2 October 2019

Human Rights Unit
Integrity Law Branch
Integrity and Security Division
3-5 National Circuit
BARTON   ACT   2600

By email: FoRConsultation@ag.gov.au

Dear Sir/Madam

**Exposure drafts of the religious discrimination bills**

This submission from the Australian Catholic Bishops Conference (ACBC) on the exposure drafts of the religious discrimination bills is prepared by the Bishops Commission for Life, Family and Public Engagement (BCLFPE).

The ACBC is a permanent institution of the Catholic Church in Australia and the vehicle used by the Australian Catholic Bishops to address issues of national significance.

The BCLFPE is one of a number of commissions established by the ACBC to address important issues both within the Church and in the broader Australian community. The BCLFPE has responsibility for public engagement and religious freedom.

More than 60 per cent of Australians profess a faith, and more than one in five Australians are Catholic.

The Catholic Church provides Australia’s largest non-government grouping of hospitals, aged and community care services, providing approximately 10 per cent of health care services in Australia. It provides social services and support to more than 450,000 people across Australia each year. There are more than 1,750 Catholic schools with more than 94,000 staff providing education to more than 765,000 Australian students. There are two Catholic universities, teaching more than 46,000 students.

The ACBC seeks to participate in public debate by making reasoned arguments that can be respectfully considered by all people of goodwill.

The ACBC appreciates the opportunity to make a submission on this important issue.
Summary

The ACBC welcomes the exposure draft religious discrimination bills as an important acknowledgement of the right to freedom of religion. Religious freedom is very important because it allows Australians who have a religious faith to both worship as they wish, but also to express their beliefs in public through such things as charitable work through hospitals, aged care and social services, providing religious faith-based education and engaging in public debate.

This legislation is important because, as well as protecting against discrimination on the grounds of religious belief or activity, it provides a positive expression of the right to religious freedom in clauses 10 and 41. Previously, Commonwealth law has only recognised religious liberty in exceptions to other discrimination legislation.

While promising, the legislation requires further work.

The legislation should be amended to avoid tests that invite courts to make theological judgements on religious belief. Courts could instead consider the policies of religious entities that detail the practical application of those religious beliefs.

Clause 10 of the Bill should be amended to include religious hospitals and aged care. There is no principled justification for their exclusion. Hospitals and aged care providers are a vital part of the mission of the Catholic Church and need the protection of these laws to help them preserve their religious mission and organisational ethos.

Similarly, religious-run publishing houses, retreat centres and other similar not-for-profit entities that charge fees to recover costs should also be included because they are run with a religious purpose.

The principal concern of the ACBC with the proposed exclusion of religious charities and other non-educational religious bodies from clause 10 is the need to address employment. In the same way as is necessary in religious schools, Catholic health and welfare agencies need to be able to hire staff who support their religious mission and to set employee conduct standards.

The Catholic Church across its many varied entities and works is a substantial employer and has many staff who may not share our religious faith, but, importantly, our staff see and support the value of our mission to serve others. People who want to work for the Church are welcome, but it is important that they support our mission and ethos.

Staff in our Catholic schools have a professional duty to support the teachings of the Catholic Church, to act as role models to students and to not publicly undermine those teachings.
Employees in Catholic hospitals and aged care are expected, similarly, to provide care in a manner consistent with their Catholic ethos and may be bound by specific obligations to adhere to practices and codes established by providers.

Catholic health and welfare services are open to serving all people. There are some services we cannot provide because of our religious beliefs.

Finally, clause 10 of the Bill is also too narrow, as it deals only with potential discrimination under the Bill and not with the intersection of freedom of religion with other rights under Commonwealth and State and Territory anti-discrimination legislation.

A. Introduction – why religious freedom should be protected

Religious beliefs are fundamental to a person’s identity and their decisions about how they wish to live their lives. Freedom to hold, express and act on one’s religious beliefs as a citizen is fundamental to civilised democratic societies. This is part of the freedom of thought, conscience and belief as recognised in the foundational international human rights instruments, including the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR).

Freedom to act on one’s religious beliefs is not confined to private worship, important as that is, for religious belief guides one’s actions and participation in the community – which is why people with a religious faith build places of worship, undertake charitable works, publicly express their beliefs and provide social and health services for the good of others. As the UN Human Rights Committee has stated:

“The observance and practice of religion or belief may include not only ceremonal acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or head coverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group. In addition, the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications.”

Australia is a pluralist society. Inherent in a pluralist society are different views and beliefs and the challenge of how to accommodate those different perspectives. Excluding, discouraging or restricting the views of people who have a religious faith is unjust and risks impoverishing public policy debate. It is mistaken to think that

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disagreement is the same as discrimination. Australia needs to be able to balance rights that are sometimes at odds with each other, rather than permitting one right to override another.

The ACBC welcomes the exposure draft religious discrimination bills as an important acknowledgement of the right to freedom of religion. These draft laws acknowledge that as fewer members of the community over time profess a religious belief, there is less and less understanding of people of faith. Where in the past there was sufficient trust and good will to resolve disagreements on matters involving the intersection of faith and public life, this is dissipating.

As a general comment, it is very important the Bills not be framed in such a way as to give judges the opportunity to rule on the details of religious belief, as that is an area beyond their competence and which should be outside the law. Similarly, care must be taken by Commonwealth agencies, in particular regulatory bodies, in their exercise of power over religious faith-based agencies to ensure that the objects of this legislation is properly upheld.

The Government has released exposure drafts of three bills for comment:

- Religious Discrimination Bill 2019
- Religious Discrimination (Consequential Amendments) Bill 2019

This submission offers comment on relevant clauses in the first and third bill.
B. Religious Discrimination Bill 2019

Clause 3 – Objects of this Act

1. An additional introductory phrase should be added to clause 3(1), to reflect the characterisation of the freedom of religion by the High Court, in terms such as:

‘Recognising that freedom of religion, as the paradigm freedom of conscience, is of the essence of a free society, the objects of the Act are: ...’.

2. Clause 3(2) seeks to ensure that “appropriate regard must be had to all human rights, including the right to freedom of religion (Explanatory Notes, [51]). While this is important, it stops short of being an unequivocal acknowledgement of the equal status of freedom of religion as one of a number of important rights. Similar language is used in the Human Rights Legislation Amendment (Freedom of Religion) Bill 2019.

3. The clause 3(2) relevantly reads:

‘In giving effect to the objects of this Act, regard is to be had to:

(a) the indivisibility and universality of human rights; and
(b) the principle that every person is free and equal in dignity and rights.’

The clause implements a recommendation of the Ruddock Review and draws on a section introduced into the Australian Human Rights Commission Act in 1995.

