

Freedom of Religion: Submission on the Exposure Draft of the Religious Discrimination Bill

(A report from the Standing Committee.)

Key Points

- The submission to the Federal Attorney-General's Department on the Religious Discrimination Bill – Exposure Draft, prepared by the Religious Freedom Reference Group, is provided as an attachment.
- Synod is encouraged to consider a motion regarding freedom of religion in Australia.

Purpose

1. The purpose of this report is to provide the Synod a copy of the submission made on the Synod's behalf by the Religious Freedom Reference Group to the Federal Attorney-General's Department on the Religious Discrimination Bill – Exposure Draft.

Recommendations

2. Synod receive this report.
3. Synod consider the following motion to be moved at the forthcoming session of the Synod, "by request of the Standing Committee" –

'Synod welcomes the Federal Government's proposed Religious Discrimination Bill as an important first step towards protecting the right of all Australians to hold and manifest religious beliefs, but expresses grave concerns about a number of drafting issues in the Exposure Draft of the Bill which profoundly threaten the Christian mission and purpose of Anglican religious institutions, including –

- (i) the exclusion of bodies such as Anglicare Sydney and Anglican Youthworks from the definition of 'religious bodies' because of fees charges for goods and services,
- (ii) the requirement that schools and other religious bodies would have to employ only Christian staff, and not be allowed to merely preference the employment of Christian staff, and
- (iii) the undefined term "vilify" undercuts the protection that the Bill gives to statements of belief.

Accordingly Synod –

- (a) urges diocesan bodies, ministers and lay people to continue to pray for, and engage respectfully with, our political leaders to improve this Bill to ensure that Australia is a place where people of all faiths and none can freely practice their beliefs with mutual respect,
- (b) calls on the Government to amend the Bill to address the concerns identified above, to ensure that no body established for religious purposes will be prevented from acting in accordance with its religious beliefs or in the furtherance of its religious purpose because of this Bill, and
- (c) noting that Australian Law Reform Commission (ALRC) has been asked by the Attorney-General to propose legislative reforms to 'limit or remove altogether (if practicable) religious exemptions to prohibitions on discrimination, while also guaranteeing the right of religious institutions to reasonably conduct their affairs in a way consistent with their religious ethos', and that the Attorney-General has altered the terms of reference and deferred the reporting timetable for the ALRC until the end of 2020 –

- (i) declares that the implementation of such reforms that guarantee the right of religious institutions to reasonably conduct their affairs in a way consistent with their religious ethos is a necessary next step towards protecting freedom of belief in Australian law, and
- (ii) respectfully requests the Attorney-General to expedite the ALRC reporting timetable, to ensure that the recommendations from the ARLC can be considered during the current Parliamentary term.'

Background

4. Set out in the Attachment to this report is the submission prepared by the Standing Committee's Religious Freedom Reference Group to the Federal Attorney-General's Department on the Religious Discrimination Bill – Exposure Draft submitted on 23 September 2019.

For and on behalf of the Standing Committee.

DANIEL GLYNN
Diocesan Secretary

24 September 2019

Submission on the Exposure Draft of the Religious Discrimination Bill

By the Anglican Church Diocese of Sydney

1 Who are we?

The name of our organisation is the 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). A number of these bodies will be making submissions in their own right, highlighting the significant adverse impact that the current drafting of the Bill will have on their religious activities.

The Diocese, through its various component bodies and through its congregational life, makes a rich contribution to the social capital of our nation, 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.

We welcome the opportunity to make this submission and we give consent for this submission to be published.

2 Executive Summary

The Diocese welcomes the Religious Discrimination Bill.

However, there are a number of problems with the current drafting which are so serious that we cannot support the passage of the Bill in its current form.

Many of these problems arise where the Bill has the effect of preventing an entity that has religious purposes from engaging in conduct in furtherance of its doctrines, tenets, beliefs or teachings, and in order to preserve its mission and identity, because this conduct is categorised by the Bill as discrimination.

There are 7 issues that need to be addressed.

