



AUSTRALIAN  
LAWYERS  
FOR  
HUMAN RIGHTS

PO Box A147  
Sydney South  
NSW 1235  
DX 585 Sydney  
[www.alhr.org.a](http://www.alhr.org.a)

7 January 2022

Committee Chair  
Senate Legal and Constitutional Affairs  
Committee  
PO Box 6100  
Parliament House  
Canberra ACT 2600

By email: [legcon.sen@aph.gov.au](mailto:legcon.sen@aph.gov.au)

Dear Committee

## Religious Discrimination Legislative Package 2021

Australian Lawyers for Human Rights (**ALHR**) thanks the Committee for the opportunity to provide this submission in relation to the the *Religious Discrimination Bill 2021 (the 2021 RDB)*, *Religious Discrimination (Consequential Amendments) Bill 2021* and the *Human Rights Legislation Amendment (Freedom of Religion) Bill 2021*, which we note together are referred to as the “religious discrimination legislative package”. The focus of this submission will be on the 2021 RDB.

ALHR has made previous substantive submissions in relation to the first exposure draft of the *Religious Discrimination Bill 2019* in October 2019 and ‘religious freedoms’ issues in 2018 which form Annexures A, B, C and D to this submission, and on which this submission is also based, as follows:

- Annexure A: Submission dated 31 January 2020 to the Human Rights Unit, Integrity Law Branch on the Second Exposure Draft Religious Discrimination Bill 2019 (RDB), Religious Discrimination (Consequential Amendments) Bill 2019 (RDCAB) and the Human Rights Legislation Amendment (Freedom of Religion) Bill 2019 (HRLAB).

- Annexure B: Submission dated 2 October 2019 to Human Rights Unit, Integrity Law Branch on First Exposure Draft Religious Discrimination Bill 2019 (RDB), Religious *Discrimination (Consequential Amendments) Bill 2019 (RDCAB)* and the Human Rights Legislation Amendment *(Freedom of Religion) Bill 2019 (HRLAB)*
- Annexure C: Submission dated 12 February 2018 to the Expert Panel on Religious Freedom as to *whether Australian law (Commonwealth, State and Territory laws) adequately protects the human right to freedom of religion.*
- Annexure D: Submission dated 19 November 2018 to the Senate Legal and Constitutional Affairs References Committee with reference to the desirability (or otherwise) of *legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff.*

## About ALHR

ALHR was established in 1993 and is a national association of Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and specialist thematic committees. Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.

## Executive Summary - Problems with the legislative package

ALHR would support a Religious Discrimination Act that provides protections against religious discrimination in areas of public life including employment, education, and membership of sporting clubs, in a manner consistent with international human rights law standards and principles.

However, as currently drafted, the focus of the 2021 RDB is the creation of significant rights to discriminate as opposed to enshrining protection against discrimination. The 2021 RDB remains seriously flawed and is significantly inconsistent with Australia's international human rights law obligations and creates an anti-human rights situation whereby all Australians can potentially be harmed by permissible discrimination on the basis of religious faith.

The 2021 RDB does not remedy the significant concerns raised by ALHR in our prior submissions on the first and second exposure drafts. Nor does it address the overarching concerns raised in our 2018 submissions regarding 'religious freedom' issues.

**ALHR submits that the religious discrimination legislative package should be rejected in its entirety.**

The following elements of the **2021 RDB continue** to be of serious concern:

1. Clause 12: "statements of belief";
2. Clauses 7-9: Faith-Based Organisations, especially when considered with s 40(2)-(6);
3. Clause 11: The power of the Attorney-General to override certain State and Territory laws;
4. Clause 12: Preventing action to address serious misconduct;
5. Clauses 5(3), 16(3) and 70: Unprecedented provisions of particular concern;

due to unprecedented provisions that would see the 2021 RDB override other Commonwealth, state and territory anti-discrimination legislation leading to subjugation of rights of vulnerable groups.

ALHR does not believe that Australian society should tolerate every behaviour that is religiously motivated, just by reason of that motivation, and strongly believes that our laws should not protect behaviour that is discriminatory and is likely to most heavily impact already vulnerable groups.

The 'right to believe' is an absolute personal right exercised internally, but there is no absolute right either in international human rights law or as a matter of principle to manifest or act upon one's religious belief externally so as to negatively impact upon others.

