

21 August 2020

Kingsford Legal Centre

Submission to the inquiry into the *Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020*

We thank the Committee for the invitation to make a submission to the inquiry into the
(the Bill).¹

Summary of recommendations

Our recommendations are as follows:

1. The Bill, in its current form, should not be passed;
2. There should be a collaborative process to set up a consistent national framework for discrimination protection. The framework should have the highest standard of protection across all protected attributes and should include strong protections against religious discrimination;
3. Remove the reference to article 18(3) of the International Covenant on Civil and Political Rights (**ICCPR**) from the Bill and introduce a Human Rights Act to provide comprehensive protection for human rights, including the right to freedom of religion;

9. Remove specific provisions for the wearing of religious symbols or religious

We are part of the UNSW Sydney Law Faculty and provide clinical legal education to over 500 of its students each year. KLC has been part of the south-east Sydney community since July 1981.

Jake's story⁷

Jake is a student at a Catholic high school. He believes that he is being treated unfairly because he is not Catholic. Jake was not allowed to attend overseas trips with the school, and his nomination for the Student Representative Council was removed by the school. We advised Jake that a discrimination complaint would be unlikely to succeed, as religion is not a protected attribute in discrimination law.

Ali's story

Ali is a young Muslim man in prison. He was given external leave to undertake studies at an educational institution. At the educational institution, Ali regularly prayed in outdoor areas. He was told he was not allowed to pray there. When he continued to pray, Ali's education leave was cancelled, and he was not allowed to continue his studies. This caused significant distress to Ali and his family.

We advised Ali that he would not be able to successfully make a discrimination complaint, as the law does not protect a person from discrimination on the basis of their religion. The lack of legal protections in NSW and at the federal level meant that Ali couldn't access his right to education or freedom of religion.

Recommendation 1: The Bill, in its current form, should not be passed.

Recommendation 2: There should be a collaborative process to set up a consistent national framework for discrimination protection. The framework should have the highest standard of pr

Section 3 – Principles

Section 3 conflates the rights to freedom of religion and freedom from discrimination on the ground of religion.⁹ Although the two rights are closely related, the distinction between them is important, as there are different legal principles for interpreting and applying the two rights. Conflating the two rights would limit the usefulness of existing legal guidance on how the two rights work in practice and introduce significant confusion into NSW discrimination law.

Australian jurisdictions with a Human Rights Act have distinct protections for the rights to freedom of religion and freedom from discrimination on the ground of religion.¹⁰ That approach is more appropriate and has greater consistency with existing human rights principles. A Human Rights Act for NSW could provide comprehensive protection for human rights, including the right to freedom of religion. This would recognise the equal status of all human rights and provide an effective, unified framework for resolving the difficult questions that inevitably arise when there is a tension between rights.

Recommendation 3: Remove the reference to article 18(3) of the ICCPR from the Bill and introduce a Human Rights Act to provide comprehensive protection for human rights, including the right to freedom of religion.

often be difficult or impossible to disprove that a person genuinely holds a belief,

Rohan's story

Rohan was a temporary teacher at a Catholic school. He was not religious and did not attend mass. Other staff made negative comments about this. Rohan missed out on a

Section 22U – Genuine occupational requirement

The definition of 'genuine occupational requirement' is too broad, encompassing activities

Recommendation 12: The exception for religious ethos organisations from State laws and programs in section 22Z should be removed.

Section 126 – Granting of exceptions by the President

Section 126 is a clear example of the Bill creating an exceptional regime for religious discrimination. Section 126 should apply to religious discrimination in the same way as all other forms of discrimination.

Recommendation 13: The amendment of section 126 should be removed.

Recommendations relevant to NSW from the Expert Panel Report: Religious Freedom Review (2018)

We have included comments on recommendations relevant to NSW from the Expert Panel Report: Religious Freedom Review (2018) (**Expert Panel Report**) in the table at **Annexure A** of the present submission.

