 32(11):

- *all* preferencing conduct is deemed to satisfy sub-clause 32(10)(b); or
- alternatively, only preferencing conduct that is *also* to “avoid injury to the religious susceptibilities of adherents of the same religion as the first person” would be deemed to satisfy sub-clause 32(10)(b).

If the latter interpretation is correct, then the two qualifying requirements in sub-clauses 32(8)(b) and 32(10)(b) seem overly limited with regard to permitting preferencing with respect to governing boards and committees. The reasons for such preferencing are outlined above, and it might be hard to establish that such reasons satisfy the requirements that either:

- “*a person of the same religion as the first person could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of that religion*”; or
- the conduct would “*avoid injury to the religious susceptibilities of adherents of the same religion as the first person*”,

Further, we are concerned that the onus would be on the organisation to prove its conduct falls within the exception.

To put the matter beyond doubt, we recommend that a new sub-clause 32A(2) be added to the Bill:

“It is not unlawful under this Act for an organisation which is a registered charity to discriminate against a person, on the ground of the person’s religious belief or activity, if membership of the governing board or a committee of the organisation (however described) is restricted (or, alternatively, restricted subject to exceptions specified in the governing rules of the organisation) to persons who hold or engage in a particular religious belief or activity, and the person does not hold or engage in that religious belief or activity.”
(Recommendation 11)

In order to resolve the same issue for faith-based clubs, we recommend that clause 35 be amended by adding the underlined words below:

Section 25 (about clubs) does not make it unlawful to discriminate against a person, on the ground of the person’s religious belief or activity, if:

- *membership (however described), or any class or type of membership, of the club; or*
- *membership of the governing board or a committee of the club;*

is restricted (or, alternatively, restricted subject to exceptions specified in the governing rules of the club) to persons who hold or engage in a particular religious belief or activity and the person does not hold or engage in that religious belief or activity.
(Recommendation 12)

7. Standard for determining whether conduct is “in accordance with the doctrines, tenets, beliefs or teachings” of a religion

We welcome the following acknowledgements in paragraphs 238 and 239 of the Explanatory Notes in connection with sub-clause 11(1) of the Bill:

238. “The requirement for an assessment as to whether a person could reasonably consider whether conduct is in accordance with the doctrines, tenets, beliefs or teachings of a religion recognises that religious bodies implement the teachings of their faith in a variety of ways and should have the autonomy to do so.”

239. A person of the same religion for the purposes of this test is intended to be a person of the same religion, or relevant religious denomination, sect, stream or tradition, as the religious body. For example, the relevant reasonable person in relation to conduct engaged in by a Methodist church would be a Methodist person, rather than a Catholic person, or a Christian generally. In addition, the relevant reasonable person in relation to conduct engaged in by an Orthodox Jewish religious body would be a reasonable Orthodox Jew who adhered to that religious stream.

The Bill itself, however, is not explicit in this regard. It is especially important for smaller denominations, sects, streams or traditions within major faith communities to have their freedom to adopt different beliefs and practices respected. We therefore recommend that a definition of “religion” be added to clause 5 as follows:

“Religion” includes a denomination, sect, stream or tradition of a religion.”
(Recommendation 13)

The Explanatory Memorandum could note that this definition is inclusive only, and does not displace the common law (see below).

Another change in the Bill from the first exposure draft is that the standard for determining whether conduct is to be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of a religion, is what a person of the same religion (rather than a generic reasonable person) would reasonably consider to be so. Whilst this is a step in the right direction, it does not accommodate the fact that even within a particular denomination, sect, stream or tradition of a religion, there can be a diversity of doctrines, tenets, beliefs or teachings, and sometimes a conflict between them. Conflicts concerning fundamental matters of faith cannot be resolved by the application of any objective test, including reliance on the evidence of religious experts or reference to the beliefs of other members of the same faith community, or a segment of it.

Accordingly, if the courts are not to be left in the position of having to be arbiters of religious doctrine when adjudicating complaints of religious discrimination, we believe that the Bill needs further consideration and refinement.