**Religious freedom does not mean freedom to visit harm upon others in the name of one's own religion.**

While ALHR welcomes the scaling back of provisions of concern from the first and second exposure drafts, including the the so-called 'Folau clause' and provisions that would have allowed healthcare workers to refuse treatment to people on religious grounds, we remain very concerned by the retention of provisions that will:

- privilege religiously-based discrimination over the rights of others to be free from discrimination;
- **build a fundamental imbalance into our existing anti-discrimination legal system by privileging the rights of one group within society at the expense of everyone else;**<sup>1</sup>
- create unprecedented Commonwealth exemptions in favour of so-called 'religious' statements which will override concurrent and more protective Commonwealth, State and territory anti-discrimination legislation, setting an undesirable precedent; and

- undermine, *inter alia*, Section 18C of the Racial Discrimination Act.

Nor is it clear how the proposed legislation would work in relation to conflicts between, or within, different religions, unlike the situation under a balanced human rights regime. Indeed it may encourage such conflicts by suggesting the existence of absolute rights which formerly would have been seen as needing to be balanced against the rights of others. That necessary restraint has now been removed.

**ALHR's primary concern is that Australian legislation and judicial decisions should adhere to international human rights standards. Human rights laws cannot be selectively applied, they are not divisible nor hierarchical. All human rights are of equal importance and human rights laws can only achieve their objectives if they are applied completely to all human rights. That is not what would occur under the 2021 RDB and religious discrimination legislative package, if passed. The singling out of select human rights for protection with an elevated status above other human rights does not reflect Australia's international legal obligations to protect all human rights equally and fails to take account of the necessary interrelation between all human rights.**

Where State anti-discrimination legislation aligns more closely with international human rights law than the 2021 RDB legislation does, it is particularly objectionable for the Commonwealth legislation to override State human rights protections. This is especially concerning given that the laws being overridden exist to protect some of the most vulnerable and marginalised groups in Australia.

Australia is the only Western liberal democracy without a federal Human Rights Act or Bill of Rights. Australia is bound by the seven core international human rights conventions yet our citizens and residents continue to live without the human rights protections enjoyed by other people in comparable countries across the Western world.

**ALHR submits that the human right to freedom of religion would best be protected by a comprehensive Federal Human Rights Act or Bill of Rights that creates a legislative framework consistent with Australia's international human rights law obligations to protect and respect all human rights equally and balance rights proportionately.**

**The present religious discrimination legislative package should not be passed.**

# 1. International Human Rights Law Principles

## General principles

### 1.1 ALHR recognises and calls the Committee's attention to the following fundamental principles of international human rights law:

- All rights are equally valuable - there is no hierarchy of rights (**the principle of indivisibility**).
- All rights should be protected together (**the principle of interdependence**).
- Any interference with a right must have a legitimate aim - the interference or restriction must be proportionate and necessary (**the principle of proportionality**).

1.2 ALHR supports legislative reform to improve human rights protections in Australia insofar as legislative reform offers protections to all in Australia (or under Australia's protection) who may themselves face discrimination on the basis of their religion. However, the currently proposed legislation is more about giving a right to discriminate than enshrining protection against discrimination.

1.3 It is a core principle of international law that there is no hierarchy of human rights – all human rights are universal, indivisible, interdependent and interrelated. The right to express one's religious beliefs does not "trump" other rights, such as the right to be free from discrimination, but rather must be considered in context. **A secular democratic government should not privilege the right to act on religious views above other human rights.**

1.4 In this regard, where protection is desired for a particular group, it will be relevant to consider the extent to which protection for that group negatively impacts on the rights of others or, conversely, reflects respect for the rights of others.

1.5 Human rights entail **both rights and obligations**. Hence, insofar as any person is entitled to the protection of 'human rights', that person must also respect the human rights of others. A secular democratic government should not privilege the right to act on 'religious' views above other human rights.

1.6 Where protection is desired for particular behaviour it will be relevant to what extent that behaviour reflects respect for the rights of others.

1.7 Protection against behaviour that is inconsistent with our society's norms – and we submit discrimination on the basis of religious beliefs is inconsistent with Australian social norms - must only be granted where the protection also ensures respect for the rights of others. That is not the case with the proposed legislation.

1.8 **ALHR does not support the subjugation of rights of other Australians, especially vulnerable groups in Australia**, including LGBTI Australians, Australian women and Australians with a disability, to the rights of religious Australians.