- A. The "commercial activities" disqualification is over-reach and will effectively prevent many religious bodies from pursuing the religious purpose or mission for which they exist
- B. Merely preferring (instead of requiring) religious staff may not be "in accordance with doctrine"
- C. The ambiguity of the undefined term "vilify" renders statements of belief vulnerable
- D. Limiting protection to "lawful" religious activity is circular and may subvert the purpose of the Bill
- E. There is no mechanism for a religious body to establish its religious beliefs
- F. The "inherent requirements" test should be limited in order to prevent misuse
- G. The "reasonableness" of restricting the manifestation of belief outside of work needs clarification

In addition to the 7 issues identified above, we are also concerned that this Bill is being considered in isolation from the matters referred to the Australian Law Reform Commission (ALRC) by the Attorney General. The ALRC has been asked to propose legislative reforms to "limit or remove altogether (if practicable) religious exemptions to prohibitions on discrimination, while also guaranteeing the right of religious institutions to reasonably conduct their affairs in a way consistent with their religious ethos".

We note that the Attorney-General has narrowed the terms of reference and extended the reporting timetable for the ALRC until the end of 2020. It is our view that reforms that guarantee the right of

religious institutions to reasonably conduct their affairs in a way consistent with their religious ethos are a necessary next step towards protecting freedom of belief in Australian law, and we respectfully request the Attorney-General to expedite the ALRC reporting timetable, to ensure that the recommendations from the ALRC can be considered during the current Parliamentary term.

3 Submission

The Diocese welcomes the Religious Discrimination Bill. It provides a general protection for people of faith from discrimination in Commonwealth law, enhanced protection for the expression of statements of belief and some protection for freedom of conscience for medical practitioners.

However, there are major problems with the current drafting, which are so serious that we cannot support the passage of the Bill in its current form. There are 7 issues that need to be addressed.

A. The “commercial activities” disqualification is over-reach and will effectively prevent many religious bodies from pursuing the religious purpose or mission for which they exist

We are gravely concerned about the unintended consequences of the current drafting of clause 10.

The definition of religious body in 10(2) excludes registered charities and other religious institutions that “engage solely or primarily in commercial activities”. There is no definition of “commercial activities” in the Bill. The commentary in the Explanatory Memorandum (paragraphs 170-175), suggests that the test is to be given a broad scope, to cover religious bodies “operating in the secular marketplace” and “selling goods [or services] to the general public” on a fee basis. Paragraph 174 of the Explanatory Memorandum makes clear that religious hospitals (e.g., St Vincent’s) and religious aged-care providers (e.g., Anglicare Sydney) would NOT be religious bodies for the purposes of clause 10.

However, many religious bodies use a market mechanism in the provision of goods and services as an important and legitimate means by which they pursue and fulfil their religious purpose or mission. The exclusion of such bodies from the definition of religious body in clause 10 will therefore profoundly undermine the reason for their existence.

For example, Anglican Youthworks provides “Christian Outdoor Education”. Most of the clients of this service are Christian schools, who choose Youthworks because Youthworks has a policy of employing Christians as outdoor educators. Youthworks charges fees to cover the cost of this service. On the definition above, this is a “commercial activity”. The same could be said for Youthworks Campsites and the publishing arm of Youthworks, Christian Education Publications (CEP). All of Youthworks activities are directed towards the religious purposes of the organisation, but since more than 80% of its revenue is from selling goods and services, the organisation is engaging “primarily in commercial activities”, and Anglican Youthworks is deemed not to be a religious body for the purposes of this Bill.

The test in clause 10(2) is equally problematic for Anglicare Sydney. Anglicare Sydney is the social welfare arm of the Diocese. The single largest component of Anglicare’s ministry relates to its retirement villages and aged care services. These ministries are unashamedly Christian in their approach. Anglicare Sydney welcomes people of other faiths as residents, but has a long standing policy of preferring to employ Christians where possible, especially in pastoral care roles, because this goes to the essence of their purpose in providing Christian aged care in a Christian context. However, since the majority of Anglicare’s income and activities are “commercial” (in the sense that people pay fees for accommodation and services), Anglicare Sydney does not qualify as a “religious body” for the purposes of clause 10.

As currently framed, the “commercial activities” test is highly arbitrary, because it only disqualifies a body that engages “solely or primarily in commercial activities”. The threshold for what counts as “primarily” will depend on how a religious body chooses to structure its operations. For example, if a religious denomination created a separately incorporated entity for a specific role (e.g., a stand-alone entity to publish liturgical resources), this entity is engaged primarily in commercial activities, but if the religious denomination conducted exactly the same activities within the denominational entity itself, the commercial publishing activities would not be the “primary” activity of the denomination. This is apparent within the Anglican Church of Australia. There are some dioceses that are incorporated as a whole (e.g., the Diocese of Southern Queensland), others are not incorporated and are made up of multiple incorporated and unincorporated bodies (e.g., the Diocese of Sydney).