Interaction between Commonwealth and NSW anti-discrimination laws

The interaction between Commonwealth and NSW anti-discrimination laws is extremely complex. There are significant overlaps and differences between the two bodies of law, such that the same conduct may be considered unlawful discrimination under one body of law, but not the other. Both bodies of law generally apply to people in NSW. Commonwealth and NSW anti-discrimination laws further interact with anti-discrimination laws in other States and Territories, and other areas of law, including employment law, tenancy law and consumer law. These interactions between laws create significant challenges for community members in identifying their rights and responsibilities. There would be significant benefits for all parties in simplifying and unifying discrimination law. A collaborative national process could produce a single Equality Act, providing unified protection for protected attributes across all Australian jurisdictions.

While there are benefits to consistency across jurisdictions, this should be appropriately implemented. In particular, consistency should provide the highest standard of protection across all protected attributes. It should not be used as a cover to weaken discrimination protection.

Recommendation 14: A collaborative nati

We have 3 partly overlapping law reform processes proceeding in parallel, without proper coordination between them: the NSW Bill, the Commonwealth Bill and the ALRC inquiry. This is an inefficient approach to reform that drives further complexity and fragmentation in Australian discrimination law. Rather than governments in different jurisdictions undertaking multiple partly-overlapping reform processes, there should be a collaborative process to set up a consistent national framework for discrimination protection (as recommended above).

Funding for the Anti-Discrimination Board NSW

The creation of a complex, new legal regime for religious matters would significantly increase the workload of the Anti-Discrimination Board (**ADB**), which would have a key

need,¹⁸ which is worsening as support measures are cut. The recent commitment of \$15.6 million for NSW's legal assistance sector will be of great help in responding to the immediate legal need as a result of COVID-19.¹⁹

The Bill would significantly increase the number of people in need of legal help. This would

Annexure A – Recommendations relevant to NSW from the Expert Panel Report

	Recommendation from the Expert Panel Report	Comments
1	Those jurisdictions that retain exceptions or exemptions in their anti-discrimination laws for religious bodies with respect to race, disability, pregnancy or intersex status should review them, having regard to community expectations.	The NSW Government should narrow the Act’s exceptions or exemptions for religious bodies with respect to all protected attributes. ²⁰
2	Commonwealth, State and Territory governments should have regard to the (Siracusa Principles) when drafting laws that would limit the right to freedom of religion.	Governments should generally have regard to international human rights law when drafting laws. We note that the ICCPR has a higher status than the Siracusa Principles and that the Siracusa Principles apply to all rights in the ICCPR.
3	Commonwealth, State and Territory governments should consider the use of objects, purposes or other interpretive clauses in anti-discrimination legislation to reflect the equal status in international law of all human rights, including freedom of religion.	The words ‘including freedom of religion’ should generally be omitted from such clauses, as specifying only one right is inconsistent with reflecting the equal status of all human rights.
6	Jurisdictions should abolish any exceptions to anti-discrimination laws that provide for discrimination by religious schools in employment on the basis of race, disability, pregnancy or intersex	The NSW Government should abolish exceptions from discrimination 8(ne)11.81 tt,9i76 dgicw.8

status. Further, jurisdictions should ensure that any exceptions for religious schools do not permit discrimination against an existing