1.9 The full title of the internationally-recognised right 'to religious freedom' is the right to **"freedom of thought, conscience, religion or belief."** This does not mean 'freedom' to follow only the majority religion or belief, and the right importantly **includes freedom 'from' religion**. This interpretation is confirmed by human rights courts internationally and particularly in Europe. The right means freedom to:

- choose between different religions and beliefs,
- convert between religions and beliefs,

- leave a religion or belief, and

- hold no religion or belief - following on from the logical argument that to have freedom of something you must also be able to be free from that thing or not have that thing (as any other situation would amount to compulsory religion).
- 1.10 Freedom of religion or belief is not limited to traditional religions. It also encompasses agnosticism, atheism, secularism, humanism and other systems of belief which hold to a set of values and principles but would not traditionally be thought of as religions (see paragraph 5.2.7 in Annexure C).
  - 1.11 It must also be recognised that while the right to believe is an absolute personal right which is exercised internally, the right to manifest or act upon one's religious belief externally so as to impact upon others is never absolute. Religious freedom does not mean freedom to visit harm upon others in the name of one's own religion. (This is discussed at paragraphs 6.48 and following, 6.5, 8.4 and 8.5 in Annexure C).
  - 1.12 It is submitted that the balancing of competing rights through a human-rights-based process involving 'reasonable accommodation' is the best method of managing the practical problems resulting from these issues. **There can be no truly free religious life without respect for the freedoms and human rights of others.**
  - 1.13 We refer the Committee to the various resources relating to the international human rights concept of religion referred to at paragraph 3.2 of Annexure C, to the discussion in Section 5 of Annexure C of the relevant international instruments enshrining the right to freedom of religion or belief, and to the discussion in Section 6 of Annexure C of how the human right to freedom of religion intersects with other rights, and indeed should support other rights, not restrict them.

### Practical problems with privileging religious 'rights'

- 1.14 In practice, the beliefs and hence the activities of those of different religions will often conflict, because "each person's religious freedom is dependent on and coextensive with everyone else's religious freedom."<sup>1</sup>
- 1.15 It is unclear how the proposed legislation would work in relation to conflicts between different religions, or conflicts within a particular religion. Indeed the legislation may encourage such conflicts by suggesting the existence of absolute rights which formerly would have been seen as needing to be balanced against the rights of others. That necessary restraint has now been removed.
- 1.16 Freedom of/from religion also involves the principle of equality amongst religions. No religion should be legally privileged above any other religion, nor above secularism, as that would result in inequality, and hence lack of freedom of religion<sup>2</sup>. This principle is particularly important in multicultural Australia.
- 1.17 **ALHR urges the Committee to recommend amendments to the 2021 RDB to avoid the subjugation of the human rights of other groups, particularly including those currently protected under State anti-discrimination laws.**

<sup>1</sup> Dr Luke Beck in *Committee Hansard*, Joint Standing Committee on Foreign Affairs, Defence and Trade, Public Hearing in Sydney, 6 June 2017, p 13, at [http://parlinfo.aph.gov.au/parlInfo/download/committees/commjnt/dffdc74c-afad-4a3b-8bc7-7625b8050249/toc\\_pdf/Joint%20Standing%20Committee%20on%20Foreign%20Affairs,%20Defence%20and%20Trade\\_2017\\_06\\_06\\_5146\\_Official.pdf;fileType=application%2Fpdf#search=%22committees/commjnt/dffdc74c-afad-4a3b-8bc7-7625b8050249/0003%22](http://parlinfo.aph.gov.au/parlInfo/download/committees/commjnt/dffdc74c-afad-4a3b-8bc7-7625b8050249/toc_pdf/Joint%20Standing%20Committee%20on%20Foreign%20Affairs,%20Defence%20and%20Trade_2017_06_06_5146_Official.pdf;fileType=application%2Fpdf#search=%22committees/commjnt/dffdc74c-afad-4a3b-8bc7-7625b8050249/0003%22)

<sup>2</sup> See Dieter Grimm, 'Conflicts between General Laws and Religious Norms', (2009) 30(6) *Cardozo Law Review* 2369, at 2374, <http://cardozolawreview.com/Joomla1.5/content/30-6/GRIMM.30-6.pdf>