We urge the Government to remove the wording in clauses 10(2)(b) and 10(2)(c) that excludes as a religious body an entity “that engages solely or primarily in commercial activities”. The consultation

materials for the Bill do not give any reasoning for the “commercial activities” exclusion. As a matter of principle, there are no good arguments that receiving a fee somehow nullifies the activity as a legitimate means of pursuing a religious purpose or mission – an activity is no less religious simply because it has a commercial character. A test which disqualifies a religious body based on whether it engages “primarily in commercial activities” is novel in Australian charity and anti-discrimination law, and should not be included in this Act. As reflected in paragraph 173 in the Explanatory Memorandum, the current drafting creates the anomaly that a not-for-profit religious charity (which is recognised as such by the ACNC for the purposes of charity law) can be defined **not** to be a religious body for the purpose of the Religious Discrimination Bill. Similar confusion will arise in relation to the interaction with applicable state and territory law. For example, an entity which is recognised as “a body established for a religious purpose” under section 81 of the *Equal Opportunity Act 2010* (Vic), would not be recognised as a “religious body” for the purposes of this Bill.

There are very significant implications for a religious entity that is not recognised as a “religious body” for the purposes of clause 10.

For example, as clause 10 currently stands:

- It would be unlawful discrimination under clause 13 (“Employment”) for Anglican Youthworks to recruit only Christians as outdoor educators to run its “Christian Outdoor Education” programs.
- It would be unlawful discrimination under clause 20 (“Goods, Services and Facilities”) for Anglicare Sydney to allow residents to use a chapel only for Christian services (and not allow a resident who adheres to another religion to use the chapel for services of that religion).
- It would be unlawful discrimination under clause 20 (“Goods, Services and Facilities”) for Anglican Youthworks to reject an application from the (hypothetical) First Church of Satan to hold a Black Mass at one of its campsites.
- It would be unlawful discrimination under clause 21 (“Accommodation”) for a Christian residential university college to give any preference to Christian students.

For these reasons, we cannot support passage of the Religious Discrimination Bill if clause 10 remains in its current form. Our recommendation is that the “commercial activities” test be removed. Clause 10(2) would then read

10(2) **Religious body** means:

- (a) an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion; or
- (b) a registered charity that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion ~~(other than a registered charity that engages solely or primarily in commercial activities);~~ or
- (c) any other body that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion ~~(other than a body that engages solely or primarily in commercial activities).~~

B. Merely preferring (instead of requiring) religious staff may not be “in accordance with doctrine”

Clause 10 applies to “conduct that may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion in relation to which the religious body is conducted.”

The Explanatory Memorandum gives two examples of such conduct in relation to employment, where it would be permissible for a Jewish school (para 180) and a Catholic charity (para 181) to require **all** staff to be Jewish or Catholic respectively, provided that this was “in accordance with” Jewish/Catholic teaching.

However, often there won’t be a specific doctrine, tenet, belief or teaching that requires the religious body to only engage staff that are adherents of the faith of the institution. The issue is more that doing so is necessary in order for the institution to further its doctrines, tenets, beliefs and teachings or to maintain its identity as a religious body.

Furthermore, many religious schools and other institutions do not insist that **all** staff are adherents to the faith of the institution. Some religious schools, for example, will seek to ensure that there is a

“critical mass” of teachers of that religion, and require other teachers to “support the religious ethos of the school” (or words to that effect). Sometimes it also arises because there are insufficient qualified and experienced adherents of the faith of the institution available for employment. That an institution cannot insist that all staff be adherents should not prevent it from insisting that some or any particular members of staff be adherents.

Clause 10 in its current form does not give sufficient flexibility.

This could be rectified by a small addition to subclause 10(1), as highlighted below.

10(1) A religious body does not discriminate against a person under this Act by engaging, in good faith, in conduct that may reasonably be regarded as being **in furtherance of, or** in accordance with the doctrines, tenets, beliefs or teachings of the religion in relation to which the religious body is conducted.

The Explanatory Memorandum should then give an example which clarifies that the preferencing of staff who hold or support the religious belief of the organisation, or (for a school) the enrolment of students of that faith, is conduct which is in furtherance of the religious purposes of that institution.

An alternative means of achieving the same result would be to add a new subclause.

