Anglican Church Diocese of Sydney

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NSW Office of the Children's Guardian
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By email: policyteam@kidsguardian.nsw.gov.au

Submission on the Exposure Draft of the Children's Guardian Amendment (Child Safe Scheme) Bill 2020

1. This submission is on behalf of Anglican Church Diocese of Sydney (the Diocese). The Diocese is one of twenty three dioceses that comprise the Anglican Church of Australia. The Diocese is an unincorporated voluntary association comprising 270 parishes and various bodies constituted or incorporated under the Anglican Church of Australia Trust Property Act 1917 (NSW) and the Anglican Church of Australia (Bodies Corporate) Act 1938 (NSW). These bodies include 40 Anglican schools, Anglicare Sydney (a large social welfare institution, which includes aged care), Anglican Youthworks and Anglican Aid (which focusses on overseas aid and development). The Diocese, through its various component bodies and through its congregational life, makes a rich contribution to the social capital of our State, through programs involving social welfare, education, health and aged care, overseas aid, youth work and not least the proclamation of the Christian message of hope for all people.

2. The Anglican Church in the Diocese of Sydney is committed to, and well progressed in, the implementation of the Child Safe Standards proposed by the Royal Commission (recommendations 6.5 and 6.6), to ensure that our churches and institutions are safe places for children and young adults.

3. We strongly support the work of the OCG in making child safety a priority. We support making the implementation of the child safe standards mandatory for organisations in a manner that is consistent with the recommendations of the Royal Commission. However the Bill does not do that; it has a number of significant short-comings. It should not proceed in its current form. Our concerns are set out in detail below.

4. We note the submission made by Freedom for Faith in respect to the Bill. We agree with the concerns raised by Freedom for Faith and endorse its recommendations.

GUIDELINES

5. Our organisation has worked closely with the NSW Office of the Children's Guardian (OCG) over several years in relation to the implementation of Child Safe Standards in Faith Organisations. The OCG publication Implementing the Child Safe Standards: A Guide for Faith-Based Organisations seeks to showcase what a number of faith-based organisations are already doing to implement the Child Safe Standards, to provide examples for other like organisations. See, for example, our Safe Ministry Blueprint for Parents and Churches, which is referenced on page 17.

6. However, our participation in the process of preparing this Implementation Guide should not be taken as an endorsement of all of the material in the booklet. We, along with a number of the other faith groups listed in the Foreword, have very significant concerns with the recommendations for the implementation of Standard 4 – "Equity is upheld, and diverse needs are taken in to account" – which in our view go well beyond child safety concerns, and may require faith-based organisations to act in ways that are contrary to fundamental teachings about gender and sexuality.

7. This implementation "Guide" takes on a heightened level of significance due to the proposed Bill, which creates a regulatory framework embedding the Child Safe Standards as the primary framework that guides child safe practice in organisations in New South Wales. Section 8EA of the Bill provides that the OCG may develop "guidelines" to assist child safe organisations to implement the Standards, and to assist people to raise concerns and make complaints about child safe organisations. Further, it will be mandatory for organisations to give effect to these guidelines since the Bill will require the systems, policies and processes of the organisation to be continuously updated to reflect the Guidelines issued by the children's Guardian (s. 8BA(2)(c)). Adopting the guidelines may also be used as evidence that an organisation has appropriate child-safe practices (s.8EA(4)).

8. The term "guidelines" is not defined in the Bill. In the context it would appear to be any document developed by the Children's Guardian for a purpose listed in section 8EA(1). This includes to "assist child safe organisations to implement the Child Safe Standards". On this basis the document Implementing the Child Safe Standards: A Guide for Faith-Based Organisations is (or will become) one such guideline specified by Section 8EA. We are concerned about the breadth of the statutory rights conferred on the OCG through these guidelines. There is no fetter on the matters which may be the subject of the guidelines, or the actions that may be imposed through such guidelines. The minimum threshold requirement is that the guideline is to 'provide guidance on any other matter the Children's Guardian identifies as appropriate' (s. 8EA(1)(c)). The Children's Guardian is not required to consult on the terms of any proposed guideline (the obligation to 'work collaboratively' under section 8E does not

impose an obligation to consult, as is the case with child safe action plans under Division 3). The Bill does not state that the guidelines must only give effect to the objects of the Act at Part 3 or the objects of Part 3A, enunciated at proposed section 8A. It might be inferred that such should be the case, but the Bill does not require it to be the case.