- 1.18 It must be remembered that many religions have discriminatory aspects, both in relation to adherents of other religions and in relation to the religion's own adherents. See the discussion on this point in Section 7 of Annexure D. Adherence to a discriminatory religion should not give one the legal right to refuse to interact with others because of those persons' sexual orientation or gender identity, nor to vilify persons because of those persons' sexual orientation or gender identity. Legislation should not privilege the followers of one religion or belief against another, or discriminate between 'religions' or beliefs.
- 1.19 Nor should a secular democratic government privilege the right to act on 'religious' views above other human rights. As Professor Grimm explains:

*" ... self-determination of religious communities as to the content and requirements of their religion does not mean that the state has to tolerate every behaviour that is religiously motivated. .... Since the transcendent truths or divine revelations that religious groups claim to practice mutually exclude each other, the state must respect a group's creed, but prevent the group from making it binding for society as a whole."<sup>3</sup>*

- 1.20 In the view of ALHR, the promotion of other human rights in addition to the right to freedom of 'religion', and a more nuanced view of the accommodations that need to be made between competing human rights, can better assist Australian society. **A federal Human Rights Act is the appropriate legislative vehicle to achieve this result.**

## 2. Groups Affected by the 2021 RDB

- 2.1 Every Australian is potentially affected by the **2021 RDB**, however ALHR has significant concerns regarding its direct adverse impact upon children, women, people with disabilities, LGBTIQ+ people, racial, culturally and linguistically diverse people, single parents, de facto couples, divorced people, and people without any religious beliefs.
- 2.2 **Not only does the 2021 RDB seek to override state and territory protections against discrimination on the grounds of disability, gender, sexual orientation, gender identity, intersex variations of sex characteristics, race, age and all other protected characteristics or attributes, clause 12(1)(b) is drafted to specifically override a Tasmanian law (s 17(1)(a)-(s) of the *Anti-Discrimination Act 1998 (Tas)*) that prohibits offensive, humiliating, intimidating, insulting or ridiculing conduct on the basis of an attribute protected by s 16 of that Act.**
- 2.3 Given that the rights of so many Australians, including vulnerable Australians, are adversely affected by this proposed law, the Committee is asked to consider the relevant international instruments and principles that apply to each of the above groups and also to the protection of all human rights, noting that (as discussed in more detail in Section 8 of Annexure C) there is no 'right of conscientious objection' under human rights law for persons holding discriminatory 'religious' beliefs.

### 3. The 2021 RDB: Protections and Problems

#### Key Concerns

- 3.1 ALHR would strongly support a law that sought to protect the right of all in Australia (and under Australia's protection) to freedom of thought, conscience, religion or belief while also protecting and respecting other human rights.
- 3.2 However, ALHR is very concerned that the 2021 RDB continues to fail to adhere to the principles of indivisibility, interdependence and proportionality of human rights including by:
  - privileging religious expression (“**statements of belief**”) more broadly, where that expression has the potential to cause harm to other vulnerable groups
  - removing human rights protections previously provided under state and territory law
  - allowing and encouraging discrimination on the basis of characteristics or attributes that are otherwise recognised under international law as deserving of equal protection, and which but for the 2021 RDB would be protected under state and territory law, to instead prefer the religious beliefs and ‘published policies’ of the discriminator, including in education and employment.

#### “Statements of Belief”

- 3.3 Pursuant to clause 12 of the 2021 RDB every Australian, whether at work, school, or accessing goods and services such as healthcare or public transport may be legally subjected to offensive, uninformed, insulting, demeaning or damaging ‘statements of belief’ as long as those statements are based on or in religion and made in ‘good faith’.
- 3.4 **The "good faith" test established under 2021 RDB is more extreme than in the previous exposure drafts. It is now entirely subjective.** Previously, it was a requirement of the test that statements of belief made in “good faith” must be reasonably regarded as being in accordance with the doctrines, tenets, beliefs or teachings of their particular religion. This objective element of the test has been removed.
- 3.5 If the 2021 RDB is passed, it will be legally permissible for a person to say harmful things, which may have previously been determined to amount to discrimination on the basis of race, sex, age, disability or other status under existing Commonwealth, state and territory laws, provided their statement is made in ‘good faith’. ALHR is concerned that this will create a landscape in Australia where, for example, comments from a manager to a female employee that “women should not hold leadership positions” or comments from a doctor to a patient that “HIV is a punishment for sin” or comments to a student that “disability is the work of the devil” may be legally protected ‘statements of belief’.
- 3.6 Human rights groups and individuals in Australia have long fought to have the principle of non-discrimination in Article 26 of the **ICCPR** enshrined in law. Pursuant to Article 26, the law of Australia, as a signatory state, is to *prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*. Pursuant to Article 2(1) of the **ICCPR**, all individuals within the territory of Australia, as a State Party to the ICCPR, undertake to recognise and ensure all individuals are afforded the rights recognised in the ICCPR without distinction of *any kind such as race, colour, sex, language, religious, political or other opinion, national or social origin, property,*

*birth or other status*. ALHR submits that clause 12 of the 2021 RDB flies in the face of these key pillars of international human rights law.