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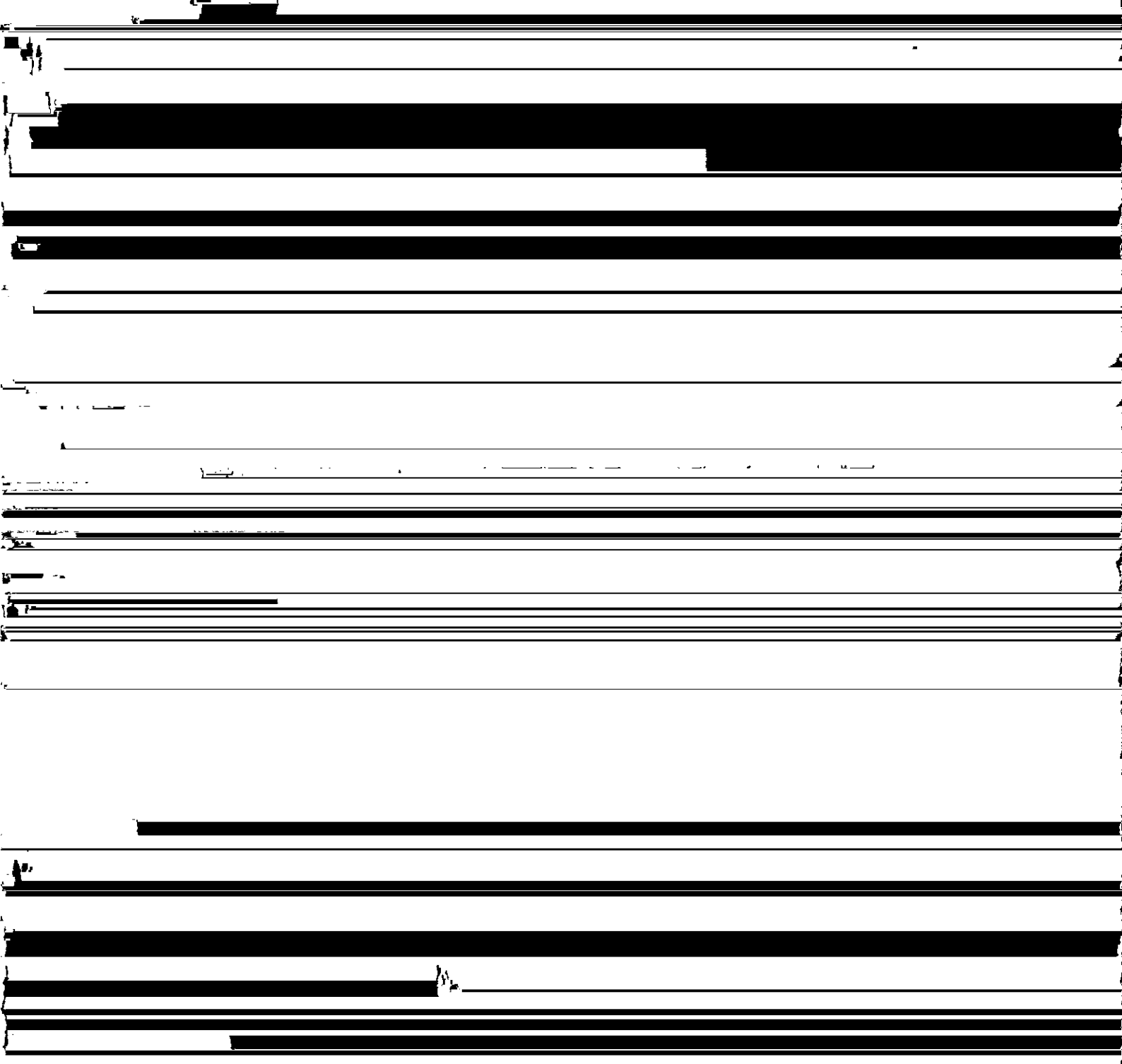
31 January 2019

Kingsford

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Religious bodies

KLC maintains that the government should make laws to protect people from religious



balancing of rights if clause 11(3) were narrowed to align with the more limited exception
in section 27 of the SDA. It would also better reflect human rights principles if exceptions

from discrimination protection required consideration of reasonableness, necessity,
proportionality and legitimacy of aims.

Religious hospitals, aged care and accommodation providers

Religious camps and conference sites

conference sites in clauses 33(2)–(5) of the Bill. These unique exceptions add unnecessarily to the complexity of discrimination law.