9. Further, there are no express powers for a body to challenge the adoption of any guideline imposed under the Act by way of administrative review. The grounds for administrative review in Part 10 of the Act are not modified to include the exercise of any of the new powers proposed to be conferred by the Bill. A body may seek review of a decision to revoke or not grant an accreditation under the Act (pursuant to section 154), however that does not confer an ability to challenge the legitimacy of any guideline which is relied upon by the Children's Guardian in exercising that power to refuse or revoke. Such guidelines are not subject to challenge – only the factual question of whether a body has complied with those guidelines is subject to review. The necessary culmination of these propositions is that the Bill proposes to grant a wide, unfettered power to the executive which may be exercised without regard to any minimal statutorily imposed constraint and which operates without recourse to judicial review.

10. Our reason for raising this matter is not abstract or hypothetical. We are deeply troubled that the approach taken on pages 18-21 of the document in relation to the implementation of Child Safe Standard 4, which will require religious bodies (including churches) to have "inclusion" and "affirmation" policies which are inconsistent with their doctrine, tenets and beliefs. For example, on page 21, the guide recommends partnering with Equal Voices, and to "sign an apology to LGBTIQ+ friends and to all who have been adversely affected by the teachings and behaviour of Christians and their churches". However, as acknowledged on the Equal Voices website,

> Within contemporary Australian churches, the body of Christ is divided over issues of sex, sexuality and gender. There remains division and debate over the acceptance, welcome, affirmation and full inclusion of Christians who are LGBTIQA+.[1]

11. Equal Voices represents a minority position, which rejects traditional Christian teaching on sexuality and gender. It is not appropriate for the OCG to require those who hold to the majority position to apologise for their beliefs, in order to have "evidence of appropriate practice by the organisation" [8EA(4)].

12. This is not necessary to ensure that "Equity is upheld, and diverse needs are taken in to account" in relation to the protection and safety of children. All children are treated with equal dignity and respect in our churches, schools and in the other ministries that

[1] https://equalvoices.org.au/about-us/

we operate, because we believe that all people are created by God in his image and loved by him, irrespective of ethnicity, cognitive or physical ability, sexual orientation, gender, age and any other personal attribute. For example, at our Synod in 2017, we passed a policy which stated that:

> We believe that all human beings are uniquely created in the image of God, loved by God and precious to him. We believe that God created humanity with two complementary sexes – male and female – and that both male and female are equally made in God's image. We believe that God made people of all races and abilities as equal in his sight, and offers salvation through faith in the atoning work of Jesus Christ to all people without distinction.

13. Irrespective of the particular content of the document *Implementing the Child Safe Standards: A Guide for Faith-Based Organisations,* and whether it will be a 'guideline' for the purposes of the Bill, the framework for guidelines provides wide latitude for the development of further or other guidelines in future that may significantly curtail the capacity of a religious body to conducts its activities in a manner consistent with its fundamental teachings.

14. We are concerned that the complaints mechanism in the Bill will be utilised to agitate for investigations of religious bodies, alleging – for example – that the binary view of gender expressed in the policy statement above does not affirm gender diversity.

CODES OF PRACTICE

15. A second area of concern relates to codes of practice. A religious body that provides out of home care or adoption services may also be required to comply with a code of practice that is made by the Children's Guardian. A code of practice, if made, will be mandatory and may include the following –

    (a) technical child protection requirements relevant to a type of entity,

    (b) particular practices or activities that the type of entity must undertake to meet the particular needs of children and young people receiving services from the type of entity,

    (c) specific practices and activities the type of entity must undertake to comply with the Child Safe Standards,

    (d) measures of compliance for each Child Safe Standard,

    (e) the outcomes to be achieved in implementing the Child Safe Standards,

    (f) other matters relevant to compliance by entities with the Child Safe Standards.

16. For the most part these requirements are not expected to pose any difficulty for religious bodies that provide out of home care or adoption services. However there is

the potential for such codes of practice to cover highly contentious subject-matter that could result in –

a. religious bodies needing to withdraw from the provision of out of home care or adoption services, or

b. secular adoption services ceasing to place children within families that hold traditional views on matters of sexual orientation and gender identity.

17. These are significant matters of public policy. We submit that such decisions, if they are to be made, should be made by the Parliament following a public consultation process and not by the Children's Guardian through an administrative instrument. While the codes of practice will be in the form of a regulation that can be disallowed by the Parliament, we do not consider that this provides sufficient protection.

THE DEFINITION OF 'RELIGIOUS BODY' IN RELATION TO THE CHILD SAFE STANDARDS

18. Given the extent of the requirements imposed by s.8BA on the "head of a child safe organisation", it is important that this only applies to religious entities that conduct activities in relation to children. The current definition is too broad, because *any* religious body is defined to be a "child safe organisation", regardless of its involvement with children.

19. We estimate that up to half of the 57,000 charities in Australia are faith-based and would all be included in the broad definition of "religious body" in section 15A of the *Children's Guardian Act 2019*. This means, for example, that the trustee of a charitable trust set up as a DGR entity for taxation purposes would have to comply with all the requirements imposed on the "head of a child safe organisation", notwithstanding the fact the charitable trust has no involvement with children. Furthermore, in 2010, the Productivity Commission estimated that there were 600,000 not-for-profit entities in Australia. If there are a similar proportion of faith-based not-for-profit entities, then this Bill is going to impose an irrelevant regulatory burden on tens of thousands of people and organisations. It is important to note that the burden imposed is by no means insignificant. The implications of section 8BA for an organisation's 'systems, policies and processes' are wide-ranging. They include the required adoption of a detailed child safe policy, an employee and volunteer code of conduct, a complaint management policy, a human resources policy and a risk management plan. Under section 8BA(2) these must be 'continuously reviewed', including to ensure that they comply with any changes to the Child Safe Standard. Such requirements, when imposed on not-for-profit religious bodies that have no dealings with children, amount to an extraordinary and inappropriate regulatory burden.

20. Currently, the wide definition of 'religious body' in the Act is not problematic since the obligations under the reportable conduct scheme apply in relation to employees (including volunteers) of religious bodies and allegations and convictions concerning

those employees. However if the Bill is passed new obligations will arise that require all religious bodies to adopt the child safe standards and develop systems, policies and processes.

21. Applying the obligation to all religious bodies is also not consistent with the recommendation of the Royal Commission in relation to the Child Safe Standards, namely:

> All institutions that provide activities or services of any kind, under the auspices of a particular religious denomination or faith, through which adults have contact with children, should implement the 10 Child Safe Standards identified by the Royal Commission. (Recommendation 16.31)

22. Further as a technical drafting matter, section 8CB, in conjunction with section 8C, states that a "related body" is a "service". This is a grammatical impossibility. Presumably the intention is that Division 3 creates an obligation on the part of 'prescribed agencies' to implement a child safe action plan that imposes obligations on entities with whom the agency contracts (by way of funding agreement etc). If this is the case, again, the issues identified at paragraph 9 attain. Namely, there are no provisions against which the validity of the plan might be assessed, and there is no stated ability to challenge the terms of a plan by way of administrative review under Part 10 of the Act. As noted above, this is a very significant devolution of power to the executive in the absence of sufficient accountability for review. The disquiet is only enhanced in the light of our concern as to the possibility that such devolved executive power may be exercised to require religious bodies to adopt policies which are inconsistent with their doctrine, tenets and beliefs, as outlined at paragraph 10 above. Similar issues also arise under Part 3A, Division 4 in respect of codes of practice, *mutatis mutandi*.

23. Finally, it is noted that the investigative powers proposed to be granted to the Children's Guardian by the Bill, as a statutorily constructed office, go well beyond those granted to a court. In that capacity they could amount to a serious abrogation of long-recognised common law rights. For example, the powers at section 8BB may be exercised regardless of any ground of privilege that may lawfully be claimed in a court, or on the grounds of the public interest or other duty of secrecy, apparently (on the express terms of the proposed legislation) even where such grounds are available by statute.

RECOMMENDATIONS

24. In light of these areas of concern, we make the following recommendations. However, as an overarching proposition, the wide unfettered powers granted to the executive arm of government by the Bill, the potential they hold for significant infringement of associational and religious freedoms (further detailed at paragraph 26 below), and the

omission of long-entrenched elemental principles of judicial review and procedural fairness lead us to the conclusion that the Bill, as drafted, cannot be supported. Protection of children is of the utmost importance to the Church. As noted above, all children are treated with equal dignity and respect in our churches, schools and in the other ministries that we operate. However, the proposed powers to be granted by this Bill are unprecedented and represent such a fundamental departure from basic principles of justice that this particular model for protection cannot be supported. The provisions of the Bill should be abandoned and a proposal that addresses the concerns we have raised above, and which subjects the decisions of the Children's Guardian to appropriate accountability by way of administrative review, should be released for consultation.

25. In addition, without limiting the amendments that are required to be made to address the detailed and specific concerns raised above, to the extent that any such proposal replicates elements of the existing Bill, it should address the following three concerns.

A. Delete subsection 8BA(2)(c) and clarify that organisations may satisfy the requirements of the Act through means other than the adoption of a guideline

26. This subsection requires the systems, policies and processes of a child safe organisation (including a religious body) to 'reflect' guidelines issued by the Children's Guardian. Yet subsection 8EA(4) also provides that an organisation can 'adopt' a guideline and rely on the guidance that it provides as evidence of appropriate practice by the organisation. It is unclear whether an organisation that 'reflects' the guidelines in its systems, policies and practices (as it will be required to do by law) has also 'adopted' the guideline. It is not helpful to have both concepts in the Bill.

27. Furthermore, a document is not truly a 'guideline' if it is mandatory for it to be reflected in the systems, policies and processes of the organisation. If they are guidelines they should be an aid to compliance rather than a source of obligation in and of themselves.

28. We recommend that subsection 8BA(2)(c) be deleted and that organisations have discretion to determine whether or not to adopt the whole or any part of a guideline and obtain the benefit of the safe harbour provided by subsection 8EA(4).

29. The Bill should also clarify that organisations may satisfy the requirements of the Act through means other than the adoption of a guideline and that the fact that an organisation has not adopted a guideline will not give rise to a negative inference against an organisation. That is to say, the guidelines should not be prescriptive and should allow sufficient flexibility according to the needs, capacities and constraints of individual organisations.

B. Protection for religious freedom in a new subsection 8BA(4)

30. NSW has a long tradition of upholding religious freedom by enabling religious groups to act in accordance with their beliefs. The Bill will grant wide latitude to the Office of Children's Guardian to determine guidelines and codes of practice. This needs to be constrained to prevent any guidelines overriding the freedom of a religious body to act in accordance with its doctrines, tenets and beliefs.

31. There is no recognition in the Bill or its accompanying Explanatory Notes of the very serious detrimental impacts it will have upon the internationally protected freedom of association and of the freedom of religion or belief. These protections are enshrined in Articles 22 and 18 of the *International Covenant on Civil and Political Rights*, and, in the case of NSW, their application is enlivened by Article 50 of the Covenant. To comply with international human rights law as applies to the protection to freedom of religion or belief, pursuant to Article 18(3), that right can only be limited to the extent that it is "necessary" to do so. As noted by former United Nations Special Rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt any proposal to limit internationally protected religious freedom rights requires rational and objective justification:

> the onus of proof … falls on those who argue in favour of the limitations, not on those who defend the full exercise of a right to freedom. Confirming this critical function, the Human Rights Committee insists "that paragraph 3 of article 18 is to be strictly interpreted: restrictions are not allowed on grounds not specified there […]. Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner."[2]

There has been no attempt to meet these standards. A justification for the sweeping and unfettered powers proposed to be conferred by the Bill has not been outlined.

32. We recommend a new subsection 8BA(4) based on the exemption for religious bodies in section 56(d) of the *Anti-Discrimination Act 1977* as follows:

> 8BA(4) A child safe standard, guideline or code of practice made under Part 3A does not apply to a child safe organisation that is a religious body in relation to an act or practice of the child safe organisation that –
>
> (a) conforms to the doctrines of that religion, or
>
> (b) is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.

[2] Heiner Bielefeldt, Special Rapporteur, *Interim report of the Special Rapporteur on freedom of religion or belief,* UN Doc A/69/261 (5 August 2014).

This will avoid the imposition of a double standard upon bodies established to propagate religion, whereby one set of actions are lawful under the *Anti-Discrimination Act 1977,* but are rendered unlawful by the Bill.

C. Limit the definition of religious body

33. We note the concerns expressed in the submission from *Freedom for Faith* that the Bill does not apply to the full range of organisations that were subject to recommendations by the Royal Commission in relation to adoption of the child safe standards. We agree that the amendments should have a more principled basis that reflects the risk of abuse. This gives rise to the concern that, in the words of the former United Nations Rapporteur, the '[r]estrictions [are being] applied in a discriminatory manner.'[3]

34. If the scope of the definition of 'child safe organisation' in proposed section 8AA is not expanded in this respect, the meaning of 'religious body' in section 8AA should at least be clarified to ensure the Bill is consistent with the recommendations of the Royal Commission that the standards be adopted by religious bodies that provide activities or services of any kind through which adults have contact with children.

35. We recommend that this be effected by substituting clause 8AA(c) in the proposed definition of 'child safe organisation' with the following:

> "(c) a religious body that has at least one employee who is required to hold a Working With Children Check in New South Wales because the employee is engaged in child-related work for, or in connection with, the religious body."

We welcome the opportunity to make this submission.

Yours sincerely

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Chair, Religious Freedom Reference Group

[3] Ibid.