10(3) Without limiting the generality of sub-section (2), for the avoidance of doubt, a religious body does not discriminate against a person under this Act by giving a preference:

- (a) in its decisions in relation to employment, or
- (b) if it is an educational institution, in its decisions in relation to the admission of students,

to persons who support, adhere to, or act in a way that is consistent with the doctrines, tenets, beliefs and teachings of the religion in relation to which the body is conducted.

C. The ambiguity of the undefined term “vilify” renders statements of belief vulnerable.

A welcome feature of the Religious Discrimination Bill is clause 41, which declares that a statement of belief does not constitute discrimination for the purposes of Commonwealth, state or territory anti-discrimination law.

However, this clause is subject to the limitation in 41(2) that it does not apply to a statement that would, or is likely to “harass, **vilify** or incite hatred or violence” (emphasis added). The word “vilify” is not defined. Leaving this term ambiguous is unhelpful.

The word “vilify” is also used to provide a similar limitation in subclause 8(4). Paragraph 132 of the Explanatory Memorandum appears to apply this to a statement which “**may cause harm to a person**, group of persons or the community at large.” The argument that orthodox statements of religious belief “cause harm” to certain groups is well-rehearsed, and if it is accepted that such statements amount to vilification, then the purposes of clause 41 (and clause 8) will have been subverted.

Furthermore, the definition of “statement of belief” already includes that the statement is made in good faith. This already provides a measure of protection. It is also unnecessary for there to be a “malice” disqualification in subclause 41(2)(a). It is difficult to see how someone can make a malicious statement in good faith. An absence of good faith is at the heart of malice.

The word “vilify” should either be removed from subclauses 41(2) and 8(4), or the word should be defined narrowly in clause 5.

The disqualification in subclause 41(2)(a) for malice should be removed.

D. Limiting protection to “lawful” religious activity is circular and may subvert the purpose of the Bill

Clause 5 limits the definition of religious activity to “engaging in *lawful* religious activity” (emphasis added).

From paragraph 70 of the Explanatory Memorandum, it is clear that the intention of this limitation is to prevent criminal acts such as forced marriages or child marriages being protected by this Bill. However, the expression “lawful” goes much further than criminal acts.

This creates a circularity of definition that could potentially subvert the protection that the Bill seeks to give to the manifestation of religious belief. If certain conduct (such as making a statement of belief) was “unlawful” religious discrimination for the purposes of state or territory legislation, then it would not be a “lawful religious activity” for the purposes of this Bill, and therefore the protection of clause 41 would not apply. This is clearly not the intention of the Bill.

To prevent this subversion of the intention of the Bill, the definition in clause 5 should be modified as follows.

religious belief or activity means:

- (a) Holding a religious belief; or
- (b) engaging in **lawful** religious activity **that is not a criminal offence under the laws of the Commonwealth or any State or Territory**; or

E. There is no mechanism for a religious body to establish its religious beliefs

The definition of “person” in clause 5 makes clear that it can include a religious body or other religious institution. This is welcome, because it ensures that the protection against unlawful discrimination will extend to religious bodies. Paragraph 78 of the Explanatory Memorandum gives the example of a religious body which was refused a facility booking on the ground of its religious beliefs or activity.

However, it is not clear how a body corporate would establish its “religious beliefs”. Clause 6 extends the meaning of “on the ground of a person’s religious belief” as applied to a natural person, but this clause provides no clarity for religious bodies.

To resolve this, a new subclause should be added which provides a mechanism by which a religious body is able to establish its beliefs.

A religious doctrine, tenet, belief, or teaching by which a religious body is conducted may be:

- (a) included in its governing documents, organising principles, statement of beliefs or statement of values; or
- (b) adopted by reference to the governing documents, organising principles, statement of beliefs or statement of values which include the doctrine, tenet, belief or teaching of another religious body or institution; or
- (c) adopted by reference to a document or source that includes the doctrine, tenet, belief, or teaching; or
- (d) established through consistent conduct in accordance with that doctrine, tenet, belief, or teaching.

F. The “inherent requirements” test should be limited in order to prevent misuse.

Subclause 31(2)(b) declares that it is not unlawful to discriminate “because of the other person’s religious belief or activity, the other person is unable to carry out the **inherent requirements** of the employment” (emphasis added). There are similar provisions in relation to qualifying bodies [31(4)] and employment agencies [31(5)].

A matter of concern with this drafting is that it could be used to authorise religious discrimination by a secular company that specifies that is an “inherent requirement” that, for example, staff must not talk about religious topics at work, or must refrain from talking about certain aspects of their religious belief at work. Such a rule would not be prohibited by subclause 31(6). This would have a chilling effect on religious expression. Moreover, there are overseas cases where religious people have

experienced discrimination because their religiously-based beliefs are regarded as incompatible with the “inherent requirements” of their professional role. This has included students training for their profession.

This could be addressed by redrafting clause 31(2) to limit the potential for misuse, as follows.

- (1) It is not unlawful to discriminate against another person in employment on the ground of the other person’s religious belief or activity, if a religious belief, or a religious belief of a particular kind, is a genuine occupational requirement of the position.
- (2) It is not unlawful to discriminate against another person in employment, in relation to a partnership, or in conferring a qualification, if a person’s religious belief is such as to make him or her wholly unable to perform the work required.

(This drafting has been proposed by Prof. Patrick Parkinson, and is reproduced with his consent)

G. The “reasonableness” of restricting the manifestation of belief outside of work needs clarification

It is commendable that subclause 8(3) seeks to make it *prima facie* unreasonable for a large employer to restrict the expression of religious belief outside the employment context. However, the current form of this clause may have the perverse effect of encouraging the restriction of religious freedom by third party sponsors (e.g., Qantas in relation to Rugby Australia) or social media boycotts (e.g., of Coopers Brewer) to create financial hardship, which would enable conduct that would otherwise be unlawful discrimination. As a matter of public policy, this should not be encouraged. This could be addressed by including a definition of “unjustifiable financial hardship” as follows

“unjustifiable financial hardship” does not include hardship that arises, or may arise, as a result of conduct that may reasonably be regarded as intended, in whole or part, to cause an employer to impose or enforce an employer conduct rule.

Furthermore, a clause similar to section 17 of the *Racial Discrimination Act 1975* could be inserted as a new clause 9 in the Bill as follows (with consequential renumbering) –

Unlawful to incite doing of unlawful acts

It is unlawful for a person:

- (a) to incite conduct that is unlawful by reason of a provision of this Act; or
- (b) to assist, promote or induce whether by financial assistance, threats of financial detriment or otherwise the doing of such conduct.

It is also not clear what the implications of subclause 8(3) are for circumstances outside the scope of the clause. For example, since subclause 8(3) only declares it to be unreasonable when a **large** employer limits religious expression **outside** work hours, should a court or tribunal infer that it **is** reasonable to limit religious expression during work hours, or that it **is** reasonable for employers under the \$50M threshold to regulate religious expression outside work hours?

If it is not possible for this to be clarified in the drafting of subclause 8(3) then, at the least, the Explanatory Memorandum should clarify that the intention of subclause 8(3) is not to otherwise permit employers to limit the expression of religious belief, but rather to make clear that employer conduct rules that fall outside the scope of subclause 8(3) would nevertheless be subject to subclauses 8(1)(c) and 8(2)(d), whereby the onus is on the employer to demonstrate that it is reasonable to limit an employee’s religious belief or activity. The Explanatory Memorandum should explain that the \$50M threshold is an expression of the Government’s commitment to limit the regulatory burden on small business, rather than giving small business permission to discriminate, and that it would be unreasonable in most circumstances for a small employer to have a blanket rule prohibiting the expression of religious views on social media.

4 The ALRC Referral

In addition to the matters identified above in relation to the drafting of the Religious Discrimination Bill, we are concerned that this Bill is being considered in isolation from the matters referred to the Australian Law Reform Commission (ALRC) by the Attorney General. The ALRC has been asked to propose legislative reforms to “limit or remove altogether (if practicable) religious exemptions to

prohibitions on discrimination, while also guaranteeing the right of religious institutions to reasonably conduct their affairs in a way consistent with their religious ethos”.

There is an obvious intersection between that task and the subject matter of this Bill. The interaction of the Bill with other discrimination law is a continuing matter of uncertainty that must be addressed. We note that the Attorney-General has limited the ALRC’s terms of reference and extended the reporting timetable for the ALRC until the end of 2020. It is our view that reforms that guarantee the right of religious institutions to reasonably conduct their affairs in a way consistent with their religious ethos is a necessary next step towards protecting freedom of belief in Australian law, and we respectfully requests that the Attorney-General to expedite the ALRC reporting timetable, to ensure that the recommendations from the ALRC can be considered during the current Parliamentary term.

Bishop Michael Stead
Chair, Religious Freedom Reference Group

Anglican Church Diocese of Sydney

23 September 2019