- 3.7 Where state anti-discrimination legislation aligns more closely with international human rights law than does the proposed Commonwealth legislation, ALHR submits it is particularly objectionable for the Commonwealth legislation to override State human rights protections. This is unprecedented in Australian legal history.
- 3.8 In Tasmania, the parliament, informed by international human rights principles, passed laws offering the widest protection in the country against conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of a range of attributes set out in s 17(1) of the *Anti-Discrimination Act (Tas) 1998*. Included amongst the attributes protected are race, sexual orientation, gender, gender identity, disability, religious belief or affiliation and religious activity.
- 3.9 However under the 2021 RDB, protections against conduct which offends, humiliates, insults or ridicules will no longer be afforded to those formerly protected groups where that conduct is a 'statement of belief' and where that statement is made in good faith and the maker genuinely considers it to be in accordance with the doctrines, tenets, beliefs or teachings of his, her or their religion.
- 3.10 Moreover, the 2021 RDB will override existing Commonwealth anti-discrimination protections such as the Commonwealth *Racial Discrimination Act 1975*. Clause 12 of the 2021 RBD expressly provides that 'a statement of belief, in and of itself' does not constitute discrimination for the purposes of...the *Racial Discrimination Act 1975*'.
- 3.11 **The broad and radical way in which the 'statement of belief' provisions have been drafted would therefore create a law that protects at least some religiously-motivated racist comments.** Therefore 2021 RBD is designed to permit comments that would otherwise be in breach of the *Racial Discrimination Act 1975*, as long as those comments are religiously-motivated. Religious beliefs do not justify racism. This again reflects the 2021 RBD's extreme elevation in status of so-called religious freedoms, subjugating all other human rights.
- 3.12 Clause 12 of the 2021 RBD would also override the *Disability Discrimination Act 1992*, meaning religiously-motivated ableist 'statements of belief' will also be protected, including:
  - denigration of people with disabilities;
  - declaring that disability is a sign of demonic possession;
  - declaring that disability is the wages of sin or deserved disfavour;
  - incitement to others to discriminate against people with disabilities;
  - incitement to others to exclude people with disabilities from religious observance or participation;
  - incitement to others to commit summary offences (offences for which a monetary penalty or less than two years imprisonment is prescribed) against people with disabilities.
- 3.13 This creates a situation where some of the most vulnerable people in our Australian community including racial minorities, LGBTIQ+ people, women, people with disability or chronic illness, single parents, people of minority faiths or of no faith will have less protection from harmful discrimination.
- 3.14 While clause 12(2) specifies that 'statements of belief' which are malicious, that harass, threaten, intimidate or vilify, or which encourage serious offences will not be protected under

the 2021 RDB, ALHR is very concerned that this subsection lacks clarity in its application. The extent to which a 'statement of belief' is or is not malicious or would be considered to harass, vilify or incite hatred, violence or incite a serious crime against a person or another group of persons will only be known after costly litigation is brought in the Federal Court to test the interpretation of the provisions. Further, the 2021 RDB will create a significant barrier to access to justice for vulnerable people who will be forced into such expensive litigation if they wish to pursue a complaint regarding discriminatory 'statements of belief'.

- 3.15 The limited protection afforded by clause 12(2)(c) seems to give licence to religious (or anti-religious) bigots to incite criminal conduct as long as it does not constitute a serious offence. For example, clause 12 may read as protecting a 'statement of belief' that urged or encouraged others to deface a shrine or public monument or damage a grave, which offences are summary offences carrying a fine of 40 penalty units under s 8 *Summary Offences Act 1988* (NSW) and therefore not within the 2021 RDB definition of serious offences.
- 3.16 It is also unclear how such a national law would work when local laws about criminal penalties for harmful conduct may differ. Is a statement not protected because it would incite conduct that is a serious offence in one state but not others? Is a statement protected until it is read by one person in that state ?
- 3.17 ALHR submits that this is a totally unsatisfactory situation. Purported 'good faith' is no reason to permit the expression of harmful discriminatory statements or to incite criminal conduct. The 2021 RDB will make it easier to make comments that "offend, humiliate, insult, ridicule or demean" minorities with impunity and incite criminal conduct against them.