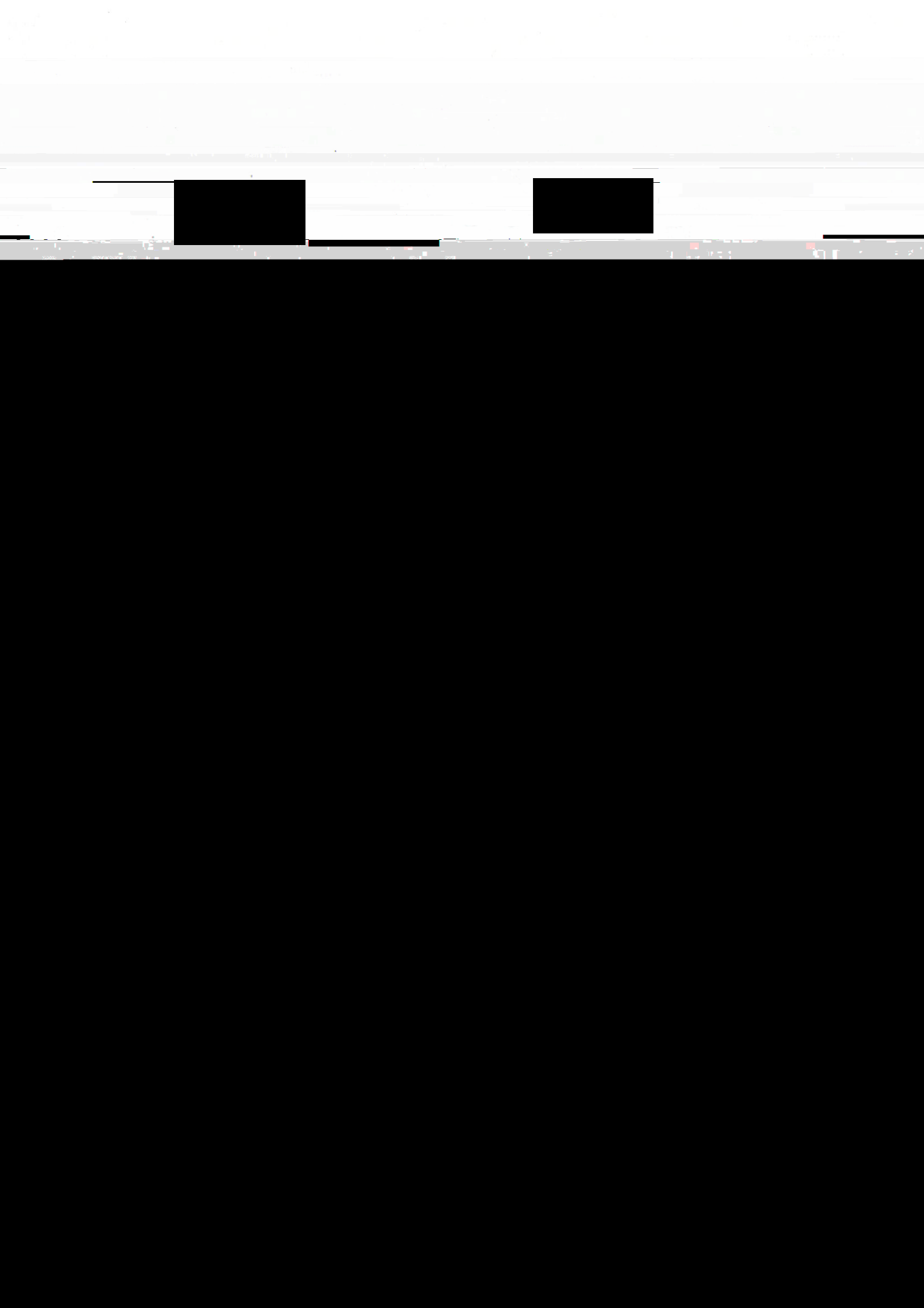
are making a conscientious objection and give patients appropriate referrals

Definition of "vilify"

Bill has introduced another new legal test, further fragmenting and complicating discrimination law. Rather than creating new legal tests for religious discrimination, it

religion.

This broader test worsens the problems that were present in the first exposure draft. It takes the test in the Bill further away from the test in section 37 of the Bill and further away from a requirement that conduct actually be in accordance with a given religion. The test is of an uncertain scope, creating difficulties for community members in knowing their rights and responsibilities. It is unclear how a person could get appropriate evidence of





About Kingsford Legal Centre

KLC is a community legal centre which has been providing legal advice and advocacy to people in need of legal assistance in the Randwick and Botany Local Government areas

discrimination and other human rights issues.

