



AUSTRALIAN CATHOLIC BISHOPS CONFERENCE

General Secretariat

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The Secretary
Committee Secretary
Senate Legal and Constitutional Affairs Committee
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Dear Secretary

Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012

The Australian Catholic Bishops Conference (ACBC) is a permanent institution of the Catholic Church in Australia and the instrumentality used by the Australian Catholic Bishops to act nationally and address issues of national significance.

The Catholic Church contributes in a wide variety of ways across the spectrum of Australian society. As an integral part of its core mission, the Church seeks to assist people experience the fullness of life. It is concerned with all that impacts on human wellbeing. It comprises many thousands of different entities which have different purposes and modes of governance.

Anti-discrimination laws, appropriately applied, can contribute to security, freedom and opportunity for fulfilment in a wide range of human endeavours. The laws developed by the Commonwealth, State and Territory Governments over recent decades have contributed to civil life in many spheres of Australian society.

The proposed consolidation of anti-discrimination laws detailed in the *Human Rights and Anti-Discrimination Bill 2012 Exposure Draft* (the Exposure Draft) has the potential to introduce consistency in the application of anti-discrimination laws across jurisdictions and in relation to the rights of complainants, applicants and people in positions of authority in business and the welfare sector. But before dealing with a number of specific concerns with the Exposure Draft, the ACBC will provide some comments on the threshold issue of religious freedom.

Religious Freedom

Freedom of religion is a fundamental human right. Its existence and importance is acknowledged in the Constitution and in international covenants to which Australia is a signatory. It is a freedom that cannot be ignored. Governments are obliged to ensure that freedom of religion and the freedom to manifest religious beliefs in public is recognised and protected in law. It applies equally to participation in religious observance and to the delivery of services by religious people and agencies, for both religious organisations and their members. Many people who adhere to religious belief exercise their religious freedom to promote the common good.

Section 116 of the Australian Constitution states: “The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.”

The right of religious freedom is also captured in the *Universal Declaration of Human Rights* (UDHR) and the *International Covenant on Civil and Political Rights* (ICCPR):

- *Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty* (UDHR, Article 2);
- *Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance* (UDHR, Article 18);
- *Each State Party to the present Covenant undertakes to respect and to ensure all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind such as race, colour, sex, language, religion; and political or other opinion, national or social origin, property, birth or other status* (ICCPR, Article 2(1));
- *Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching* (ICCPR, Article 18(1));
- *No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice* (ICCPR, Article 18(2));
- *Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others* (ICCPR, Article 18(3));

- *The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions (ICCPR, Article 18(4));*
- *All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (ICCPR, Article 26).*

The right to religious freedom (ICCPR, Article 18) is a “non-derogable” right under Article 4(2), meaning that governments may not act to restrict or suspend this right even in times of public emergency.

The law needs to find the correct balance between competing rights, so the right to be protected from unjust discrimination is not pursued in a way which undermines religious freedom.

The ACBC has detailed a number of concerns with the Exposure Draft below, in order of the clauses in which the issues arise.

Clause 6 – The dictionary

The definition of “**employment**” in clause 6 includes volunteers. Volunteers are the backbone of the Church, much of which is a collection of small enterprises with limited resources. Every activity of the Church relies on the generous support of volunteers and typically a parish may have over 100 volunteers supporting Church and school activities and visiting the elderly, sick or poor. Across the Church nationally, tens of thousands of volunteers are involved in the activities of the Church in Australia. Legislation that diverts resources away from service delivery to managing risk, litigation and developing protocols to serve new anti-discrimination laws, risks jeopardising the services provided by Church agencies and volunteers. Imposing a duty not to discriminate would significantly increase compliance costs, be disruptive and a disincentive to engage volunteers. Therefore, the ACBC does not support the application of anti-discrimination regulation to the acceptance of and treatment of volunteers in the same way as applied to employees.

A regulatory or financial burden placed on Churches or charities should not be so high as to hinder the recruitment and retention of volunteers, as the costs will fall on those people the organisations care for.

The definition for “**educational institution**” should, to avoid doubt, include the words “pre-school or early childhood learning centre.”

The ACBC is concerned about the definition of “**immediate family**” as the implication of the definition to the operation of the proposed legislation is not clear, so reserves its right to make further comment on this point.

The ACBC submits that the term “**religious purposes**” should be defined to avoid doubt over the application of clause 33. The following definition is proposed, based closely on ICCPR article 18(1):

religious purposes means activities undertaken either individually or in community with others and in public or private, to manifest a person’s religion or belief in worship, observance, practice and teaching.

Clause 17, The protected attributes

Inclusion of “Religion” as a protected attribute

The ACBC reminds the Committee of the long community debate on how to promote and protect religious freedom in Australia. In particular the 1988 Constitutional referendum which sought to extend freedom of religion.

There is concern that inclusion of “religion” as a protected attribute in this Exposure Draft seeks to achieve the purpose of the 1988 referendum despite its emphatic rejection by the Australian people. That is the Exposure Draft, making use of the external affairs power of the Commonwealth Government, risks propelling matters of religious practice and belief from being matters of public discourse to being matters for litigation.