#### Faith-Based Organisations

- 3.18 Pursuant to clauses 7-9 of the Bill, faith-based hospitals, aged care facilities, accommodation providers and disability service providers will be able to discriminate in incredibly broad and unjustified ways against people with different or no religious beliefs in employment. The combined impact of sections 7-8 and 40(2)-(6) means that for schools, charities and non-commercial bodies this protection will extend beyond employment to also permit discrimination in education and the delivery of certain services.
- 3.19 The 2021 RDB allows religious schools to prescribe their positions on religious matters in policies and prefer people for employment on that basis, overriding protections in state and territory laws.
- 3.20 Clause 11 of the 2021 RDB will empower the Commonwealth Attorney General to make regulations that override state and territory regulations that seek to narrow the above mentioned new *freedoms to discriminate* that this Bill would establish. ALHR submits that measures which override human rights protections (which we deplore) should go before the parliament, if they are to happen at all.
- 3.21 In establishing such broad exemptions the Bill elevates the right of faith-based organisations to discriminate above other rights to non-discrimination even where:
  - the services provided by such an organisation are taxpayer-funded, for example, providing domestic violence, mental health or homelessness services;
  - the services provided are a substitute for service delivery by the government, which has out-sourced its responsibilities;
  - the organisation is a large or major employer in the service area;
  - an individual is a member of the same faith but differs in their interpretation of doctrine, such as believing in divorce or same sex marriage; and

- religious beliefs have no direct relevance to the service.

3.22 ALHR submits that this is entirely unacceptable. **Faith-based organisations should abide by the same laws as everyone else in Australia and should not be immune from state, territory and Commonwealth laws of general application.**

### Preventing action to address serious misconduct

- 3.23 Clause 15 of the 2021 RDB would significantly inhibit employers and bodies that confer professional qualifications in sectors such as law or medicine, from responding reasonably to members who make offensive, uninformed, insulting, demeaning or damaging statements based in religion outside of work contexts, even if such statements might be considered disgraceful conduct by peer professionals.
- 3.24 Pursuant to clause 15, qualifying bodies may only take disciplinary action against members where the statement of belief is malicious or likely to threaten, harass or vilify a person. This section ignores the reality that offensive, uninformed, insulting, demeaning or damaging statements based in or about religion made outside work contexts may still significantly undermine public confidence in the profession or harm colleagues and clients within that profession, and be particularly harmful to vulnerable communities.
- 3.25 ALHR echoes the concern expressed by other legal interest groups, that this section has the potential, in particular, to undermine the paramount duty of legal practitioners to the administration of justice (see: rule 3.1 of the Australian Solicitors Conduct Rules and rule 4(a) of the Australian Barristers Conduct Rules). For example, public confidence in the administration of justice may be undermined where a member of the legal profession makes personal and public statements of belief that are contrary to and critical of a judicial decision in terms that exceed legitimate professional discussion.
- 3.26 Legal practitioners agree to be bound by conduct rules on their admission to the profession and it is entirely appropriate that qualifying bodies be able to properly investigate and impose disciplinary sanctions for breaches of those rules.

### Unprecedented provisions of particular concern

- 3.27 In addition to the unprecedented way in which the 2021 RDB will override existing Commonwealth, state and territory anti-discrimination laws, there are several further measures within the Bill that are unusual and without precedent.
- 3.28 Clause 5(3) of the 2021 RDB protects religious activities that contravene local government by-laws. Again illustrating the Bill's unprecedented preferencing of religious rights over other laws and by-laws.
- 3.29 Clause 16 protects 'persons', including corporations and body corporates, associated with individuals who hold or engage in a religious belief or activity.
- 3.30 The operational effect of section 16(3) is of particular concern to ALHR as it will allow corporations to sue if they suffer detriment, such refusal of goods or services like facilities or accommodation, because of a close association with a person who holds or does not hold a religious belief. ALHR notes here that section 70 extends liability under the Bill to anyone who is directly or indirectly 'knowingly concerned' in religious discrimination.
- 3.31 The limited exception in s 35(1)(b) would prevent a person from refusing goods or services to a person, for example, if the person expressed a religious belief that might reasonably be considered counselling or urging the commission of a summary offence against the provider

of the goods or services or other vulnerable persons. For example:

- a conference venue could be sued for refusing to lease a speaking venue to a religious leader or group that promoted the commission of summary offences against First Nations or people of colour as tenets of their religion;
- a local newspaper could be sued for refusing to accept advertisements for a rally of religious adherents that promoted the desecration of war memorials in NSW as a demonstration of faith;
- an internet publisher could be sued for blocking or refusing to permit online publication of religious views that promoted summary offences against women as punishment for wearing clothing or engaging in work or social activities deemed by the religion to be inappropriate.

ALHR submits that this section is another example of the 2021 RDB prioritising religious rights over other rights and laws. It should not be unlawful that in circumstances where a person closely affiliated with a corporation makes a statement of belief that is hateful, disparaging, offensive or bigotted, that other individuals and businesses that do not share the same beliefs may seek to distance themselves or otherwise demonstrate their disagreement in support of those persons and groups impacted by the statement. Section 16, in its current form, would expose those individuals or businesses to complaints of direct discrimination for acting in support of marginalised and vulnerable groups.

## 4. Where Rights Compete: What Should Prevail?

### The balancing of indivisible and interdependent human rights

4.1 International human rights law has developed a process or set of principles by which conflicts between different rights can be managed, both within the realm of human rights alone and in relation to external issues. As mentioned, when it comes to the right to religious belief and the right to participate in religious activity as might be protected by the 2021 RDB, it is important to differentiate between:

- The internal **right hold a belief** (the right to freedom of thought, conscience and religion); and
- The external **right to manifest that belief**.

4.2 The internal right to a belief is absolute – the right to hold a personal belief cannot be restricted in any circumstances. The right to manifest one’s religious belief externally within society can however be restricted if the restriction is necessary for the protection of public safety, public health or morals or for the protection of rights and freedoms of others and must be balanced against those other rights, including the right to be free from discrimination. To quote the current UN Special Rapporteur on Freedom of Religion and Belief:

*Freedom of religion or belief is interwoven with the core principles of equality, non-discrimination and non-coercion and overlaps with other rights, including the rights to freedom of opinion and expression, peaceful assembly and association, and education. It must, therefore, be understood in the context of articles 18 to 20 and be read together with core principles enunciated by articles 2 and 5 of the International Covenant on Civil and Political Rights. An abuse of one right can be an obstacle to the enjoyment of all the others.*<sup>4</sup>

---

<sup>4</sup> Shaheed A/72/365 Interim Report: Elimination of all forms of religious intolerance (2017) par 46  
<https://digitallibrary.un.org/record/1305380?ln=fr>

## Rights must be balanced where they conflict

- 4.3 In general terms, no human right 'trumps' any other right – all are equally valuable (the principle of indivisibility) and should be protected together (the principle of interdependence).
- 4.4 Some rights are expressed as absolutes, such as the right to be free from slavery, torture, cruel or inhuman or degrading punishment or treatment, or arbitrary deprivation of life, and the right to recognition as a person in law.<sup>5</sup>
- 4.5 Subject to those absolutes, all rights must be balanced where they conflict so as to maximise the practice of other rights to the greatest possible extent, in 'an atmosphere of mutual consideration'<sup>6</sup> and so as to 'ensure that none is inappropriately sacrificed'.<sup>7</sup> This is sometimes described as a process of providing reasonable accommodation to other rights and other persons: 'a fair balance needs to be struck between the rights of the individual and the rights of others.'<sup>8</sup> This is similar to the test of proportionate response to the harm in question which is generally used to assess whether or not legislation or policy is too wide in its scope.

## Taking account of context and other values

- 4.6 The balancing and reasonable accommodation tests are very much dependent upon context and cannot be used in the abstract. They may also need to call upon other rights and other values (such as reasonableness or proportionality).
- 4.7 Human rights can validly be restricted if the restriction is prescribed by law and is necessary for the protection of public safety, public health or morals or for the protection of the rights and freedoms of others.

