



AUSTRALIAN CATHOLIC BISHOPS CONFERENCE

Bishops Commission for Life, Family and Public Engagement

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Human Rights Unit
Integrity Law Branch
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By email: FoRConsultation@ag.gov.au

Dear Sir/Madam

Religious Freedom Bills – Second Exposure Drafts

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

This submission follows the ACBC's submission dated 2 October 2019 on the first exposure draft. The ACBC appreciates the Government's openness to considering the concerns outlined in our first submission and that the Government has made a number of amendments in the second exposure drafts.

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

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

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

The Catholic Church provides Australia's largest non-government grouping of hospitals, aged and community care services, providing approximately 10 per cent of health care services in Australia. It provides social services and support to more than 450,000 people across Australia each year. There are more than 1,700 Catholic schools providing education to more than 760,000 students and employment to 96,000 staff. There are two Catholic universities, teaching more than 46,000 students.

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

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

Introduction

The ACBC welcomes the second exposure drafts of the religious discrimination bills and the amendments the Government has made to the bills.

Religious freedom is a crucial component of a free society. To people who have a religious faith, religious freedom ensures they are able to worship as they wish, but also to express their beliefs in public through such things as charitable work through hospitals, aged care and social services, providing religious faith-based education and engaging in public debate.

This legislation is important because it sets out a positive expression of the right to religious freedom and protects against discrimination on the grounds of religious belief or activity. Commonwealth law currently only protects religious freedom through the application of exceptions from existing legislation.

The ACBC supports the intent of this legislation because of a concern to ensure that the rights of Catholics and other people who have a religious faith or none are not discriminated against because of their beliefs or activities.

The ACBC acknowledges the complexity of the task of ensuring this legislation does not have the unintended consequence of curtailing religious freedom. For example, while it would be unjust in most contexts to exclude a person on the basis of their religious or ethical beliefs, it would be equally unjust to insist that a religious organisation employ a person who was opposed to its religious and ethical beliefs.

There are a large number of organisations run by communities of people with a religious faith and the ACBC is concerned to ensure that these organisations can continue to operate in accordance with their religious beliefs.

Religious schools, health services and welfare agencies need to be able to hire staff who support their religious mission and to set employee conduct standards.

The Catholic Church across its many varied entities and works is a substantial employer and while some staff do not share our religious faith, importantly they understand and support the value of our mission. It is important that whatever their religious faith, every employee supports our mission and ethos.

Staff in our Catholic schools act as role models to our students and, in recognition of this, have a professional duty to support the teachings of the Catholic Church and to not publicly undermine those teachings.

Employees in Catholic hospitals and aged care are expected, similarly, to provide care in a manner consistent with the Catholic ethos and may be bound by specific obligations to adhere to practices and codes established by providers.

While Catholic health and welfare services are open to serving all people, there are some services that these institutions cannot provide because to do so would contradict the Catholic faith on which they have been founded. Similarly, individual medical professionals of faith should not be forced to participate in procedures that go against their religious beliefs.

Religious Discrimination Bill 2019

Clause 5 – definitions

“Relevant employer”

The term “relevant employer” continues to be problematic because it allows in clauses 8(3) and 32(6) the religious freedom of an employee to be dependent in part on the revenue of an employer. The definition also removes all protection for people with a religious faith who work for a government entity.

“Statement of belief”

The definition of “statement of belief” has been amended to introduce as one of the three limbs of the definition that it is a statement of religious belief which “is of a belief that a person of the same religion as the first person could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of that religion”.

In a comment on the change, the Government has stated:

The Bill now makes clear that a court will now need to consider whether a person of the same religion as the religious body or person could reasonably consider the act to be in accordance with the doctrines, tenets, beliefs or teachings of that religion.¹

While the courts will still need to determine whether a statement of belief of a person professing a particular religion is “in accordance with the doctrines, tenets, beliefs or teachings of that religion”, the relevant reference point for this judicial determination will be a person who shares the same faith. We consider this to be an improvement, but given there is a wide range of views within any religious faith tradition, we would prefer the test were in terms that “the religious body reasonably regards its conduct as being in accordance with its doctrines [etc] or as necessary for its religious purposes”.

¹ Attorney General’s Department, Religious freedoms legislation: key changes from first exposure draft. 10 December 2019.

Vilify

The ACBC appreciates clarification of the meaning of the word “vilify”, which has been defined as “incite hatred or violence towards the person or group”.

Clause 8(2) - indirect discrimination: reasonableness test

The addition of a test for “qualifying body conduct rules” in the second draft of the Bill is a useful inclusion. However, given that certain religious institutions also require accreditation from qualifying bodies, this protection should extend to religious organisations and not just to individuals.

Clause 8(3) – Conditions that are not reasonable relating to statements of belief

The ACBC reiterates its objection to permitting religious discrimination so as to avoid “unjustifiable financial hardship” to employers (clause 8(3)), which results in religious freedom being not a universal human right, but something which depends on where a person works. It also encourages secondary boycotts, sponsorship withdrawals and similar actions that would enliven the “unjustifiable financial hardship” carve-out.

This draft of the Bill maintains the differing levels of protection for employees of large and small companies, and employees of government agencies are excluded from these religious freedom rights altogether. This is an inappropriate way to recognise a universal human right, because such rights should not be dependent on external factors.

Additionally, by providing circumstances under which an employer conduct rule that restricts statements of belief outside the workplace is unreasonable, the Bill leaves it open to conclude that there are circumstances under which the restriction of statements of belief either inside or outside the workplace is indeed reasonable. It is then left to the judiciary to determine the nature of reasonable restrictions on statements of belief, having regard to the factors outlined in clause 8(2). We consider this to give too much discretion to employers and the judiciary, and submit that to balance this:

- statements of belief in the workplace should have similar protection to that provided in clause 42 of the Bill; and
- the clarification contained in paragraphs 434-435 of the Explanatory Note be included in the legislation itself.

Clause 8(6), (7) – Conditions that are not reasonable relating to conscientious objections by health practitioners

The ACBC notes changes to these clauses, but continues to believe there should be stronger Commonwealth protection for (a) the conscience rights of healthcare workers, and (b) express protection for the conscience rights of healthcare providers

like Catholic hospitals and aged care. This is particularly important where state or territory laws do not recognise this aspect of a universal human right.

Catholic healthcare agencies decline to provide some particular services because of their religious ethos, but where services are offered they serve all people equally.

Clause 9 (Discrimination extends to persons associated with individuals who hold or engage in a religious belief or activity)

A new clause 9 proposes:

This Act applies to a person who has an association (whether as a near relative or otherwise) with an individual who holds or engages in a religious belief or activity ...

We appreciate that this new clause is an attempt to provide some protection to religious organisations, and not just to individuals. It should be noted in the explanatory memorandum that the many religious organisations which are unincorporated associations would also fall within the protection of this clause.

Clause 11 (Religious bodies may act in accordance with their faith)

Clause 11 provides that a “religious body”, as defined, does not discriminate against a person on grounds of religion (“under this Act”), by engaging in good faith “in conduct that a person of the same religion as the religious body could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of that religion” (cl 11(1), (3)), including giving preference to persons of the same religion as that of the religious body (cl 11(2), (4)).

It would be preferable if this clause referred to conduct that a person of the same religion of the religious body could reasonably consider to be in accordance with **or furtherance of** the doctrines, tenets, beliefs or teachings of that religion, to avoid claims that employment decisions are not “in accordance with” religious beliefs.

Clause 11(5) - definition of “Religious body”

The definition of “religious body” encompasses religious education institutions (cl 11(5)(a), as previously proposed) and has been expanded to include “public benevolent institutions” (a subset of registered charities, being those which are directly involved in practical relief to the poor and sick, whether or not their activities can be classified as commercial, but not “a hospital or aged care facility”)(cl 11(5)(b)), and other religious bodies (if not engaged solely or primarily in commercial activities)(cl 11(5)(c)).

The limitation of charitable institutions to public benevolent institutions is problematic because it would result in a number of religious organisations being excluded from the protections afforded by the Bill, particularly smaller religious faith groups.

The provision excludes “an institution that is a hospital or aged care facility, or that solely or primarily provides accommodation”. The Attorney-General’s Explanatory Notes (para 232) state that hospitals and aged care agencies have been excluded from clause 11, as unnecessary, and that they will have the benefit of specific exemptions (eg in respect of employment, cll 32(8), (10)).

The ACBC appreciates this change to allow religious hospitals and aged care providers to be able to preference employment of people of their religious faith or people who support the religious mission of the organisation. However, limiting protection to employment matters alone would leave Catholic and other religious health and aged care facilities vulnerable to demands that they provide services contrary to their beliefs. While Catholic health, aged care and accommodation services are open to serving all people, there are some services that these institutions cannot provide to anyone because of the religious beliefs on which they are founded.

Clause 32(4) – Qualifying bodies and inherent requirements

There is a question over what might be regarded by qualifying bodies as the inherent requirements of a profession, trade or occupation. This would be clearer if qualifying bodies were expressly referred to in paragraphs 434 and 435 of the explanatory memorandum.

Clause 32(8), (10) creates an exception for religious hospitals, aged care facilities and accommodation providers.

The ACBC welcomes the inclusion of religious hospitals, aged care facilities and accommodation providers in the legislation. Catholic hospitals, aged care facilities and accommodation providers are key providers of services to all Australians, in pursuit of their religious mission. We would prefer that this was not achieved by way of an exception. Exceptions give the impression that religious freedom rights are somehow subordinate to other concerns.

Clause 42 – Statements of belief

While the ACBC welcomes the clarification of this clause by the inclusion of a definition of “vilify”, we are concerned that the inclusion of the undefined term “harass”, means that people of faith remain vulnerable to broad judicial interpretation when it comes to statements of belief.

Additionally, this clause is expressed to override state and territory anti-discrimination laws only, and not other laws, such as the proposed *Racial and Religious Tolerance Amendment Bill 2019* (Vic), which, if passed, would cause the same issues as section

17 of the *Tasmanian Anti-Discrimination Act 1998*. This clause should override all state and territory laws, not just anti-discrimination laws.

Finding national consistency on religious freedom

It is alarming that in some jurisdictions, some political parties are suggesting amendments to State legislation to ensure the proposed religious discrimination bills will, in effect, have little effect within their State. For the Federal Government to find consistency on religious freedom, and specifically on protections from discrimination on religious grounds for individuals and organisations, it is preferable that the Bill is universally applicable.

Review into the Framework of Religious Exemptions in Anti-Discrimination Legislation

The Australian Law Reform Commission (**ALRC**) is undertaking a separate process to review religious exemptions in anti-discrimination legislation, with a report due by the end of the year. The draft religious freedom bills and the ALRC inquiry are closely linked and it is the ACBC's view that both processes will be crucial to successfully ensuring the just recognition of religious freedom in Australian law. It is important that the ALRC process does not ultimately undermine the religious freedoms intended to be protected by the religious discrimination legislation.

Conclusion

The ACBC welcomes the opportunity to comment on a second exposure draft of the religious discrimination bills. The draft laws are an important way to help people of faith and the organisations they establish as communities of faith to manifest their religious belief in the service of others. The ACBC looks forward to working with the Government and other members of Parliament to improve the recognition of religious freedom in Australia.

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

Yours sincerely

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