In this respect the Church has in mind now, as it had in 1988, the risk of a United States style “religious freedom” litigation culture developing in Australia. The development of such a culture would erode rather than promote both religious freedom and social cohesion.

The ACBC strongly believes that the religious freedom law reform agenda which was rejected by the Australian people at a referendum should not be revived, even if indirectly, through this proposed Bill.

Listing religion as a new protected attribute would introduce uncertainty into the law, including the risk of legal actions hostile to religion. Religion has never itself been a justiciable ground of action under any Commonwealth legislation and so its addition is an untested addition to the law.

Clause 22(3) has the effect of limiting the application of religion as a protected attribute to “work and work-related areas”, but when combined with the definition of employment in clause 6 a wider range of non-educational church agencies, including agencies which engage volunteers, will now be covered by anti-discrimination law in new and unpredictable ways.

Given “unfavourable treatment” under clause 19(2) is defined to include “harassing the other person” and “other conduct that offends, insults or intimidates the other person,” a conversation at work about religion could give rise to a claim if it involved insults or remarks taken to be offensive about a person’s religion. An employer is then responsible for those actions unless the employer can demonstrate reasonable steps were taken to avoid the insults and offensive comments.

The inclusion of conduct that offends or insults a person will have a chilling effect on upholding and promoting religious teachings and principles in agencies founded for religious purposes (including for the carrying out of works of service). Even if these teachings and principles would usually be protected by an exception (and this cannot be taken for granted), this has to be proven by the respondent in a lengthy and expensive legal process.

Before religion is listed the Government should identify the harm the new attribute is meant to address and explain how the broad practice of religion will be protected beyond the narrow range of exceptions listed in clauses 32 and 33.

Religion should be deleted from the list of protected attributes.

Sexual orientation and gender identity

The extension of the list of protected attributes to include sexual orientation and gender identity may give rise to potential conflicts with the conscientious moral values of other people, so there is scope for conflict with the right of people to practise their religion and to serve others in accordance with their most deeply-held beliefs and values.

The terms ‘sexual orientation’ and ‘gender identity’ relate to thoughts and feelings rather than what governments can regulate, which is behaviour. Human sexuality is not an identity, but is a gift expressed in actions which necessarily have a moral dimension. The Church sees human sexuality “... expressed in the complete and lifelong mutual devotion of a man and a woman in marriage.”¹

The list of protected attributes should not include sexual orientation and gender identity.

Clause 19, When a person discriminates against another person, and related concepts

The Exposure Draft allows for a complaint of discrimination on the basis of two or more protected attributes. The ACBC is concerned that, in the interests of clarity and justice, each attribute referred to in a complaint should be addressed separately, so it is clear the threshold for each complaint has been reached and the respondents’ actions can be clearly assessed in respect of intention, context, reasonableness and in terms of their conflict with competing rights including religious belief. A complaint on the basis of a combination of protected attributes should not be permitted.

Clause 19(2)(b) also includes offending someone in the meaning of discrimination. Including “offends” in the definition would restrict freedom of speech unreasonably, including the right to discuss religious beliefs which some people may regard as offensive. The word “offends” should be deleted.

¹ See Archbishop Silvano Tomasi’s speech at the 16th Session of the Human Rights Council – General Debate Geneva, 22 March 2011:
<http://www.radiovaticana.org/EN1/articolo.asp?c=471925>

Conduct that “offends, insults or intimidates” is typically conduct which may constitute harassment under existing legislation. It appears such conduct would not amount to discrimination under existing legislation. The effect of subclauses 19(1) and (2) when read together is to conflate the current definitions of discrimination and harassment with the unintended consequence that conduct that is not in fact discriminatory (such that conduct which may offend) would be discriminatory. This conflation should be rectified such that conduct that is deemed to “offend, insult or intimidate” would not amount to discrimination.

Chapter 2, Part 2-2, Division 4 – Exceptions to unlawful discrimination

The language of exemptions and exceptions in the Exposure Draft is misleading and fails to recognise that religious freedom is not a special permission to discriminate granted by government but a fundamental human right that government is obliged to protect. To make this clear and to remove the potential for misunderstanding, the legislation should replace the language of exemptions and exceptions with language that recognises that competing rights must be balanced against each other. This change in the language used in legislation should also be applied to other fundamental rights, such as the right to freedom of association.

Recognition should be given to the exercise of rights to religious freedom embodied in law and as encapsulated in statements of mission, values, philosophy or a code of conduct of religious organisations.

When Churches and Church members express their religious freedom and their cultural, ethnic and religious identity through acts of worship or charity, they continue and celebrate traditions dating back centuries. These expressions of identity arise not only in ceremonial activities of worship and devotion in churches, but also, under the auspices of the Catholic Church, in the treatment of staff and students in schools, staff and patients in hospitals, staff and residents in aged care facilities and staff and clients of services for people experiencing homelessness. As human beings endowed with religious freedom people have the right to contribute to society and serve humanity in accordance with those beliefs.