The alternative approach that has been adopted by courts in Canada³, the UK⁴ and the US⁵, and by the High Court of Australia⁶ is to focus instead on the genuineness of a person's conviction that the belief in question is in accordance with, or in furtherance of, the doctrines, tenets or teachings of the person's religion. These courts have regarded such a conviction as genuine unless it is fictitious, capricious or an artifice, thereby excluding sham or insincere assertions of religious belief. We believe the government should adhere to this time-honoured approach, and the well-recognised principles underpinning it. A test based on genuineness of conviction would supersede the "good faith" criterion now included in the Bill.

In addition to excluding beliefs which are fictitious, capricious or an artifice, the Bill should retain exceptions for conduct that is not reasonable and statements of belief which are malicious or would be likely to harass, threaten, seriously intimidate or vilify another person or group of persons, or advocate the commission of a serious criminal offence.

We therefore recommend that a provision be added to the Bill to the effect that the principles developed by the common law will be applied in determining whether conduct is to be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of a religion.
(Recommendation 14)

Consequential amendments will need to be made throughout the Bill.

8. Protection of associates

Under clause 9 of the Bill, which is new, the prohibition of discrimination is now extended to persons who have an association with individuals who hold or engage in a religious belief or activity. The provision is similar to provisions in other Federal, State and Territory anti-discrimination laws.

Whilst this is a welcome improvement, we believe clause 9 needs to be supplemented with additional provisions in order to be made effective.

- The nature of the "association" that is protected needs to be defined, as it is in other legislation. Clause 9 refers only to an association "*as a near relative or otherwise*". The expression "*near relative*" is defined in clause 5, but the expression "*or otherwise*" is left open, and could become a source of litigation. At a minimum, we believe this should be clarified by adding a provision or Note to the Bill in the same or similar terms to

³ *Syndicat Northcrest v Amselem* (2004) 2 SCR 551 *per* Iacobucci J at [53].

⁴ *R (on the application of Williamson) v Secretary of State for Education and Employment (Williamson)* (2005) UKHL 15 *per* Lord Nicholls at [22].

⁵ *Thomas v. Review Board of the Indiana Employment Security Division* 450 U.S.707 (1981) *per* Burger CJ at 715-716.

⁶ *Church of the New Faith v Commissioner for Pay-roll Tax (Vic)* (1983) 154 CLR 120 *per* Mason ACJ and Brennan J at 129-130, and *per* Wilson and Deane JJ at 174.

paragraph 202 of the Explanatory Notes, namely: “*Other forms of association that may be protected by this clause may include personal, business, employment or other forms of relationships with an individual*”. To this should be added a relationship arising through common membership, or participation in the activities of, an incorporated or unincorporated faith-based body. **(Recommendation 15)**

- The Bill does not provide expressly how the criteria constituting direct and indirect discrimination in clauses 7 and 8 would apply to an associate. It is not always self-evident how the prohibition against direct or indirect discrimination would apply ‘in the same way’ to an associate as it applies to the religious believer. We believe this needs to be fleshed out in the Bill. **(Recommendation 16)**
- In order for the protection of associates to be effective, the substantive provisions in Part 3 of the Bill which make discrimination unlawful in specific areas of public life need to be extended expressly to protect associates, as is the case in the *Disability Discrimination Act 1992*. **(Recommendation 17)**

9. Protection of statements of religious belief generally

Like other faith community organisations, we welcome the government’s desire to provide legal protection to reasonable statements of religious belief. Statements which are malicious or are likely to, harass, threaten, seriously intimidate or vilify or incite hatred or violence against another person or group of persons or promote or encourage the commission of a serious criminal offence, are excluded from protection by sub-clause 42(2), and rightly so in our view.

As stated in our [submission](#) dated 27 September 2019, we believe the main effect of clause 42 of the Bill (formerly clause 41) would be to exclude certain kinds of complaints that may at present be brought under s.17 of the *Anti-Discrimination Act 1998* (Tas), which is very much an outlier provision compared to other State and Territory laws. Clause 42(1)(a) is limited to providing that statements of religious belief are not “discrimination” under an anti-discrimination law. It would not preclude certain 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**. Anti-discrimination laws generally treat vilification and these other forms of prohibited conduct separately to their treatment of discrimination.

Courts in Australia have found that in certain situations mere words can amount to “discrimination”. In *Nationwide News Pty Ltd v Naidu*⁷ it was recognised that “*racially abusive epithets of a kind ... could readily give rise to a racially hostile working environment. Like cases of sexual harassment, racial harassment of that kind would also be unlawful*’ as racial discrimination”. Similarly, in *Qantas Airways v Gama*⁸, the Full Court of the Federal Court held that “*remarks [by fellow employees] which are calculated to humiliate or demean an employee by reference to race, colour, descent or national or ethnic origin*’ could amount to discrimination”. In *Singh v Shafston Training One Pty Ltd and Anor*⁹, it was held that racially

⁷ [2007] NSWCA 377 at [378] *per* Basten J

⁸ (2008) FCAFC 69 at [78]

⁹ [2013] QCAT 008 (ADL051-11), 8 January 2013

‘insulting’ comments directed against an employee in front of his peers could comprise discrimination. There the complainant asserted that the comments made against him on the basis of his race “*caused him significant distress, disturbance to his concentration, and from time to time, poor appetite and sleeping habits. He says that he has been diagnosed with depression as a result*” (para 5).

Yet statements of the kind that have been found to constitute discrimination in these cases would in our view be excluded from protection by sub-clause 42(2), because such statements, taken in context, are clearly malicious, or harass, threaten, seriously intimidate or vilify the complainant.

It follows that even though clause 42(1)(a) may have real work to do in a limited number of borderline cases in which sub-clause 42(2) would not apply, many of the concerns which have been publicly expressed about clause 42, to the effect that it would open the door to legally-sanctioned, denigration of people based on a range of personal attributes, have been over-stated.

However, the messaging conveyed by clause 42 and related provisions in the Bill is another matter. We believe the government should take seriously and address the understandable concerns which have been raised that the Bill will “send a signal” which facilitates or encourages the denigration of people, for example on the basis of their faith or sexual orientation or identity, under cover of an ostensible statement of religious belief.

Of course, we do not believe that the government - or any faith community - is in fact seeking to send a signal to the wider community that denigrating other people on the basis of their faith or sexual orientation or identity or other personal attributes is morally acceptable merely because it may be allowed under the Bill and the current law.

Accordingly, the government should consider taking other measures, outside the Bill itself, including clear public announcements, in order to negate any suggestion that the government is encouraging or sanctioning statements that disparage or are disrespectful of people on the basis of their faith, sexual orientation or identity, or any other personal attribute, even if the statements are allowed under the Bill and the current law. **(Recommendation 18)**

10. Protection of statements of religious belief by an employee outside the course of employment

Sub-clause 8(3) of the Bill now provides that it would be unlawful for a “*relevant employer*” to impose an employer conduct rule which “*would have the effect of restricting or preventing an employee of the employer from making a statement of belief other than in the course of the employee’s employment... unless compliance with the rule by employees is necessary to avoid unjustifiable financial hardship to the employer*”.

Statements which are malicious or are likely to, harass, threaten, seriously intimidate or incite hatred or violence against another person or group of persons or promote or encourage the commission of a serious criminal offence, are excluded from protection by sub-clause 8(5), and we reiterate our support for excluding such statements from protection. Further, even if an employer conduct rule or a qualifying body conduct rule is made unlawful under clause 8, a statement of belief that the rule sought to prohibit may still be prohibited as vilification under

State or Territory laws, which continue to operate under clause 62, or under other Commonwealth laws.

Nevertheless, we reiterate our view that the government should consider taking other measures, outside the Bill itself, including clear public announcements, in order to negate any suggestion that the government is encouraging or sanctioning public expressions of these lower-level forms of disparagement and disrespect.

Apart from the adoption of the expression “*in the course of the employee’s employment*”, subclause 8(3) is unchanged from that which appeared in the first exposure draft. The definition of “*relevant employer*” in clause 5 has not changed. The protections afforded to employees under sub-clause 8(3) would therefore not apply if the employer has or had revenue for the current and previous financial year of less than \$50 million, or is a government or a body established for a public purpose by law.

Accordingly, our concerns with these provisions remain the same as those outlined in our [submission](#) dated 27 September 2019:

- The expression “*unjustifiable financial hardship*” is not defined in the Bill. It could conceivably include being the target of capricious and vindictive reprisals in the form of threatened or actual boycotts by third parties, such as sponsors or suppliers or customers or landlords of an employer, who have been offended by a statement of a genuinely held religious conviction by an employee. It would be wrong in our view for the law to empower such behaviour by making it a lawful pretext for an employer to sack or discipline the employee.
- It seems alien to Australia’s tradition of a ‘fair go’ to make the personal freedom of employees to express their religious beliefs outside the course of their employment, without facing potential retaliatory action by their employer, dependent on the financial size of the employer, or the potential financial consequences for the employer (including from retaliatory actions by third parties), or on not being employed in the public sector.

Both the “*unjustifiable financial hardship*” exception for large employers and the limitation of the provisions of clause 8(3) to large, non-government employers should therefore be reconsidered. **(Recommendation 19)**

Different considerations could apply if an organisation engages an employee or contractor as a brand ambassador, and that role, and the constraints on the employee’s conduct that it requires, are accepted freely and explicitly by the employee as essential requirements of the duties of the position. Constraints on the behaviour of the employee or contractor could be justified if the relevant contract of engagement sets these out clearly and explicitly, and they are necessary for the effective performance of the duties for which the employee or contractor has been engaged.

Similarly, if set out clearly and explicitly in the relevant contract of engagement, there should be no impediment to a religious body requiring an employee or contractor not to engage at any time in forms of conduct, including the making of statements, which are openly disrespectful of the religion or its adherents.

11. Persons are protected from religious discrimination only in respect of “lawful” religious activity

Divisions 2 and 3 of Part 3 of the Bill would make it unlawful to discriminate against a person in various circumstances on the grounds of the person’s 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. However, the definition is circular, begging the question of what test will be applied to determine whether a belief or activity is “religious”. If the relevant test is whether the belief or activity is “in accordance with the doctrines, tenets, beliefs or teachings” of a religion, this has its own difficulties, as described in section 7 of this submission.

As in the first Exposure Draft, religious activity remains 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”. Understandably, the Bill does not seek to protect people from being discriminated against for engaging in child marriage, to pick one example.

We welcome the clarification in new sub-clause 5(2) that the definition of “unlawful” for the purposes of the definition of “religious belief or activity” does not include local by-laws. However, we continue to have the concerns outlined in our [submission](#) dated 27 September 2019:

- If a State or Territory government were to come under the control or influence of an extremist group with an anti-religious agenda and it passed laws banning certain activities which might be regarded as core religious behaviour of a particular faith community, this would open the door to State-sanctioned religious discrimination against any member of that community who remained religiously observant.
- If a person engages in a religious activity that involves only a minor, civil wrong, the Bill would seem to allow what would otherwise be unlawful religious discrimination against that person.

Accordingly, we recommend that:

- A provision should be added to the definition of “*religious belief or activity*” in clause 5, stating 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 28(2) i.e. “*an offence involving harm (within the meaning of the Criminal Code), or financial detriment, that is punishable by imprisonment for 2 years*”. Alternatively, a paragraph could be added to the Bill (in similar terms to paragraph 42(1)(c)) enabling the government, by regulation, to exclude a breach of an oppressive provision of a State law from the meaning of “unlawful” in clause 5. (**Recommendation 20**)

12. Conscientious objection by health practitioners

Sub-clauses 8(6) and 8(7) of the Bill seek to protect the freedom of health practitioners to conscientiously object to providing or participating in a particular kind of health service or

procedure. Under sub-clause 8(6), a health practitioner conduct rule could be challenged under the Bill if it conflicts with a State or Territory law that permits conscientious objection. Sub-clause 8(7) would apply only in a case in which no State or Territory law applies.

These provisions are little changed from those in the first exposure draft. Notes have been added to both sub-clauses stating that these provisions do not have the effect of allowing a health practitioner to single out particular people or groups of people in declining to provide a particular kind of health service, or health services generally. There has been some change in the language of sub-clause 8(6) in order to put this into effect.

Our principal concern is with sub-clause 8(7). If there is no State or Territory law that applies, then the onus would be on a qualifying body, or whoever else imposes the rule, to demonstrate that the health professional conduct rule prohibiting conscientious objection is necessary to avoid an “unjustifiable adverse impact” on, for example, the health of a person seeking the service. The expression “unjustifiable adverse impact” is not defined, and if the issue were to arise in a real case, by the time the question is determined by a court it may be too late for the person seeking the service.

A situation may arise where a health practitioner conscientiously objects to performing a certain kind of procedure, but only in particular circumstances, for example, a health practitioner who is prepared to perform a termination of a pregnancy in its early stages in order to protect the life or health of the mother, or to avoid the foetus developing into a child born with catastrophic disabilities, but who refuses on religious grounds to perform a termination of a pregnancy that is sought by a patient solely for gender selection reasons. The Bill seems to allow only for conscientious objection to a kind of procedure in all circumstances, but not in only limited circumstances.

Qualifying bodies for health practitioners currently have professional ethical codes which usually require the health practitioner to give prompt disclosure to the patient of the practitioner’s conscientious objection to the treatment or procedure, and a prompt referral either to another health practitioner or to a government body where such a referral could be obtained. These codes also make provision for people seeking treatment in emergency and life-threatening situations. It is not clear that the disclosure and referral provisions of these codes, for example, which are widely considered to be reasonable and necessary, would survive the enactment of sub-clause 8(7). In some circumstances it is also possible that a refusal of a health service that is made permissible by sub-clause 8(7) would be unlawful under other anti-discrimination laws such as the *Disability Discrimination Act* and the *Sex Discrimination Act*.

For the Jewish community, the sanctity and dignity of human life are paramount values. We also believe that health professional qualifying bodies generally try to act responsibly, and to take into account the range and complexity of the professional experiences of practitioners, despite entertaining some highly questionable complaints from time to time. There is a case for providing, contrary to sub-clause 8(8), that there should be a presumption that a health professional conduct rule imposed by a qualifying body is reasonable. The presumption would be rebuttable if there was proof that the rule goes beyond what is necessary to protect the health and well-being of patients. However, we have not made this a formal recommendation, as we

believe that the matter requires deeper consideration, including expert input by health professionals, both those who do and do not identify as people of faith.

13. Protections for charities advocating a traditional view of marriage

Clause 4 of the HRLA Bill continues to provide 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, to be considered a charity, an organisation must also meet the additional requirement of providing a ‘public benefit’.¹⁰

We remain concerned that the HRLA Bill leaves open the possibility that a charity may lose or not be conferred with that status by reason of promoting its traditional view of marriage, or any other religious doctrine, because a court interpreting this common law test may hold that promoting a traditional view of marriage or some other religious doctrine, does not confer a ‘public benefit’. As noted in our [submission](#) dated 27 September 2019, this outcome in fact occurred in a recent case in New Zealand.¹¹ 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*. **(Recommendation 21)**

14. ALRC Review into the Framework of Religious Exemptions in Anti-discrimination Legislation

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. We remain of the view 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, so that any recommendations made by the ALRC can be considered together with the Bill. All changes that are being proposed to this area of the law, and the way they would interact with each other, should be able to be considered as a whole. **(Recommendation 22)**

Conclusion

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

Yours sincerely



Peter Wertheim AM
co-CEO

¹⁰ See the definition of “charity” in section 5 of the *Charities Act 2013* (Cth), and the definition of “public benefit” in section 6.

¹¹ *Family First New Zealand* [2018] NZHC 2273 (31 August 2018)

Summary of Recommendations

1. Add a subsection to clause 11 to the effect that 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, unless it is not reasonable to do so in furtherance or in aid of the purposes of the religious body.
2. Define “religious body” as set out in section 2 of this submission, and delete the words “*but does not include an institution that is a hospital or aged care facility, or that solely or primarily provides accommodation*”. Insert exceptions in certain cases to the *protections* extended to religious bodies in preferencing people of the same faith in service delivery.
3. Amend the definition of “*educational institution*” in clause 5 to make it explicit that it also includes a preschool, kindergarten, long day care centre and crèche, to the extent that these bodies provide early childhood education.
4. “Delete “(a) is reasonable in the circumstances; and (b) is consistent with the purposes of this Act; and” from clause 12.
5. Amend paragraph 12(1)(i) of the Bill by adding the underlined words below:

“is intended to meet a need arising out of a religious belief or activity of a person or group of persons or, if religious beliefs and activities are shared by a group of persons, a cultural or linguistic need of members of the group”.
6. Amend sub-clause 12(1)(ii) of the Bill by adding the underlined words below:

“is intended to reduce a disadvantage experienced by a person or group of persons on the basis of the person’s or group’s religious beliefs or activities or, if religious beliefs and activities are shared by a group of persons, on the basis of any other attribute or perceived attribute of the group.”
7. Add a subsection to clause 12 to the effect that, without limiting the generality of the clause, in meeting a need or reducing a disadvantage it is not discrimination for a person 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 same religion as the first person. It should also be made explicit that the clause may benefit a corporation as well as a natural person.
8. Amend paragraph 29(1)(b) by adding the underlined words below:

*“Nothing in Division 2 or 3:
makes unlawful any conduct engaged in to give effect to such a provision, or any other conduct engaged in by the registered charity which confers charitable benefits or enables charitable benefits to be conferred.”*

9. Add a definition of “charitable benefit” to clause 5 of the Bill:

“Charitable benefit” includes a benefit for a charitable purpose as defined in the Charities Act 2013”.

10. Add a new sub-clause 36A(1) as follows:

“Exception relating to registered charities

It is not unlawful under this Act for an organisation which is a registered charity to discriminate against a person, on the ground of the person’s religious belief or activity, if membership (however described), or any class or type of membership, of the organisation is restricted (or, alternatively, restricted subject to exceptions specified in the governing rules of the organisation) to persons who hold or engage in a particular religious belief or activity, and the person does not hold or engage in that religious belief or activity.”

11. Add a new sub-clause 32A(2):

“It is not unlawful under this Act for an organisation which is a registered charity to discriminate against a person, on the ground of the person’s religious belief or activity, if membership of the governing board or a committee of the organisation (however described) is restricted (or, alternatively, restricted subject to exceptions specified in the governing rules of the organisation) to persons who hold or engage in a particular religious belief or activity, and the person does not hold or engage in that religious belief or activity.”

12. Amend clause 35 by adding the underlined words below:

Section 25 (about clubs) does not make it unlawful to discriminate against a person, on the ground of the person’s religious belief or activity, if:

- *membership (however described), or any class or type of membership, of the club;*
- *membership of the governing board or a committee of the club;*

is restricted (or, alternatively, restricted subject to exceptions specified in the governing rules of the club) to persons who hold or engage in a particular religious belief or activity and the person does not hold or engage in that religious belief or activity.

13. Add a definition of “religion” to clause 5 as follows:

“Religion” includes a denomination, sect, stream or tradition of a religion.

14. Adopt the “genuine belief test” as set out in section 7 of this submission, and add a provision to the Bill to the effect that the principles developed by the common law will be applied in determining whether conduct is to be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of a religion. Consequential amendments will need to be made throughout the Bill.

15. Add a provision or Note to clause 9 of the Bill as follows: *“Other forms of association that may be protected by this clause may include personal, business, employment or other forms of relationships with an individual and a relationship arising through common membership, or participation in the activities of, an incorporated or unincorporated faith-based body.”*
16. Add a further provision to clause 9 clarifying how the criteria constituting direct and indirect discrimination in clauses 7 and 8 would apply to an associate ‘in the same way’ to an associate as it applies to the religious believer.
17. Extend the substantive provisions in Part 3 of the Bill, which make discrimination unlawful in specific areas of public life, so that they expressly protect associates.
18. The government should consider taking other measures, outside the Bill itself, including clear public announcements, in order to negate any suggestion that the government is encouraging or sanctioning statements that disparage or are disrespectful of people on the basis of their faith, sexual orientation or identity, or any other personal attribute, even if the statements are allowed under the Bill and the current law.
19. Both the “unjustifiable financial hardship” exception for large employers and the limitation of the provisions of clause 8(3) to large non-government employers should be reconsidered.
20. 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 28(2) ie “*an offence involving harm (within the meaning of the Criminal Code), or financial detriment, that is punishable by imprisonment for 2 years*”. Alternatively, the Bill should make provision for the government, by regulation, to exclude a breach of an oppressive provision of a State law from the meaning of “unlawful” in clause 5.
21. 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*.
22. The timing of the release of the Australian Law Report Commission Report, following its Review into the Framework of Religious Exemptions in Anti-discrimination Legislation, should be brought forward to as early a date as possible, and no later than the date originally set, namely 10 April 2020.