## The good faith of those seeking protection

- 4.8 Human rights entail both rights and obligations. Where protection is desired for particular behaviour it will be relevant to what extent that behaviour reflects respect for the rights of others. Generally, behaviour should not be protected by Australian law, nor advocated by policy, where that behaviour itself infringes other human rights.
- 4.9 In balancing the competing claims, it is important to minimise any negative impact; to impinge as little as possible upon other rights.
- 4.10 That is, where there is a conflict between human rights and other interests it may be necessary to limit or constrain the other interests if they are to be implemented in a way that limits the free exercise of human rights.

---

<sup>5</sup> See generally Attorney-General's Department Public Sector Guidance Sheet: Absolute rights at <https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Absoluterights.aspx>

<sup>6</sup> Grimm, op cit, 2382.

<sup>7</sup> Alice Donald and Erica Howard, The right to freedom of religion or belief and its intersection with other rights, ILGA-Europe Research Paper, 2015, p i available at: <[https://www.ilga-europe.org/sites/default/files/Attachments/the\\_right\\_to\\_freedom\\_of\\_religion\\_or\\_belief\\_and\\_its\\_intersection\\_with\\_other\\_rights\\_0.pdf](https://www.ilga-europe.org/sites/default/files/Attachments/the_right_to_freedom_of_religion_or_belief_and_its_intersection_with_other_rights_0.pdf)>.

<sup>8</sup> Ibid, p i.

## 5. Conclusion

- 5.1 Any legislation which impinges upon human rights must be narrowly framed, proportionate to the relevant harm, and provide an appropriate contextual response which minimises the overall impact upon all human rights, democracy and the rule of law. The 2021 RDB still fails this test. The religious discrimination legislative package remains seriously flawed and is inconsistent with Australia's international human rights law obligations. ALHR submits that the religious discrimination legislative package should be rejected in its entirety.
- 5.2 Australia's international human rights treaty obligations should be enshrined in Commonwealth legislation. ALHR submits that this cannot be done on a piecemeal basis and we are concerned that the proposed legislative framework which singles out only select human rights for protection does not reflect Australia's international legal obligations to protect other human rights equally. The rights contained in Article 18 of ICCPR which establish the right to freedom of thought, conscience and religion, are not superior to other human rights and freedom of religion is only one aspect of that right.
- 5.3 There is no hierarchy of human rights. Human rights laws cannot be selectively applied. As noted earlier in this submission, fundamental principles of international law clearly establish that human rights are indivisible, interdependent and interrelated. They come as a package. All human rights are of equal importance and human rights laws can only achieve their objectives if they are applied completely to everyone and with interconnection.
- 5.4 It is ALHR's submission that the appropriate balance between freedom of/from religion or belief and other freedoms would best be served by adoption at the federal level of a Bill of Rights or Human Rights Act that was consistent with international human rights law.
- 5.5 In 2008, the National Human Rights Consultation Committee recommended the Federal Parliament adopt a Human Rights Act similar to legislation in place in Victoria and the ACT. In 2019, Queensland passed a Human Rights Act. Thirteen Years later, Australia continues to lag behind the rest of the world at a federal level.
- 5.6 **We would be happy to provide further submissions and oral evidence on the form that this legislation should take.**

**Kerry Weste**

**President**

[Australian Lawyers for Human Rights](#)

[president@alhr.org.au](mailto:president@alhr.org.au)



## **Annexure A**

Submission dated 31 January 2020 to the Human Rights Unit, Integrity Law Branch on the Second Exposure Draft Religious Discrimination Bill 2019 (RDB), Religious Discrimination (Consequential Amendments) Bill 2019 (RDCAB) and the Human Rights Legislation Amendment (Freedom of Religion) Bill 2019 (HRLAB)

## Annexure B

Submission dated 2 October 2019 to Human Rights Unit, Integrity Law Branch on First Exposure Draft Religious Discrimination Bill 2019 (RDB), Religious *Discrimination (Consequential Amendments) Bill 2019 (RDCAB)* and the *Human Rights Legislation Amendment (Freedom of Religion) Bill 2019 (HRLAB)*

## **Annexure C**

Submission dated 12 February 2018 to the Expert Panel on Religious Freedom as to *whether Australian law (Commonwealth, State and Territory laws) adequately protects the human right to freedom of religion*

## Annexure D

Submission dated 19 November 2018 to the Senate Legal and Constitutional Affairs References Committee with reference to the desirability (or otherwise) of *legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff*