

**Submission to the Senate Legal and Constitutional Affairs
Committee in Response to Exposure Draft of Human Rights and
Anti-Discrimination Bill 2012**

Submitted by ANGLICARE Diocese of Sydney

December 2012

1 Introduction

- (a) ANGLICARE Diocese of Sydney (“ANGLICARE Sydney”) is a large Christian organisation operating a wide range of community services and programs across the Sydney Metropolitan and the Illawarra regions of New South Wales. Our range of services includes aged care both through nursing homes and community services; disability case management and respite; emergency relief for those in crisis; foster care and adoption including children with special needs; counselling and family support services (including Family Relationship Centres); mental health recovery services; youth services; shops which provide low-cost clothing; chaplains in hospitals, prisons, mental health facilities and juvenile justice institutions; and emergency services in times of disaster.
- (b) Inter alia, our mission is to care by doing good works that grow communities and address emotional, social, and physical needs, and to meet spiritual needs through the gospel of the Lord Jesus Christ.
- (c) ANGLICARE Sydney has previously made an extensive submission in response to the Attorney-General’s discussion paper *Consolidation of Commonwealth Anti-Discrimination Laws* in February 2012. Our previous submission argued that the right to religious freedom is a key right to be protected and outlined Australia’s obligations in this regard under various international instruments. The submission outlined the kinds of protections afforded to religion under Australian law as well as examples of discrimination claims that resulted in lengthy and costly court actions against religious organisations and individuals, both in Australia and overseas. Our previous submission made 15 recommendations designed to better protect religious freedom under the proposed consolidated legislation.
- (d) It is not proposed to set out again the issues raised in our previous submission. Instead the Inquiry is referred to our previous submission lodged with the Attorney-General’s department in February 2012.
- (e) The purpose of this latest submission is to focus on a few key issues which arise from the proposed legislation and which are specific to the operations of ANGLICARE Sydney as a Christian charity.

2 General comments on the proposed Bill

- (a) The Bill seeks to consolidate the existing Commonwealth anti-discrimination legislation - the *Age Discrimination Act 2004*, the *Disability Discrimination Act*

1992, the *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984* and the *Australian Human Rights Commission Act 1986* - into a single Act. It is noted that, according to information on the Government's website about the current Inquiry, the Bill does not propose significant changes to existing laws or protections but is intended to simplify and clarify the existing anti-discrimination legislative framework. However, ANGLICARE Sydney believes that the proposed changes envisaged by the Bill do represent many significant changes, the effect of which goes well beyond the objectives of consolidating the legislation and simplifying the legislative framework.

- (b) ANGLICARE Sydney considers that the introduction of additional protected attributes, the widening of the scope of the Bill to cover any area of public life, and changes to the burden of proof have, when taken together, the potential to impose significant burdens on religious organisations and other not-for-profits, both in ensuring compliance with such legislation and in responding to claims brought by individuals under the expanded legislation.
- (c) ANGLICARE Sydney notes with alarm the comments of former NSW Chief Justice Jim Spigelman regarding the potential limitations that such legislation will place upon generally accepted rights to free speech.¹ Our view is that the Bill, by seeking to prohibit speech that offends or insults, will not only affect the right to free speech but also broadens the meaning of discrimination, since a person may be held to have "discriminated" against another person simply by exercising free speech, even though that person was not in a position of authority over the other person or providing a service to that person.

3 Freedom of religion and the definition of discrimination

- (a) ANGLICARE Sydney welcomes the Government's commitment not to remove current religious exemptions under the consolidation Bill. As outlined in our previous submission, the freedom of religion is a key right to be protected which is foundational to both the motivation and daily operation of organisations such as ANGLICARE Sydney. In this respect, it is essential that faith-based organisations remain free to pursue their mission, to deliver services in a manner consistent with their beliefs and to select staff who adhere to the beliefs and values of the organisation without being accused of unlawful discrimination.

¹ Merritt, C, "ABC chairman Jim Spigelman slams ALP laws that make it illegal to be offensive" *The Australian*, 11 December 2012.

- (b) ANGLICARE Sydney believes that priority must be given to upholding the long-established right to the freedom of religion and belief, particularly as consideration is given to the extension of legislation on unlawful discrimination into new areas. Further exceptions/ exemptions should be introduced as required in order that religious bodies can continue to exercise their rights to freedom of religion, consistent with both Australian and international law.
- (c) However, ANGLICARE Sydney also concurs with the positions of Patrick Parkinson, Professor of Law at Sydney University, and Nicholas Aroney, Professor of Constitutional Law at University of Queensland, when they state that, the casting of the protection of the right to freedom of religion in the form of 'exceptions' or 'exemptions' does not do justice to the importance of this right.² This goes to the heart of how unlawful discrimination is to be defined in the new Bill.
- (d) Therefore, ANGLICARE Sydney concurs with Professors Parkinson and Aroney that the prohibition of unlawful discrimination ought to be redrafted so that there will be no unlawful discrimination where a right to freedom of religion, association or cultural expression is being legitimately exercised.

4 Volunteers

- (a) The definition of "employment" in clause 6 of the Bill includes work other than under a contract of employment, including unpaid voluntary work. According to the Explanatory Notes accompanying the Bill, volunteers were previously excluded from protection under the Sex Discrimination Act, Age Discrimination Act and Disability Discrimination Act.
- (b) In common with many religious organisations and not-for-profits, ANGLICARE Sydney has a large pool of volunteers, which currently exceeds the numbers of paid staff. ANGLICARE has recruitment, training, grievance and termination procedures for both employees and volunteers alike; however the processes surrounding volunteers are not as extensive as for paid employees.
- (c) Therefore ANGLICARE Sydney is concerned that the extension of anti-discrimination legislation to cover volunteers will impose a significant regulatory burden upon our organisation, including the need for management training, new procedures for volunteers and legal advice. It is possible that some services that

² Parkinson, P and Aroney, N "Review of Commonwealth Anti-Discrimination Laws Prohibitions and Exceptions" Unpublished note.

are volunteer-intensive may become less affordable through increased overheads. This is apart from the cost of any action which may be brought under the extended legislation by disaffected individuals.

- (d) Yet it is not clear to ANGLICARE Sydney what the basis is or what is the need for extending the legislation to cover volunteers, other than to simplify the legislation.³ In addition, when religious organisations are involved, there is the possibility that a claim of discrimination being made will be found to be in conflict with rights associated with the freedom of religion and the exemptions granted to religious organisations under the legislation. It is unreasonable that this legislation opens up religious and other not-for-profit organisations that are heavily reliant upon volunteers to the potential expense of litigation over discrimination claims – particularly when the need to do so has not been clearly established. The regulatory burden upon religious organisations and non-for-profits cannot justify whatever benefits might be thought to accrue from expanding the scope of the legislation in this kind of way.
- (e) Therefore we recommend that “voluntary or unpaid work” be removed from the definition of employment in clause 6.

5 Shifting the Burden of Proof

- (a) The Explanatory Notes accompanying the Bill outline proposed improvements to the complaints process, including:
- a shifting burden of proof once an applicant has established a prime facie case, to recognise that the respondent is best placed to know the reason for an action and to have access to relevant evidence (clause 124)
 - enhanced ability for the Commission to dismiss clearly unmeritorious complaints, and that matters dismissed in this way may proceed to court only by leave of the court (clauses 117 and 121), and
 - provision that parties should bear their own costs for litigation as a default position, with the court retaining a discretion to award costs in the interests of justice (clause 133).
- (b) ANGLICARE Sydney remains concerned that with the introduction of many additional protected attributes, the widening of the scope of the Bill to cover any area of public life, and changes to the burden of proof and awarding of costs have, when taken together, the potential to lead to a considerable increase in claims that

³ *Human Rights and Anti-Discrimination Bill 2012 Explanatory Notes*, paragraph 138.

have little merit or claims that, while they may have substance, are of a relatively minor nature. There are now many examples both in Australia and overseas of actions being commenced against religious organisations or individuals that were ultimately shown to have little merit and were unsuccessful, yet were extremely burdensome to those organisations or individuals both in terms of time and legal and staff costs. Many such examples were documented in our previous submission in response to the Attorney General's discussion paper in February 2012.