4. The ‘universality’ of human rights is well understood and the principle of freedom and equality in dignity and status of all is deeply entrenched in international human rights law, as well as Church teaching. ‘Indivisibility’ of human rights is perhaps less clearly understood, because there is a long tradition of debate about whether there is a hierarchy of human rights, in which it should be noted, freedom of religion is one of the core or fundamental rights. On the other hand, the World Conference on Human Rights convened by the United Nations in Vienna in 1993 declared that human rights are ‘universal, indivisible and interdependent and interrelated’.

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2 Church of the New Faith v Commissioner of Pay-Roll Tax (Vic) (1983) 154 CLR 120, 130 (Mason ACJ and Brennan J).

3 The freedom of thought, conscience and religion has the highest status in international law, comparable to the right to life, freedom from torture c and slavery and the right of all persons to recognition before the law. These core rights are those from which the ICCPR provides that there may be no derogation: art 4(2) even in time pf public emergency. On the controversy about hierarchy of human rights, see readings and comments in Henry J Steiner, Philip Alston, Ryan Goodman International Human Rights in Context – Law, Politics Morals, 3rd ed (2008) (Oxford UP), pp 154 – 159; cf Chris Sidoti Introducing Human Rights Law (HREOC, speech May 1997).
Clause 5 – Definitions

“Relevant employer”

5. The concept of a “relevant employer” is problematic because it allows in clauses 8(3) and 31(6) the religious freedom of an employee to be dependent on the revenue of an employer. Religious freedom is a universal right and should not depend on an employer’s revenue.

6. Governments should not have a blanket exemption from this legislation under the definition for “relevant employer”. People with a religious faith who work for a government entity deserve religious freedom protections too.

“Religious belief or activity”

7. The qualification in the definition of “religious belief or activity” (paragraphs (b) and (d)) of engaging in religious activity that is “lawful” opens this definition to change over time, as federal, state or local governments change laws. The definition could include a government imposing a condition as part of a funding contract. This means that as public attitudes to the activities of people with a religious faith change over time and may turn against particular activities, the religious freedom protections for people with a religious belief will correspondingly be reduced, and those who are pursuing a particular activity may lose their religious freedom protections.

Solution

8. The better course is to remove ‘lawful’ from the definition of ‘religious belief or activity’ and to rely on provisions such as clauses 27(1)(b) and (2) (as proposed to be amended – see below) and 41(2) to carve out particular conduct.

9. It should also be made clear that the definition of religious activity includes not only acts of prayer and worship, but the variety of activities acknowledged by the UN Human Rights Committee as being part of the freedom of religion, ie the observance of dietary regulations, the wearing of distinctive dress, the freedom to choose religious leaders, establish seminaries and schools and the preparation and distribution of religious texts.

“Statement of belief”

10. Paragraph (a)(iii) in the definition of “statement of belief” says it “is of a belief that may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion”. The ACBC is concerned if the inclusion of a

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reasonableness test means it is left to the courts to decide the meaning of the doctrines, tenets, beliefs or teachings of a particular religion. Providing the ability of a court to determine what is and is not a doctrine of a particular religion resulted in the Supreme Court of Victoria applying its own interpretation of the teaching of the Christian Brethren in relation to sexual morality over the view proffered by an organisation established under its beliefs. The judgement of what is religious doctrine is beyond the competence of a court and should be redrafted to avoid courts being asked to adjudicate on such matters.

11. It should be a matter of policy to ensure that courts do not determine the beliefs of a religious community. As proposed with respect to clause 10, below, if a ‘reasonableness test’ is to be introduced, it would be better if it were in terms that ‘the religious body reasonably regards its conduct as being in accordance with its doctrines [etc] or as necessary for its religious purposes’.

Clause 8 – Discrimination on the ground of religious belief or activity – indirect discrimination

12. The effect of permitting religious discrimination so as to avoid ‘unjustifiable financial hardship’ (Clause 8(3)) results in religious freedom being not a universal human right, but something which depends on where a person works. An employer would in some cases be able to restrict an employee’s freedom to publicly express their religious beliefs outside work, depending on a financial test of company turnover. This would be a strange sort of religious freedom.

13. Because no objective measure is given for “unjustifiable financial hardship”, the language in this clause is unclear, leading to open questions as to the meaning of the legislation and the need for expensive test cases.

14. Clause 8(3) would in effect invite a sponsor of a sporting team or customer of a company to threaten withdrawal of sponsorship or custom, raising the risk of “unjustifiable financial hardship to the employer.” Legislation should instead be designed to stop that sort of threatening behaviour, which could also be used to punish organisations that allow their staff the freedom to express their religious beliefs in public outside work hours.

15. Additionally, because the only restriction in clause 8(3) relates to large companies facing “unjustifiable financial hardship” due to religiously-motivated comments made by employees outside of work hours, the clause might be taken to imply that the restriction of statements of belief outside of work hours is acceptable for those who work for small- or medium-sized companies or for Government, as is the restriction of statements of belief made inside work hours.

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5 Christian Youth Camps Ltd v Cobaw Community Health Service Ltd (2014) 50 VR 256; [2014] VSCA 75.
16. There is concern that in the context of the “religious belief or activity” definition, Catholic institutions and agencies may be forced to employ people who do not agree with the organisation’s mission.

17. The use of the word “vilify” in clauses 8(4)(b) and 41(2)(b) is problematic because the term is not defined and so it is difficult to know what it might mean. The only guidance available is provided in paragraph 132 of the Explanatory Notes accompanying the Bill, which state that the exclusion of statements that are malicious, would harass, vilify or incite hatred or violence “acknowledge that employers may legitimately restrict their employees’ religious expression where it may cause harm to a person, group of persons or the community at large.” The inclusion of a “harm” principle opens up the ability for an individual or group to use the “vilification” provision to silence debate of legitimate issues. It is important to define this term so it is not held hostage to public debate, where the meaning might be expanded or skewed to suit one side of a debate or another. It would be better to omit it or else to use ‘threaten’ or ‘intimidate’.

Clause 8(5) and (6) – Conscientious objection

18. One of the advantages of the Bill is that it recognises the right to conscientious objection. The provisions of the Bill with respect to conscientious objection (clauses 8(5) and (6)) are supported as far as they go. However, they are limited, in that they only extend to:

(a) individual health practitioners; and
(b) rules of employment, registration or practice (called ‘health practitioner conduct rule’, defined in clause 5).

Limits

19. The provisions do not extend to hospitals and other health care providers conducted by or in accordance with the doctrines etc. of religious bodies, and do not apply to laws of the State or Territory which may be inconsistent with conscientious objection of the religious faith of those conducting or administering the service. Essentially clause 8(5) leaves in place a State law that touches on conscientious objection even if the State law does so in a way that limits or abridges conscientious objection (such as the Victorian Abortion Law Reform Act 2008, s 8). Finally, these protections only provide a defence against an employer rule, not an anti-discrimination claim.

20. A more general provision should protect this aspect of freedom of religion – in particular freedom from coercion to provide a service which is contrary to religious belief (as per art 18(2) of the International Covenant on Civil and Political Rights).

21. Laws that force doctors to refer for abortion are an example of an imposition on the religious freedom of Christians and other people of faith. For example, the Victorian Abortion Law Reform Act 2008 forces medical practitioners who may
have a religious or conscientious objection to abortion to “refer the woman to another registered health practitioner in the same regulated health profession who the practitioner knows does not have a conscientious objection to abortion”.  

22. Clause 8(6) is unclear in terms of the real protection it might provide given the example in the Explanatory Notes of access to contraception as a “health service” and the lack of any definition of “unjustifiable adverse impact.” It seems the Commonwealth proposal may, for example, be a harsher regime than current state law in Victoria because the fundamental rights of health workers only last until they have an “unjustifiable adverse impact” on others.

National standard needed

23. Leaving State and Territory laws in place to override a health practitioner’s conscience is not appropriate. It is a derogation from the Commonwealth’s responsibilities to leave conscience only as a State matter. Ideally, matters of conscience and their resolution should be dealt with consistently across Australia by reference to a consistent minimum standard. (If a State or Territory law accorded additional protection to the right to freedom of religion, conscience and belief, the federal law should permit that, but derogations from the federal standard should not be permitted).

Solutions

24. The law should protect conscientious objectors with the possible exception of an emergency where actions need to be taken to prevent a person from dying. Some examples are the Health Act 1993 (ACT) s 84; Criminal Law Consolidation Act 1935 (SA) s 82A(5)–(6); the Health Act 1911 (WA) s 334(2) and The Reproductive Health (Access to Terminations) Act 2013 (Tas) s 6(1)–(4).

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6 Victorian Abortion Law Reform Act 2008, section 8(1)(b)
7 Health Act 1993 (ACT) s 84: “(1) No-one is under a duty (by contract or by statutory or other legal requirement) to carry out or assist in carrying out an abortion. (2) A person is entitled to refuse to assist in carrying out an abortion.”
8 Criminal Law Consolidation Act 1935 (SA) s 82A(5)–(6) “Subject to subsection (6), no person is under a duty, whether by contract or by any statutory or other legal requirement, to participate in any treatment authorised by this section to which he has a conscientious objection, but in any legal proceedings the burden of proof of conscientious objection rests on the person claiming to rely on it. (6) Nothing in subsection (5) affects any duty to participate in treatment which is necessary to save the life, or to prevent grave injury to the physical or mental health, of a pregnant woman.”
9 Health Act 1911 (WA) s 334(2) (“No person, hospital, health institution, other institution or service is under a duty, whether by contract or by statutory or other legal requirement, to participate in the performance of any abortion.”)
10 The Reproductive Health (Access to Terminations) Act 2013 (Tas) s 6(1)–(4) “(1) Subject to subsection (2), no individual has a duty, whether by contract or by any statutory or other legal requirement, to participate in treatment authorized by section 4 or 5 of this Act if the individual has a conscientious objection to terminations. (2) Subsection (1) does not apply to an individual who has a duty set out in subsection (3) or (4). (3) A medical practitioner has a duty to perform a termination in an emergency if a termination is necessary to save the life of a pregnant woman or to prevent her serious physical injury. (4) A nurse or midwife has a duty to assist a medical
25. There should be stronger Commonwealth protection for (a) the conscience rights of healthcare workers and (b) express protection for the conscience rights of healthcare providers like Catholic hospitals and aged care. This is important given, for example, moves in some states towards legalising assisted suicide.

Clause 10 – Religious bodies may act in accordance with their faith

26. The ACBC welcomes the fact that this clause includes a positive statement of the right to religious freedom. The provision is welcome because it sets out as a positive statement of human right (not as an exception or exemption) that a religious body will not discriminate against a person under the Religious Discrimination Act by engaging in certain conduct related to the doctrines, tenets, beliefs or teachings of the religion. This is the kind of positive declaration that has previously been urged by the ACBC and others, and accepted by the Ruddock Religious Freedom Review of 2018.¹¹

Exclusion of commercial activities not justified or principled

27. The drafting is flawed, however, because it excludes from its scope a religious registered charity or other, non-educational, religious body that engages solely or ‘primarily’ in undefined ‘commercial activities’. This exclusion is too wide and sweeping: it raises the likelihood that all religious-conducted or religious-sponsored hospitals and aged care services (as well as religious-run publishing houses and campsites or other religious facilities which charge or are able to be hired) are excluded. Indeed, even the Society of St Vincent de Paul could be excluded given its vast number of retail stores, despite them being operated on a not-for-profit basis.

28. The Explanatory Notes (paragraph 174) assert that religious hospitals and aged care providers are not included. This exclusion lacks a principled justification. It is not consistent with existing Commonwealth treatment of religious bodies and prevents the clause achieving the stated aim of Government, of permitting religious organisations to preserve their mission and organisational ethos.

29. This means that excluded faith-based agencies cannot preference the employment of religious staff, except for some senior leadership positions or where there is an inherent requirement such as a chaplain’s role. These faith-based agencies will find it difficult to insist their employees support the agency’s religious mission unless this is part of an inherent requirement for senior employees – see the Clause 31 inherent requirements test.

¹¹This has long been recommended, for example: Human Rights and Equal Opportunity Commission, Article 18: Freedom of Religion and Belief (July 1998) and Parliamentary Joint Standing Committee on Foreign Affairs, Defence and Trade, Inquiry into the Status of the Human Right to Freedom of Religion or Belief - Interim Report (Nov 2017).
30. Religious bodies involved in activities which are central to their mission and an expression of their purpose should have the freedom to prefer staff of a particular religious faith, without being limited by whether or not their activities are or can be characterised as ‘commercial’. For a religious body, undertaking activities in fulfilment of their mission and purpose, a lack of influence over hiring staff threatens to impact on the culture of an organisation and the ability of the organisation to continue to operate according to its faith tradition.

31. For example, Catholic hospitals and aged care homes require clinical staff and executive leaders as part of their contract to agree to observe the “Code of Ethical Standards for Catholic Health and Aged Care Services in Australia”, which is a detailed manual of ethical behaviour. This Code is critical to ensuring the ongoing Catholic mission of Catholic healthcare agencies.12

32. As another example, a potential situation in Catholic residential aged care facilities in Victoria is that cleaners may be the first people approached by residents to discuss the state’s Voluntary Assisted Dying (VAD) scheme. This means that, regardless of their own religious or particular ethical position, cleaners may be required to be trained in the Catholic response to VAD, and other ethical principles related to the Catholic vision.

Solution

33. The better course would be to remove the words ‘(other than a registered charity that engages solely or primarily in commercial activities)’ from clauses 10(2)(b) and (c) and instead add as s 10(4):

‘Paragraphs (2)(b) and (c) do not apply to conduct of a body if:

(a) the conduct is connected with the provision, by the body, of Commonwealth-funded aged-care; and

(b) the conduct is not connected with the employment of persons of or by that body.’

34. This drafting reflects the existing Commonwealth Sex Discrimination Act, s 37(2), which provides that religious bodies may not discriminate between residents and applicants in providing Commonwealth funded aged care, but permits the religious body’s employment policies to be determined separately in accordance with the body’s religious ethos.

A problematic new test – religious body’s conduct must be ‘reasonably regarded’ as in accord with doctrine etc

35. Proposed s 10 is potentially problematic because the test for non-discrimination is not only that the conduct be engaged in ‘in good faith’ (which is acceptable) but that the conduct must be such as ‘may reasonably be regarded as being in

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12 A copy of the Code of Ethical Standards for Catholic Health and Aged Care Services in Australia can be found here: https://www.cha.org.au/code-of-ethical-standards
accordance with’ religious doctrines etc. This departs from existing Commonwealth laws, which use two different tests, in the alternative (it being only necessary to satisfy one or the other), and creates a third kind of test, one that heightens the risk of an outside observer imposing their view of what religious doctrines, tenets, beliefs or teachings require. A third test creates unnecessary uncertainty and confusion, when there should be consistency and constancy.

Solution

36. If a ‘reasonableness test’ is to be introduced, it would be better if it were in terms that the religious body reasonably regards its conduct as being in accordance with its doctrines etc.

37. Adding the words “or for a religious purpose” to the end of “in accordance with the doctrines, tenets, beliefs or teachings of the religion” would better clarify the conduct which is entitled to be protected.

Only applies under this Bill

38. Finally, proposed s 10 is narrow, in that it deals only with potential discrimination on religious grounds under the Religious Discrimination Act.

39. For all the positive statement that clause 10 contains, it does not deal with the interaction of freedom of religion with other rights: it would be better if clause 10 said that “Notwithstanding any law, it is lawful for a religious body to engage, in good faith, in conduct ...”. That would then extend a positive statement of one dimension of religious freedom across all federal (and State) laws, by reference to all forms of discrimination. Proposed s 41 provides a template for this wider application.

Employment

40. The legislation should make clear the ability of religious organisations to impose conduct rules on their employees and, in the case of schools, on their students (Clauses 8 and 10, 13 and 18 (to the extent that clause 10 does not apply to all religious bodies)), so religious organisations can maintain their identity and mission.

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Existing Commonwealth anti-discrimination law (eg Sex Discrimination Act, s 37(1)(d)); Age Discrimination Act, s 35; Fair Work Act 2009, s 351(2)(b) and (c)) has exemptions for:

1. a religious body’s ‘act or practice that conforms to the doctrines, tenets or beliefs of that religion’ or
2. a religious body’s conduct that is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

The existing tests are not perfect, and also have implicit in them that a Court or Tribunal must decide what constitutes the doctrines, tenets or beliefs of a religion, but a ‘reasonably regarded’ formula can be read as an invitation to the Court or Tribunal to assess matters as an objective bystander.
41. The implication of Explanatory Notes paragraphs 180 and 181 is that a Catholic agency could require all of its employees to be Catholic, or none. However, this is overly simplistic and not practical: Catholic agencies often hire non-Catholics where the employees support the religious mission of the organisation.

42. The Explanatory Notes make it clear that a requirement that all the staff be adherents to the faith would pass the test. So to maintain a preference for Catholics, the school would have to say that it is an inherent requirement of being a teacher at a Catholic school to be Catholic. This would need to apply to every teaching position. However, this is not how Catholic schools operate. Catholic schools want the freedom to hire staff who are supportive of the teachings of the Catholic Church, act as role models to students and do nothing that would undermine the transmission of those teachings. Staff employed in Catholic schools need not be Catholic but they must be willing to commit to this standard in order for the school to maintain its Catholic identity.

43. Amendments are needed to clause 10 to make it clear that religious schools can prefer staff from a particular religious background if they wish, but some flexibility is needed.

44. Clause 10(1) refers to actions “in accordance with the doctrines, tenets, beliefs or teachings of the religion ...”. The Catholic Church has a lot of written documentation developed over centuries, but many religions don’t have the same breadth of “doctrines, tenets, beliefs or teachings” in written and official form.

45. There is also a practical difficulty in the draft relating to the link between religious doctrine and the decisions made by religious entities. The Explanatory Notes imply hiring policies need to be an express part of a religion’s doctrines and teachings – this is not practical for many religious groups, including Catholics. Instead, employment policies are in furtherance of the propagation of those doctrines and teachings, and so the furthering of religious beliefs should be covered by this clause as well.

46. As drafted it seems that it would be unlawful, subject to very narrow exceptions, for a Christian school to preference applicants for teaching positions or, for example, to promote a Christian applicant to the position of deputy school principal in preference to a well-qualified non-Christian colleague, using faith commitment as one of the criteria. Yet this should be permitted, where in the judgment of those conducting the school it promotes the school’s religious character and ethos.

Enrolment – extension of clause needed

47. Catholic schools are open to all families who seek a Catholic education but may wish to give preference to Catholic students and particularly Catholic students with families active in the local parish or area. This needs to be accommodated by the
Bill, as conduct for a ‘religious purpose’ or conduct to maintain the religious ethos of the religious body. It is not directly addressed by the present drafting of clause 10. Various models exist under State anti-discrimination laws.

**Clause 13 - Employment**

48. Proposed s 13 makes discrimination on religious grounds in employment unlawful. This is subject to exclusions in clause 31. There are several matters of concern if this clause is to apply to certain religious organisations.

49. If clause 10 is not broadened to include employment by all religious bodies, the scope of clause 13 and the exemptions in clause 31 will need to be reworked to accommodate employment by many religious bodies of their own staff. This is so as to recognise that employment by religious bodies is an essential matter for the maintenance of the ethos and mission of the body in a consistent and considered way.

50. The ‘**Suggested draft of new Section on Employment**’ submitted by Freedom for Faith (see **Attachment A**) is supported. For the reasons outlined by that group, this should be supported and adopted to ensure that religious bodies can hire staff who will act in accordance with religious doctrines or purposes or code of moral conduct promulgated by the religious body. It draws on suggestions of the Ruddock Religious Freedom Review and South Australian anti-discrimination legislation.

**Clause 27 – Counselling, promoting etc. a serious offence**

51. This clause refers to conduct “that would constitute a serious offence”. A **serious offence** is proposed to be defined in cl 27(2) as an offence involving ‘harm’ as defined in the **Criminal Code**, that is, as ‘physical harm or harm to a person’s mental health, whether temporary or permanent’ (Dictionary, **Criminal Code**).

52. Because this clause is a restriction on freedom of expression and on freedom of religion (and is picked up in cl 41(2)(c)), discrimination should be permitted only in limited circumstances which are genuinely serious. To that end, the definition of ‘serious offence’ should be revised:

(a) first, despite the impression which the description ‘serious offence’ might convey, the first operative criterion of ‘harm’ does not have any qualifier, and can include temporary or inconsequential harm. If the Criminal Code definition is to be used, it should be qualified as “serious” harm. Similarly, ‘financial detriment’ should be qualified as ‘serious’

(b) Secondly, the punishment threshold for the offence is low and is inconsistent with the tests in other Commonwealth legislation (eg **Proceeds of Crime Act 2002** (Cth), s 338). For consistency, it should be an indictable offence punishable by imprisonment of 3 years or more (or equivalent).
53. Clause 27(2) should read:

Serious offence means:

(a) an indictable offence punishable by imprisonment for 3 years or more under a law of the Commonwealth; or
(b) an equivalent offence under a law of a State of Territory;
that is an offence involving the infliction, to a serious degree, of:
(c) harm (within the meaning of the Criminal Code); or
(d) financial detriment.

Clause 28 – Registered charities

54. Clause 28 contains a limited exception that provides that the Religious Discrimination Act does not affect a provision of the governing rules (constitution etc) of a registered charity, and permits the charity to give effect to them.

55. Although this reflects other Commonwealth legislation (eg s 34, Age Discrimination Act), it is likely to be too narrow in practice, because it does not cover the conduct of charities administering already created trusts and wills. It would be sensible to extend clause 28 to protect the administration of existing trusts and gifts.

56. A new paragraph 28(b) should provide that:

Nothing in Division 2 or 3 affects a provision of any will, trust deed or other instrument, executed before the commencement of this Act, under which a gift has been made to or for the purposes of the registered charity.

The presently proposed (b) (conduct engaged in to give effect to such a provision) should be renumbered as (c) and refer to both the governing rules and to such wills and trusts etc.

57. This addition is necessary so as to protect charities from breach of the law if they were to administer a legacy trust or will in accordance with conditions of the gift; and, if they followed the legislation and ignored a condition applying to a bequest or gift made before the legislation comes into force, protects them from committing a breach of trust in administering the gift. An addition of this kind is the preferable solution, as the only alternative would be to require the charity to bring a complex, difficult, uncertain and expensive Court application for a variations of trust, to which the Attorney-General in the relevant jurisdiction would be a necessary party.
Clause 29 – Conduct in direct compliance with certain legislation etc.

58. Clause 29(3) provides that it is not unlawful for a person to discriminate if the relevant conduct is ‘in direct compliance with a provision’ of State or Territory law. This drafting - consistent with existing law (eg Age Discrimination Act, s 39) - is nonetheless problematic and too narrow.

59. It is not clear what ‘direct compliance’ means. The Explanatory Notes cast no meaningful light on it. The policy which the Bill should express is that:

(a) where state or territory legislation does not protect religious freedoms to the same extent as this Bill, then the provisions of this Bill should apply;

(b) if something is permitted with respect to religious belief or activity under state law, it should be permitted under Federal law.

60. To achieve that, the drafting used in the *Fair Work Act*, s 351(2)(a) should be adopted and clause 29(3) should say:

‘Nothing in Division 2 or 3 applies to conduct of a person on the ground of another person’s religious belief or activity where the conduct of the first person is not unlawful under any anti-discrimination law (within the meaning of the *Fair Work Act 2009*) in force in the place where the conduct occurs’.

61. Otherwise, federal law can exclude State laws: for example, in this Bill, clause 41, which expressly overrides State and Territory laws. As discussed above, clauses 8(6) and 10 should be amended to do so likewise.

Clause 31(2) – Exceptions relating to work – Inherent requirements

62. An inherent requirements test is problematic for many religious organisations because the test can focus more on the tasks and skills involved in a particular job, rather than the spiritual motivation behind the job that helps the organisation form and maintain a particular religious culture.

63. As explained above, religious organisations need the flexibility to continue to employ staff who support the mission of their agency, who may not be from the organisation’s particular faith, and to be able to prefer applicants who have a particular religious background.

64. Acknowledging that this clause won’t apply if religious organisations are covered by clause 10, the proposed inherent requirements exception in clause 31(2) duplicates or potentially cuts across the *Fair Work Act 2009* (Cth) which already prohibits ‘adverse action’ against an employee or prospective employee on grounds of religion. The *Fair Work Act* has three long-established exceptions with which the *Religious Discrimination Act* should be consistent.
65. Therefore, the Bill should reflect each of:

(a) s 351(2)(a) of the *Fair Work Act* (conduct not unlawful under federal and
locally applicable anti-discrimination law)\(^\text{15}\);
(b) s 351(2)(b) (inherent requirements), and
(c) s 351(2)(c) (conduct in good faith necessary to avoid injury to religious
susceptibilities of adherents to that religion or creed).

*Inherent requirements exception insufficient and uncertain*

66. The only relevant exception proposed is an inherent requirements test (clause
31(2), (3)) – where an employee’s religious belief or activity makes them unable to
carry out the inherent requirement of the employment.\(^\text{16}\)

67. Although nothing in the Bill will affect religious educational institutions (clause
10(1), (2)(a)), the inherent requirements test is of uncertain application in the
context of religious hospitals and other non-educational religious bodies, and is
narrow and its application is debateable. It will not fully protect those non-
educational religious bodies’ employment practices without amendment. For that
reason, clause 10 should be amended in the manner outlined above, to remove
the commercial qualification from cl 10(2)(b) and (c).

68. Alternatively, a drafting technique used in Queensland anti-discrimination law
could be adopted, by inserting in the Bill an example of an inherent requirement,
such as:

> An inherent requirement of a position as an employee of a religious body may
include a condition, requirement or practice that persons who manage, or
deliver the services of, that religious body hold or conform to a particular
religious belief or abide by policies for standards of behaviour published by that
religious body.\(^\text{17}\)

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\(^\text{15}\) Section 351(2)(a) protects an exception or exemption under State Anti-Discrimination laws that is wider than in the *Fair Work Act*, consistently with a general intention that those Acts should as far as possible work in co-ordination with the FWA: 27(1A) FWA. To the extent that State Anti-Discrimination law are narrower or less generous than the FWA, the FWA prevails. That should be the same position for this Bill.

\(^\text{16}\) This kind of provision implements ILO Convention 111 on Discrimination in Employment and Occupation (referenced in this Bill, clause 57(e)) which provides in art 1(2) that any “distinction, exclusion or preference” based on the inherent requirements of a particular job shall not be deemed to be discrimination. This provision applies to both employees and applicants for employment. Cases on this test include *Qantas Airways Ltd v Christie* (1998) 193 CLR 280 (an age limit on Qantas pilots), *X v The Commonwealth* (1999) 2000 CLR 177 (HIV-status of member of armed forces) and in the State sphere under an equivalent State provision, *Toganivalu v Brown & Corrective Services* [2006] QADT 13; *Walsh v St Vincent de Paul Society Qld (No 2)* [2008] QADT 32; *Re Mission Australia* [2012] QCAT 124.

\(^\text{17}\) Modelled on Anti-Discrimination Act 1991 (Qld) s 25(1), note 4 (applicable in its terms to educational institutions).
69. The general inherent requirements test should be redrafted in the manner suggested by Freedom for Faith in its submission commentary on Clause 31.

**Clause 41 – Statements of belief do not constitute discrimination etc.**

70. Clause 41 provides that ‘a statement of belief’ does not constitute discrimination under any federal or state anti-discrimination law or contravene a provision of Tasmanian law under which a complaint was brought against Archbishop Porteous. This provision is worthwhile and welcome.

71. A critically important aspect of clause 41 is that it applies for the purposes of all Commonwealth and State anti-discrimination legislation. It does this by cross-referencing to the definition of ‘anti-discrimination law’ in the *Fair Work Act 2009* (Cth).

72. Further, as a welcome matter of form, like clause 10, this provision is not expressed as an exception or exemption, but is presented as a positive declaration of conduct which is non-discriminatory. It is valuable and should be supported. This should protect religious bodies which set out the doctrinal basis of their existence and services, whether publicly or privately, including for example in job advertisements.

73. The definition of *statement of belief*\(^\text{18}\) (clause 5) uses the formulation of a statement ‘that may reasonably be regarded as being in accordance with’ religious doctrines etc. As with clause 10, this invites external adjudication of the correspondence of the statement with the religious doctrines etc, and is of potential concern for that reason, as explained; on the other hand, in clause 41, it may give some flexibility, giving protection to a genuine statement by someone who is not an expert theologian (where the statement is a paraphrase or simplification of doctrine etc, but is not entirely accurate). On balance, it should be supported in clause 41.

74. Our comments on the exclusions from protection for statements of belief outlined in relation to clause 8(4) also apply to clause 41(2).

**Inter-relationship with State laws**

75. Subject to the specific overriding provisions contained in clause 60, the Bill is expressed to not override State and Territory laws. As outlined, in the interests of a consistent minimum standard and consistently with the model in the *Fair Work Act*, the Bill should state that where state or territory legislation does not protect religious freedoms to the same extent as this Bill, then the provisions of this Bill should apply.

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\(^{18}\) What is ‘religious belief’ is not defined.
C. Human Rights Legislation Amendment (Freedom of Religion) Bill 2019

Charities Act 2013

76. Clause 4 would amend section 11 of the Charities Act 2013 to allow an organisation to undertake advocacy in favour of marriage between a woman and a man, without the organisation being disqualified from being a charity.

77. There should also be a similar amendment to section 6 of the Charities Act to ensure advocacy for marriage does not contravene the public benefits test.

78. Additionally, clause 4 should protect not only advocacy relating to traditional marriage, but also advocacy of other religious beliefs or activities as well.

Marriage Act 1961

79. Clause 7 inserts a new Section 47(c) into the Marriage Act which allows educational institutions to refuse to make a facility available for the solemnisation of a marriage or for purposes reasonably incidental to the solemnisation of a marriage, i.e. a purpose intrinsic to or directly associated with the solemnisation of a marriage.

80. This Human Rights Legislation Amendment (Freedom of Religion) Bill 2019 leaves unresolved whether Churches might be obliged to hire out their halls for same-sex marriage receptions, even though a Church may have a theological objection to same-sex marriages. Section 47B of the Marriage Amendment (Definition and Religious Freedoms) Act 2017 which deals with facilities of bodies established for religious purposes remains deficient in scope and certainty.

81. There are two principal concerns - the meaning of (1) “body established for religious purposes” (in short-hand, “religious body”) and (2) what was a facility “reasonably incidental to solemnisation of a marriage”. An attempt has been made to address these, but uncertainty and ambiguity remain:

(1) The definition of religious body cross-refers to s 37 of the SDA, but the concept is not defined there; the concerns are that the phrase does not extend to all forms by which Church property is held (such as lay or corporate trustees), and that reference to a “body” implies some form of company or trust, which may fail to protect decisions by individuals (local managers or agents) on behalf of the formal holder of Church property.  

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19 In Cobaw (2014) 50 VR 256, there was considerable discussion and disagreement among the judges of the Court of Appeal as to whether the individual manager of the facility was liable for refusing a booking on discriminatory grounds, in addition to or instead of the body which owned the property.
(2) Because “solemnisation of a marriage” is the religious element of a marriage, the question of whether refusal of the hire of a Church hall for a wedding reception is protected by s 47B turns on whether a wedding reception “is intrinsic to, or directly associated with, the solemnisation of the marriage”. It is very unlikely that a wedding reception is “intrinsic” to the solemnisation of marriage – “solemnisation” in the Marriage Act refers to what is part of the religious ritual; it is unclear whether a reception, which is entirely a civil matter, is “directly associated” with the solemnisation.

82. This doubt should be resolved by addition of an express provision to ensure Churches are not obliged to hire out their facilities (halls etc.) for a wedding reception or other purpose associated or in connection with a marriage that is contrary to the doctrines, tenets, beliefs or teachings of the religion concerned.

83. A consolidated list of suggested amendments is provided at Attachment B.

D. Conclusion

The ACBC welcomes the exposure drafts of the religious discrimination bills as an important step in improving the recognition of religious freedom in Commonwealth law. The draft laws require some significant amendment to ensure they properly assist both people of faith and the organisations they establish as communities of faith to manifest their religious belief in the service of others. In particular, Catholic hospitals and aged care are a vital part of the work of the Catholic Church in Australia and must not be excluded from the definition of “religious body”. The ACBC looks forward to working with the Government and other members of Parliament to improve the recognition of religious freedom in Australia.

I would be happy to answer questions. I can be contacted via Mr Jeremy Stuparich, Public Policy Director, ACBC on 02 6201 9863 or policy@catholic.org.au

Yours sincerely

Most Rev Peter A Comensoli
Archbishop of Melbourne
Chair, Bishops Commission for Life, Family and Public Engagement
Suggested draft of new section on employment

(1) This section applies to an institution that is conducted in accordance with religious doctrines, or otherwise established for religious purposes.

(2) It is lawful for an institution to which this section applies, or a person acting on behalf of such an institution, to –

(a) employ or engage a particular person, or allocate particular duties or responsibilities to that person, on the ground or condition that the person adheres to, acts in accordance with, the religious doctrines or religious purposes of the institution, or agrees to abide by a code of moral conduct;

(b) not employ or engage a particular person, terminate the employment or engagement of a particular person, or not allocate particular duties or responsibilities to a particular person, on the ground that the person does not or no longer adheres to or acts in accordance with the religious doctrines, tenets, beliefs, teachings or religious purposes of the institution or has not agreed to abide by or has breached a code of moral conduct of the institution;

(c) do acts ancillary or incidental to the acts referred to paragraphs (a) and (b), such as advertising for a position that requires the appointee to adhere to or act in accordance with the religious doctrines or religious purposes of the institution or to abide by a code of moral conduct;

provided that the institution has a policy that is publicly available on request, outlining its expectations of employees and others engaged by the institution.

(3) In this section –

(a) an institution includes any association, body, corporation, entity or organisation whether or not incorporated under any Commonwealth, State or Territory law;

(b) religious doctrines include religious beliefs, codes of moral conduct, practices, principles, teachings and tenets;

(d) the engagement of a person includes as a contract worker.

(4) Subject to subsection (5), this section has effect notwithstanding any other Commonwealth, State or Territory law.

(5) This section does not affect the operation of:

(a) the Racial Discrimination Act 1975;

(b) the Disability Discrimination Act 1992;

(c) the Age Discrimination Act 2004;

(d) section 5C, 7, 37 and 38 of the Sex Discrimination Act 1984.

(per Freedom for Faith)
Australian Catholic Bishops Conference - Consolidated list of suggested amendments

Religious Discrimination Bill 2019

Clause 3 – Objects of this Act

1. **Add** an introductory phrase to clause 3(1), to reflect the characterisation of the freedom of religion by the High Court, in terms such as:

   ‘Recognising that freedom of religion, as the paradigm freedom of conscience, is of the essence of a free society, the objects of the Act are: ...”.

Clause 5 – Definitions

“Religious belief or activity”

2. **Remove** ‘lawful’ from the definition of ‘religious belief or activity’ (paragraphs (b) and (d)) and rely on provisions such as clauses 27(1)(b) and (2) [amended as suggested below] and 41(2) to carve out particular conduct.

3. **Clarify**: It should also be made clear that the definition of religious activity includes not only acts of prayer and worship, but the variety of activities acknowledged by the UN Human Rights Committee as being part of the freedom of religion, ie the observance of dietary regulations, the wearing of distinctive dress, the freedom to choose religious leaders, establish seminaries and schools and the preparation and distribution of religious texts.

“Statement of belief”

4. **Redraft**: Paragraph (a)(iii) in the definition of “Statement of belief” says it “is of a belief that may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion”. The ACBC is concerned if the inclusion of a reasonableness test in these terms may mean it is left to the courts to decide the meaning of the doctrines, tenets, beliefs or teachings of a particular religion. Legislation should as far as possible be drafted to ensure that courts do not determine the beliefs of a religious community.

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20 Church of the New Faith v Commissioner of Pay-Roll Tax (Vic) (1983) 154 CLR 120, 130 (Mason ACJ and Brennan J).

Clauses 8, 41(2)(b) – Discrimination on the ground of religious belief or activity – indirect discrimination

5. **Amend**: The use of the word “vilify” in clauses 8(4)(b) and 41(2)(b) is problematic because the term is not defined and so it is difficult to know what it might mean. It would be better to **omit** ‘vilify’ entirely or else to **substitute** for it ‘threaten’ or ‘intimidate’.

Clause 8(5) and (6) – Conscientious objection

6. Leaving State and Territory laws in place to override a health practitioner’s conscience is not appropriate. It is a derogation from the Commonwealth’s responsibilities to leave conscience only as a State matter. Ideally, matters of conscience and their resolution should be dealt with consistently across Australia by reference to a consistent minimum standard. (If a State or Territory law accorded additional protection to the right to freedom of religion, conscience and belief, the federal law should permit that, but derogations from the federal standard should not be permitted).

7. **Redraft**: The law should protect conscientious objectors with the possible exception of an emergency where actions need to be taken to prevent a person from dying. Some examples are the *Health Act 1993* (ACT) s 84; *Criminal Law Consolidation Act 1935* (SA) s 82A(5)–(6); the *Health Act 1911* (WA) s 334(2) and *The Reproductive Health (Access to Terminations) Act 2013* (Tas) s 6(1)–(4).

8. **Strengthen**: There should be stronger Commonwealth protection for (a) the conscience rights of healthcare workers and (b) express protection for the conscience rights of healthcare providers like Catholic hospitals and aged care. This is important given, for example, moves in some states towards legalising assisted suicide.

Clause 10 – Religious bodies may act in accordance with their faith

9. **Remove** the words ‘*(other than a registered charity that engages solely or primarily in commercial activities)*’ from clauses 10(2)(b) and (c) and instead **add** as s 10(4):

   ‘Paragraphs (2)(b) and (c) do not apply to conduct of a body if:

   (a) the conduct is connected with the provision, by the body, of Commonwealth-funded aged-care; and
   (b) the conduct is not connected with the employment of persons of or by that body.’
10. If a ‘reasonableness test’ is to be introduced, it would be better if it were in terms that the religious body reasonably regards its conduct as being in accordance with its doctrines etc.

11. Add the words “or for a religious purpose” to the end of “in accordance with the doctrines, tenets, beliefs or teachings of the religion” to better clarify the conduct of religious bodies which is entitled to be protected.

12. Extend: Proposed s 10 is narrow, in that it deals only with potential discrimination on religious grounds under the Religious Discrimination Act. For all the positive statement that clause 10 contains, it does not deal with the interaction of freedom of religion with other rights: redraft clause 10 to say that “Notwithstanding any law, it is lawful for a religious body to engage, in good faith, in conduct ...”.

That would then extend a positive statement of one dimension of religious freedom across all federal (and State) laws, by reference to all forms of discrimination. Proposed s 41 provides a template for this wider application.

13. Extend: The legislation should make clear the ability of religious organisations to impose conduct rules on their employees and, in the case of schools, on their students. Amendment would be required to clauses 8 and 10, 13 and 18 (to the extent that clause 10 does not apply to all religious bodies), so that religious organisations can maintain their identity and mission.

14. Redraft: The Bill needs to be redrafted to accommodate the enrolment practices of Catholic schools, as conduct for a ‘religious purpose’ or conduct to maintain the religious ethos of the religious body. Catholic schools are open to all families who seek a Catholic education but may wish to give preference to Catholic students and particularly Catholic students with families active in the local parish or area. This is not directly addressed by the present drafting of clause 10. Various models exist under State anti-discrimination laws.

Clause 13 and clause 31 - Employment

15. If clause 10 is not broadened to include employment by all religious bodies, the scope of clause 13 and the exemptions in clause 31 will need to be reworked to accommodate employment by many religious bodies of their own staff. This is so as to recognise that employment by religious bodies is an essential matter for the maintenance of the ethos and mission of the body in a consistent and considered way.

The ‘Suggested draft of new Section on Employment’ submitted by Freedom for Faith (see Attachment A) is supported, for the reasons outlined by that group.
Clause 27 – Counselling, promoting etc. a serious offence

16. **Revise**: Because clause 27 is a restriction on freedom of expression and on freedom of religion (and is picked up in cl 41(2)(c)), discrimination should be permitted only in limited circumstances which are genuinely serious. To that end, the definition of ‘serious offence’ should be revised:

(a) first, despite the impression which the description ‘serious offence’ might convey, the first operative criterion of ‘harm’ does not have any qualifier, and can include temporary or inconsequential harm. If the Criminal Code definition is to be used, it should be qualified as “serious” harm. Similarly, ‘financial detriment’ should be qualified as ‘serious’

(b) Secondly, the punishment threshold for the offence is low and is inconsistent with the tests in other Commonwealth legislation (eg *Proceeds of Crime Act 2002* (Cth), s 338). For consistency, it should be an indictable offence punishable by imprisonment of 3 years or more (or equivalent).

Accordingly, clause 27(2) should read:

*Serious offence* means:

(a) an indictable offence punishable by imprisonment for 3 years or more under a law of the Commonwealth; or

(b) an equivalent offence under a law of a State of Territory;

that is an offence involving the infliction, to a serious degree, of:

(c) harm (within the meaning of the *Criminal Code*); or

(d) financial detriment.

Clause 28 – Registered charities

17. **Add**: It would be sensible to extend clause 28 to protect the administration of existing trusts and gifts.

A new paragraph 28(b) should provide that:

Nothing in Division 2 or 3 affects a provision of any will, trust deed or other instrument, executed before the commencement of this Act, under which a gift has been made to or for the purposes of the registered charity.

The presently proposed (b) (conduct engaged in to give effect to such a provision) should be renumbered as (c) and refer to both the governing rules and to such wills and trusts etc.
Clause 29 – Conduct in direct compliance with certain legislation etc.

18. **Clarify**: It is not clear what ‘direct compliance’ means. The policy which the Bill should express is that:

(a) where state or territory legislation does not protect religious freedoms to the same extent as this Bill, then the provisions of this Bill should apply;

(b) if something is permitted with respect to religious belief or activity under state law, it should be permitted under Federal law.

**Amend**: To achieve that, the drafting used in the *Fair Work Act*, s 351(2)(a) should be adopted and clause 29(3) should be amended to say:

‘Nothing in Division 2 or 3 applies to conduct of a person on the ground of another person’s religious belief or activity where the conduct of the first person is not unlawful under any anti-discrimination law (within the meaning of the *Fair Work Act 2009*) in force in the place where the conduct occurs’.

Clause 31(2) – Exceptions relating to work – Inherent requirements

19. **Amend**: Although nothing in the Bill will affect religious educational institutions (clause 10(1), (2)(a)), the inherent requirements test is of uncertain application in the context of religious hospitals and other non-educational religious bodies, and is narrow and its application is debateable. It will not fully protect those non-educational religious bodies’ employment practices without amendment. For that reason, clause 10 should be amended in the manner outlined above, to remove the commercial qualification from cl 10(2)(b) and (c).

20. **Alternatively**, a drafting technique used in Queensland anti-discrimination law could be adopted, by inserting in the Bill an example of an inherent requirement, such as:

> An inherent requirement of a position as an employee of a religious body may include a condition, requirement or practice that persons who manage, or deliver the services of, that religious body hold or conform to a particular religious belief or abide by policies for standards of behaviour published by that religious body.\(^22\)

21. The general inherent requirements test should be **redrafted** in the manner suggested by Freedom for Faith in its submission commentary on Clause 31.

Clause 41 – Statements of belief do not constitute discrimination etc.

22. Our comments on the exclusions from protection for statements of belief outlined in relation to clause 8(4) and 27(2) also apply to clause 41(2).

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\(^{22}\) Modelled on *Anti-Discrimination Act 1991* (Qld) s 25(1), note 4 (applicable in its terms to educational institutions).
Inter-relationship with State laws – clauses 29, 41, 60

23. Subject to the specific overriding provisions contained in clause 60, the Bill is expressed to not override State and Territory laws. In the interests of a consistent minimum standard and consistently with the model in the *Fair Work Act*, the Bill should expressly state that where State or Territory legislation does not protect religious freedoms to the same extent as this Bill, then the provisions of this Bill should apply.

Human Rights Legislation Amendment (Freedom of Religion) Bill 2019

*Charities Act 2013*

24. **Extend:** Clause 4 would amend section 11 of the *Charities Act 2013* to allow an organisation to undertake advocacy in favour of marriage between a woman and a man, without the organisation being disqualified from being a charity.

   There should also be a similar amendment to section 6 of the *Charities Act* to ensure advocacy for marriage does not contravene the public benefits test.

25. The amendments to the *Charities Act* should protect advocacy of other religious beliefs or activities as well as advocacy in favour of a particular religious belief with respect to marriage.

*Marriage Act 1961*

26. **Add:** Doubt over the application of Section 47(c) of the Marriage Act should be resolved by addition of an express provision to ensure Churches are not obliged to hire out their facilities (halls etc.) for a wedding reception or other purpose associated or in connection with a marriage that is contrary to the doctrines, tenets, beliefs or teachings of the religion concerned.