For example, parents choose Catholic schools for their children because they expect that this education will be provided by teachers in a manner consistent with the doctrines, beliefs and practices of the Catholic Church. If a teacher in a church school publicly argues against church teachings or lives in such a way to challenge those teachings, the school should have the freedom to refuse to employ that person. The Catholic Church does not impose its beliefs on anyone and no one is obliged to work for a church agency. The expectation that those working in a Catholic agency will support its mission applies to everyone without discrimination.

People considering a move into a church aged care residential facility have an expectation that the particular ethos of that church will be upheld at the facility. If a resident is not prepared to abide by that ethos, the Church aged care facility should have the freedom to refuse to accept that person. To deny this is to deny religious freedom and, among other matters, would require religious communities whose charism is to live in communion with

the aged and share a home with them to act contrary to their callings. The explanatory memorandum offers no evidence that current arrangements pose actual difficulties.

Clause 33(3), which says the exceptions provided to religious bodies do not apply in the case of Commonwealth-funded aged care, risks establishing an expectation that government-funded services should be provided to secular standards, without regard to the religious beliefs and mission of the provider. Religious service providers are much more than an arm of the state. A second concern is that it may make it more difficult for Catholic aged care providers to act in accordance with Church teaching and mission with regard to employment and service provision. If staff cannot carry out their mission, the provision in-effect expands its reach to cover employment.

In each situation, school education and aged care, Catholic organisations meet all regulatory requirements for eligibility to offer educational and aged care services, and also manage the culture of the organisations and the treatment of individuals, whether employees or clients, consistent with the doctrines and practices of the Catholic Church.

At a minimum the Church would like to maintain the exception for educational institutions as provided in clause 33(4).

**Clause 52 – Requesting or requiring information for discriminatory purpose;
Clause 53 – Publishing etc indicating intention to engage in unlawful conduct**

There is concern that clauses 52 and 53 taken either individually or collectively will have a chilling effect on freedom of speech, especially in relation to the freedom to express and manifest religious beliefs. This is particularly so given religion is listed as a protected attribute.

In the case of each of clauses 52 and 53 an exception should be included in respect of “any public act done reasonably in good faith for reasons of religious belief or religious instruction”, which is similar to provisions found in section 49ZT of the NSW *Anti-Discrimination Act 1977*.

The ACBC also proposes an amendment to clause 53(2) (based on the incorporation of a definition of *religious purposes* in the dictionary), by adding a subclause (c) “for religious purposes” – so that publishing or displaying material reasonably and in good faith for these purposes is not unlawful.

Clause 124 – Burden of proof in proceedings under section 120 etc.

Clause 124 of the Exposure Draft reverses the onus of proof to the respondent. The Church and the not-for-profit sector are significant employers in the community. Reversing the onus of proof would impose a significant and unnecessary financial burden on employers.

The burden of proof is very important. Already because of the standard set by the *Ellenbogen* decision, the Australian Human Rights Commission must accept any complaint which, taken at its highest, would amount to discrimination under the legislation. In effect,

this creates a situation where complaints that are lacking in substance and therefore have no reasonable prospects of success are accepted, proceed to conciliation and must be responded to by employers. Complainants therefore already have a significant advantage in having matters conciliated because they allege discrimination on a ground in the legislation when there is little or no evidence to support the allegation. Complainants should continue to be put to the task of having to make out their claim.

The effect of clause 124 is not consistent with existing provisions in the discrimination legislation where a reverse onus of proof currently applies. In the existing legislation, the reverse onus, where it applies, is narrow and limited to specific circumstances. Clause 124 provides for a reverse onus in terms which are very similar to s. 361 of the *Fair Work Act 2009* (Cth). That section of the *Fair Work Act* has been the subject litigation which ultimately made its way to the High Court in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32. There is doubt that clause 124, if enacted, would be interpreted the way in which it is suggested in the Explanatory Notes. Rather, and using the interpretation of s.361 of the *Fair Work Act* as an indication, it is more likely that a complainant would only need to demonstrate that they fall within a protected attribute and that they were treated unfavourably. The onus would then shift to the respondent and it would be presumed that the unfavourable treatment is due to the protected attribute. Experience strongly suggests that respondents will have grave and substantial difficulties displacing this onus.

No consideration appears to have been given to having differing compliance obligations on enterprises of varying sizes, particularly the impact on small enterprises which are fundamental to a strong economy and civil society. Most Church employers are small employers with few expert resources at their disposal. The experience of many with those aspects of the *Fair Work Act* where a reverse onus of proof applies is that they are at a significant disadvantage in defending claim. This in turn acts as a deterrent to employing or engaging people covered by such legislation.

A change in the burden of proof with the introduction of any new attributes would generate considerable challenges and costs for organisations across the community. There should be a significant threshold for complaints to avoid discrimination becoming a mechanism for claims pursued because of other grievances. Organisations subject to complaints may also be obliged to consider responding on commercial grounds, settling with some complainants purely to save the cost of a complaint going further.

I would be happy to answer any questions the Committee may have.

Yours faithfully

Rev Brian Lucas
General Secretary