- (c) It is also proposed under the Bill that each party in a matter will bear their own litigation costs rather than the unsuccessful party. For religious and other not-for-profit organisations that provide services to the community, such litigation diminishes the financial resources that would otherwise be used to meet service and client needs. Unlike for-profit organisations, not-for-profit organisations often do not have the same resources to respond to such actions. For the good of society at large we believe that such unhelpful and expensive actions are to be avoided wherever possible.
- (d) In addition, it could be argued that the shifting of the burden of proof to the respondent runs counter to the presumption of innocence, which is a fundamental protection under the law.
- (e) Therefore regarding the burden of proof in unlawful discrimination matters, we believe that the full burden of proof should continue to rest with the complainant. This approach is consistent with existing approaches in Australian law on unlawful discrimination. We also recommend that the cost of litigation be borne by the unsuccessful party in a matter as the default position.

6 Aged Care Exception

- (a) The Bill provides that Commonwealth-funded aged care services will not be subject to the same exemptions generally available to religious organisations under the legislation. The Explanatory Notes advise that the reason for this exception is that significant feedback was received during the consultations of discrimination faced by older same-sex couples in accessing aged care services run by religious organisations, particularly when seeking to be recognised as a couple.⁴

⁴ *Human Rights and Anti-Discrimination Bill 2012 Explanatory Notes*, paragraph 190.

- (b) ANGLICARE Sydney is a provider of aged care services both residential accommodation and community services.
- (c) ANGLICARE Sydney is deeply concerned by the link that has been made explicitly in this part of the Bill between the funding of services by the Government and the implementation of anti-discrimination provisions. Our view is this is a false way of resolving a conflict between what are competing and legitimate human rights; that is in this instance, the right of organisations to act upon their religious beliefs on the one hand versus the application of anti-discrimination provisions for same-sex couples on the other hand. The presence or otherwise of Government funding should not be a factor in resolving such a conflict; rather it is a balancing of rights in this particular situation and ensuring that Australia meets its international obligations.
- (d) Therefore, ANGLICARE Sydney's view is that this part of the Bill should not be implemented without extensive consultations with the aged care sector. In this respect, no such consultations have occurred to our knowledge, save the short period for submissions connected with this Inquiry. Our view is that religious organisations should be given the opportunity to outline how they believe such discrimination is justified or otherwise in the light of the fundamental freedoms of religion and association.
- (e) ANGLICARE Sydney believes that not making an exception for aged care provision is more than about people simply gaining easier access to such services. Unlike other forms of service provision, which may simply involve transactions between clients and service providers, aged care residential facilities involve new residents becoming part of an existing community of residents, with various rights and responsibilities. An integral part of this community will be the culture and ethos of the nursing home provider, which will be evident to greater or lesser degree depending upon the provider. Once a person or couple are accepted into such a community, there is the potential for conflict where the person or couple are in fundamental disagreement with the religious ethos of the service provider or where the service provider has objections to the lifestyle or behaviours of the new resident(s). It is naive to assume that all of this will be resolved upon admission to a facility.
- (f) We believe that such a conflict between residents and service providers could potentially lead to claims of discrimination. In considering the provisions of this Bill, the Government needs to balance the rights of the individual with the rights of the provider, following consultation with the sector. In practice this could lead to

some restrictions upon the individual, which, if they are clearly communicated prior to admission into the facility, would not be viewed as discriminatory if the individual then chose to proceed with the admission.

7 Conclusion

ANGLICARE Sydney trusts that this submission will be of assistance in shaping the Bill.

Grant Millard
Chief Executive Officer
ANGLICARE Sydney