KLC has a specialist discrimination law service (NSW wide), a specialist employment law service and an Aboriginal Access Program. In addition to this work, KLC also undertakes

Maintaining the correct balance in discrimination law

KLC has been advised that there is no domestic protection for students in NSW

religious discrimination in Australia. This is exacerbated in NSW where there is insufficient coverage at the state level.¹ KLC has extensive experience providing legal advice to

The creation of broad exceptions has the effect of reducing discrimination protection in other areas and for groups vulnerable to discriminatory practices and conduct. KLO is

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

'goods and services' and 'accommodation'. This process would have significant cost benefits in reducing the complexity of the differing legal tests, would allow an opportunity

Recommendations

4. Australia adopt an Equality Act, with harmonised tests across attributes;

For the alternative clause 9 (2)(d) of the Bill to be removed to ensure

consistency with the SDA

attributes of age, sex, sexual orientation, gender identity, intersex status, marital or

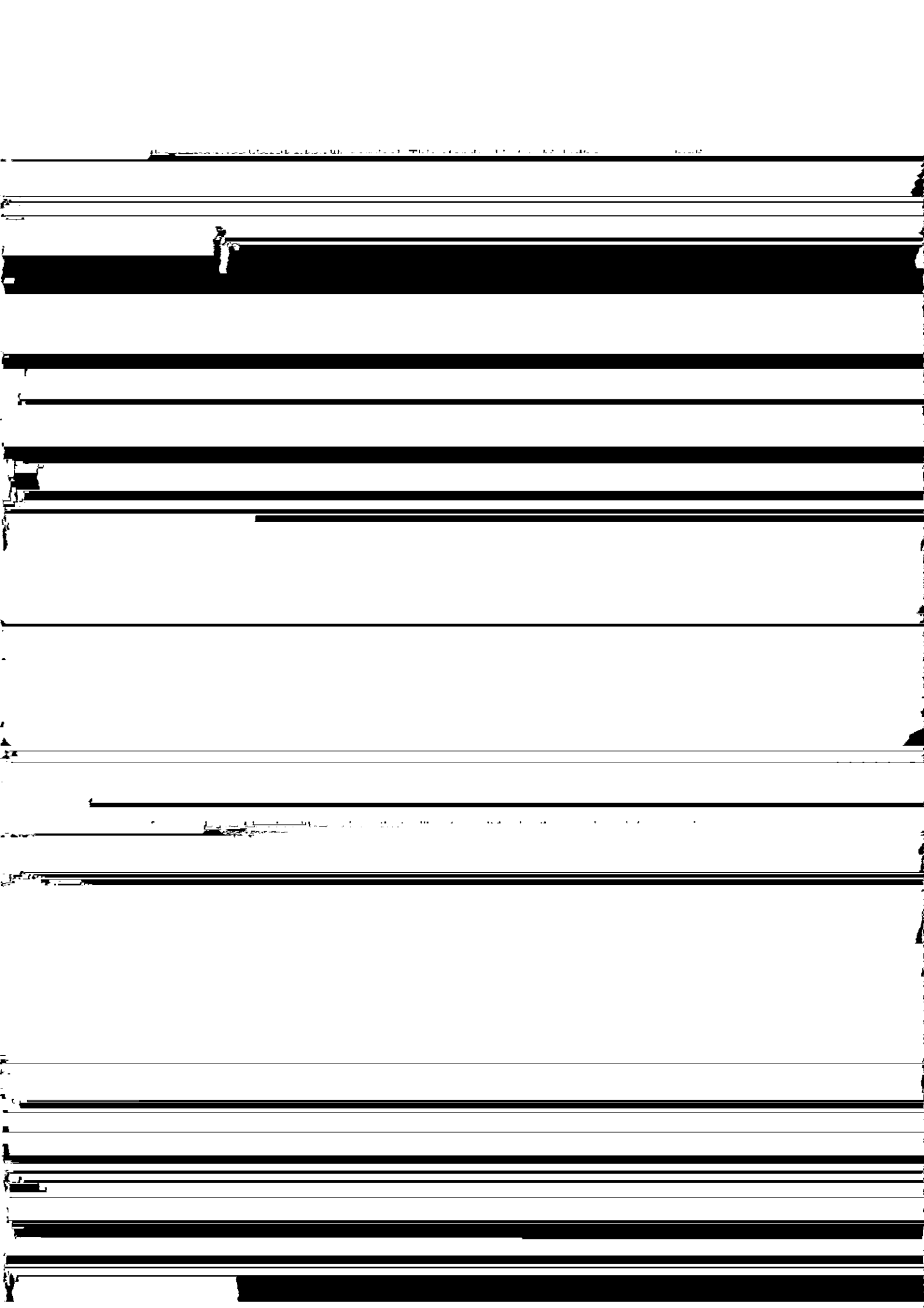
Statements of Belief – Clause 41

KLC believes that a starting point for addressing discrimination is that the Bill should not erode current discrimination law protections. However, the proposed Bill and clause 41 specifically outlines that it will override other State and Territory discrimination law

of options for people who experience discrimination and will erode rather than increase discrimination protection overall. It has always been the case that individuals who have experienced discrimination have a range of state based and federal laws, and this

for an employer exceeding \$50 million revenue. This is a high threshold for relevant employers to meet, and will restrict their ability to implement diversity and inclusion policies that prohibit statements of belief that would offend, insult, humiliate or

sets the wrong message in relation to all employers about the importance of ensuring



Rights Institute et al v. 13 KLC notes that there are other significant areas of...
that do not have a standard...
Freedom Commissioner
Recommendation:
12. That the Attorney General's Department
Australian Human Rights Commission

Yours Sincerely,
KINGSFORD LEGAL CENTRE

Eleanor Holden
Director

Emma Colledge
Solicitor

¹³ Committee on the Elimination of Discrimination against Women, Concluding observations on the eighth periodic report of Australia, UN Doc CEDAW/C/AUS/CO/8 (25 July 2018) 17.



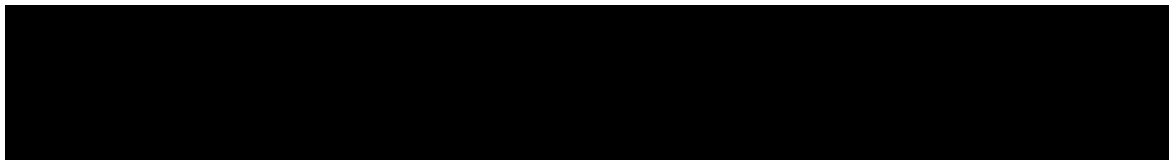
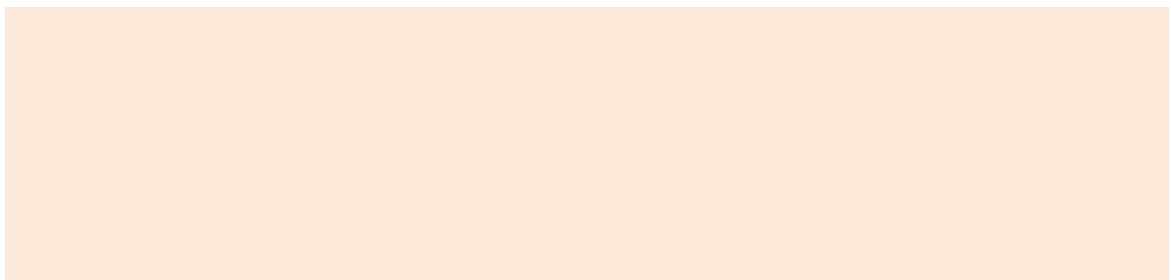
Submission to the Religious Freedom Review

KLC

NACLC

CLCNSW

Summary of recommendations



About KLC, CLCNSW and NACLC



Freedom of Religion under Australian Law

SDA

