

Submission from the Catholic Archdiocese of Sydney, the Diocese of Parramatta and the Catholic Education Commission (NSW) on the Human Rights and Anti-Discrimination Bill 2012 (Cth)

1 Introduction

The Catholic Archdiocese of Sydney, the Diocese of Parramatta and the Catholic Education Commission (NSW) are grateful for the opportunity to provide our views regarding the exposure draft of the Human Rights and Anti-Discrimination Bill 2012 (Cth) (**the Bill**), which was released on 20 November 2012 by the Attorney-General, the Honourable Nicola Roxon, and the Minister for Finance and Deregulation, the Honourable Penny Wong.

The Human Rights and Anti-Discrimination Bill 2012 Explanatory Notes (**the Explanatory Notes**) state that:¹ *"The Bill does not intend to make significant changes to what is unlawful and what is not. However, the Bill makes a number of improvements to the existing anti-discrimination framework to produce a clearer and simpler law."*

We welcome efforts to clarify and simplify federal anti-discrimination law. The current inconsistency between the various pieces of legislation that regulate anti-discrimination creates unnecessary confusion. We support the effect of the Bill in eliminating inconsistency in the current regulation by standardising the definitions of unlawful conduct and the processes in respect of protected attributes. However we have concerns about several aspects of the Bill that significantly increase the regulation of conduct in public life. This Submission identifies these concerns, which in general terms are:

- the tension between the Bill (and the protections from discrimination provided thereby) and the rights of freedom of religion and freedom of speech;
- the broadening of the concept of discrimination under the Bill;
- the increased number of protected attributes under the Bill;
- the application of the Bill to volunteers;
- the increase in the risk (and cost) of litigation, including through the reversal of the burden of proof, and the treatment of costs; and
- the limitations placed on the exceptions related to religion by the Bill.

As a body that is involved in a number of the areas of public life which the Bill seeks to regulate, the Bill will have a significant

1. Explanatory Notes at page 1.

impact on the way in which the Catholic Church operates. The Catholic Church defends the right of every human being to be treated justly. The right of every human being to be treated justly has many facets and involves a balancing of a number of rights. We are concerned that the Bill undermines the rights of freedom of religion and freedom of speech. In addition, and more generally, we are concerned that the Bill will cause an untenable increase in the risk of litigation and compliance costs for respondents.

2 Rights of freedom of religion and freedom of speech

The rights of freedom of religion and freedom of speech are fundamental human rights. They are rights enshrined in treaties ratified by Australia, including the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights (ICCPR)*. We recognise the potential for conflict between these rights and the right to freedom from discrimination, particularly in the field of anti-discrimination law, and stress the importance of striking the right balance. In the discussion below, we identify aspects of the Bill which fail to strike the right balance and which undermine the rights of freedom of religion and freedom of speech.

3 Concept of discrimination

The parties to this submission understand the reasoning for the alteration to the terms used to describe discrimination. We recognise that the concepts of discrimination by unfavourable treatment and discrimination by imposition of policies are intended to reflect the current protections against direct and indirect discrimination in the *Age Discrimination Act 2004 (ADA)*, the *Disability Discrimination Act (DDA)*, the *Racial Discrimination Act (RDA)* and the *Sex Discrimination Act (SDA)*. We understand that the new definitions of discrimination will capture the type of conduct that is rendered unlawful under the current regulation.

We are concerned, however, that the changes to the definition of discrimination significantly broaden the scope of conduct that will be regulated in comparison to the current regulatory framework. In particular:

- clause 19(2) of the Bill, which makes it clear that, for the purposes of discrimination by unfavourable treatment, “unfavourable treatment” includes “harassing the other person” and “other conduct that offends, insults or intimidates the other person.” The Explanatory Notes explain that:²

“[such] conduct imposes a detriment on a person because of his or her attribute and would therefore be discrimination under subclause 19(1). The harassment itself does not need to relate to the protected attribute. It is sufficient that the offensive

2. Explanatory Notes, at pages 26-27.

conduct is targeted at the person because of their attribute."

We consider that clause 19(2), by which conduct that merely offends or insults will be discrimination by unfavourable treatment, encroaches on freedom of speech. In particular, it is noted that clause 19(2) contains no test of reasonableness in the context of harassment or conduct that offends, insults or intimidates such as there is in current regulation in sexual harassment and vilification laws.

In this respect, we endorse the following comments of James Spigelman, the former Chief Justice of the Supreme Court of New South Wales (referring also to section 18C of the RDA which concerns racial vilification):³

"The new s19 defines, for the first time, discrimination by unfavourable treatment to include "conduct that offends, insults or intimidates" another person. As has always been the case with s 18C, the relevant conduct must occur "because the other person has a particular protected attribute". Significantly, unlike existing s 18C (or its replacement by the new s 51), there is no element of objectivity, as presently found in the words "reasonably likely to offend". It appears to me the new Bill contains a subjective test of being offended. ..When rights conflict, drawing the line too far in favour of one, degrades the other right. Words such as "offend" and "insult", impinge on freedom of speech in a way that words such as "humiliate", "denigrate," "intimidate", "incite hostility" or "hatred" or "contempt", do not. To go beyond language of the latter character, in my opinion, goes too far."

- Clause 19(3) of the Bill concerns discrimination by imposition of policies. As noted above, discrimination by imposition of policies is similar to indirect discrimination under the ADA, the DDA, the RDA and the SDA. Unlike indirect discrimination, however, discrimination by imposition of policies is not limited by a requirement that the discrimination be unreasonable in the circumstances. Rather, the onus is on the respondent to establish that the discrimination falls within an exception, for instance, because the conduct was "justifiable" within the meaning of clause 23 of the Bill. **We are concerned that this new concept is more complex and therefore will make it more difficult for respondents to defend against complaints.**

3. See <http://www.abc.net.au/unleashed/4420410.html>

4 Protected attributes

The Bill provides that the range of attributes that will now be protected by federal anti-discrimination law has expanded. It is noted that clause 17 of the Bill extends protection to attributes which, at the federal level, are currently protected only as part of the “equal opportunity in employment” scheme under the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**) (including, relevantly, religion) or are currently not protected at all (i.e. gender identity and sexual orientation).

Including religion as a protected attribute is a significant development. We hope this will provide protection for individuals to manifest their religion at work and in work-related areas, without any adverse impact on freedom of religion for church agencies and employers. We reserve the right to make further submissions on this in the light of report of the Senate Committee.

We are also concerned about the impact of the extension of protection to certain other grounds that may conflict with the right to religious freedom and the practice of religious beliefs.

We note that the extension of the protection to sexual orientation and gender identity will be subject to the religious exemptions (discussed further at item 7 below). For instance:

- The exceptions related to religion contained in clauses 32 and 33 apply in respect of gender identity, sexual orientation and marital or relationship status.
- The exception related to religion contained in clause 32 applies in respect of family responsibilities.

However, our concerns are not entirely alleviated. For instance, the exception in clause 33(2) does not apply if the discrimination is connected with the provision, by the first person, of Commonwealth-funded aged care and the discrimination is not connected with the employment of persons to provide that aged care (see item 7.2 below). This means, for instance, that a Catholic Church provider of Commonwealth-funded aged care would be required to admit same sex couples as residents. **This is a requirement that would conflict with the teachings of the Catholic Church and to that extent, require facilities to act in a manner that is inconsistent with their faith. To that extent, the Bill then undermines the right to freedom of religion.**

We are also concerned about the expansive definition of “family responsibilities” contained in the Bill and the extent to which that may require Catholic employers to act in a way that is inconsistent with the teachings of the Catholic Church. Conduct which would otherwise be unlawful as contravening the protection for sexual orientation or marital or relationship status may be exempt by reason of the religious exceptions contained in the Bill. However, by

reason of the broad meaning of “family responsibilities” (and the use of the term “immediate family” as defined), behaviour which would otherwise be exempt is rendered unlawful. We submit that this too undermines the right to freedom of religion in circumstances where it is reasonable to consider that those working in a Catholic agency would anticipate that their employer would act in a manner that is consistent with the Church’s teachings. For these reasons, **“family responsibilities” should also be listed in clause 33(1) as a ground to which the exceptions for religious bodies and educational institutions apply.**

5 Volunteers

The Bill extends anti-discrimination protection to those engaged in voluntary or unpaid work. This is by reason of the definition of “work and work-related areas” which includes “voluntary or unpaid work”. The current range of legislation does not regulate voluntary work.

The impact that this will have on Catholic Church entities will be significant. The Catholic Church relies heavily on the support of volunteers. Volunteers can be found in every facet of the Catholic Church’s work. Each parish alone relies upon the support of a multitude of volunteers, but volunteers are also found, for example, at schools, aged care facilities, accommodation for the disabled and in services provided to the poor. We are concerned that **extending the reach of anti-discrimination regulation to volunteers will significantly increase the compliance costs for Catholic entities in being required to implement preventative measures such as training and policies, in addition to increasing the cost burden for entities through the risk of litigation.**

6 Increase in risk (and costs) of litigation

The Bill includes a number of measures that are intended to simplify the process for dealing with complaints. **We are concerned that the process of simplification under the Bill will have the effect of making it easier to bring and maintain vexatious claims.** This concern is heightened because of the expansion in the conduct that is considered unlawful under the Bill and therefore the increased likelihood that complaints will be made, as discussed elsewhere in this paper.

6.1 Reversal of burden of proof

The change to the burden of proof imposes a disproportionate burden on those defending claims. Under clause 124(1) it is now incumbent on a respondent to a complaint to rebut a presumption that behaviour is unlawful once the complainant has established a prima facie case. **We are concerned that this will significantly increase the risk of litigation and thereby increase costs of**

respondents both in the context of defending litigation and in establishing preventative measures to limit the risk that claims will be commenced.

We welcome the retention of the exception for religious bodies (discussed in detail in item 7 below) and the new exception for justifiable⁴ conduct. However we are concerned that the Bill presents a number of impediments in defending conduct that is justifiable or consistent with its teachings.

The Explanatory Notes explain that clause 124⁵ *"will require the applicant to first establish a prima facie case that the unlawful discrimination occurred before the burden shifts to the respondent to demonstrate a non-discriminatory reason for the action, that the conduct is justifiable or that another exception applies. The applicant will not be required to disprove the application of defences and exceptions. The policy rationale behind this is that the respondent is in the best position to know the reason for the discriminatory action and to have access to the relevant evidence."*

The reverse onus proposed under clause 124 is very similar to s. 361 of the *Fair Work Act 2009* (Cth) (**FWA**). It is doubtful, however, that clause 124, if enacted, would be interpreted the way in which it is suggested in the Explanatory Notes. Section 361 of the FWA 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. Using the interpretation of s.361 of the FWA 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.

We consider that clauses 124(1) and (2), in the context of a Bill that broadens the concept of discrimination (see item 3 above), are likely to increase the risk of litigation and the costs for respondents (typically employers, educational institutions and providers of aged care and other such services and education). In this respect, we endorse the following comment made by Mr Spigelman (which also goes to how unsatisfactory it is, as a matter of principle, to treat fundamental human rights such as freedom of speech and freedom of religion and belief as "exceptions"):⁶

*"The new Bill proposes a significant redrawing of the line between permissible and unlawful speech. This is so, notwithstanding the ability to establish that relevant conduct falls within a statutory exception. **A freedom that is***

4. The Bill, clause 23.

5. Explanatory Notes at page 89.

6. See <http://www.abc.net.au/unleashed/4420410.html>.

contingent on proving, after the event, that it was exercised reasonably or on some other exculpatory basis, is a much reduced freedom. Further, as is well known, the chilling effect of the mere possibility of legal processes will prevent speech that could have satisfied an exception” (emphasis added).

6.2 Costs

Clause 133 of the Bill provides that each party is to bear that party’s own costs. However, in some circumstances if the court considers that there are circumstances that justify it in doing so, the court may award costs. The Explanatory Notes state that:⁷

“This change in policy in relation to costs means that as a default position each party will bear their own costs in proceedings, rather than costs following the event as is the case currently, which generally means that the unsuccessful party pays the costs of the successful party. The risk of an adverse cost order is a significant barrier to commencing litigation, even for cases with relative merit.”

We are concerned that, by reducing the risk of an adverse costs order, **clause 133 will increase commencing and maintenance of vexatious litigation and the costs for respondents.**

7 Exceptions

7.1 General concerns

The signatories to this submission have several general concerns regarding the exceptions contained in the Bill. To begin with, the terminology of “exceptions” is problematic and fails to acknowledge that the right of freedom of religion is a fundamental human right, which the Commonwealth government is obliged to protect under international law. In our view, **the terminology of “exceptions” should be replaced with the terminology of “protections”**. Using the terminology of “protections” would recognise that conduct which is deemed not to be unlawful because it is covered by an exception related to religion is in fact *lawful* because it accords with the fundamental human right of freedom of religion.

In addition, we note that the fact that an entity may rely upon an exception is of little assistance when faced with a revised system where the number of claims are likely to increase given the broadening of the concept of “discrimination” and the reduced barriers to bringing a claim.

7.2 Concerns relating to exceptions related to religion

Subject to the concerns identified above, we support the inclusion of the exceptions related to religion in clauses 32 and 33. However to ensure that religious freedom is properly protected, we suggest that

7. Explanatory Notes at page 94.

the list of attributes to which the exceptions apply be made consistent with the religious exemptions in State anti-discrimination legislation such as the *Anti-Discrimination Act 1976* (NSW) and the *Equal Opportunity Act 2010* (Vic). In this regard, we note that s84 of the Victorian Act also gives the benefit of exemption to individuals.

We otherwise support the exemptions set out in clauses 32 and 33 subject to the following. We have several concerns about the exceptions as currently drafted.

First, the term "religious purposes" in clause 33(2) should be defined by reference to clause 18(1) of the ICCPR, which provides that:

"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."

We therefore recommend including in clause 6 the following definition:

"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."

Secondly, **the exceptions contained in clause 33 should apply in relation to "family responsibilities"**. As discussed above, the term "family responsibilities" is defined in clause 6 of the Bill as responsibilities of the person to care for or support a child of the person who is wholly or substantially dependent on the person or any other member of the person's "immediate family", which includes a same sex de facto partner or former same-sex de facto partner, as well as a child, parent, grandparent, grandchild or sibling of a same-sex de facto partner or former same-sex de facto partner.

While the exceptions contained in clause 33 apply in relation to sexual orientation and marital or relationship status, we are concerned that treating employees in conformity with the doctrines, tenets, beliefs or teachings of the Catholic Church could still expose organisations to claims under the Bill. In our view, a body established for religious purposes (as contemplated by clause 33(2)) and an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion (in our case, the Catholic Church), or an officer, employee or agent of such an institution (as contemplated by clause 33(3)) should be able to act in a way that is consistent with the teachings of the Catholic Church, and indeed, that their employees would expect such organisations to do so.

Thirdly, **the exception enumerated in clause 33(2) should extend to the provision of Commonwealth-funded aged care.** In this regard, the Explanatory Notes state that:⁸

"There was significant feedback during consultations of the 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. When such services are provided with Commonwealth funding, the Government does not consider that discrimination in the provision of those services is appropriate."

We are troubled by this reasoning. The inclusion of exceptions related to religion stems from recognition of the importance of the freedom of religion. This is acknowledged in the Explanatory Notes, which state that:⁹

"Given the importance of freedom of religion, it is important to maintain explicit religious exemptions."

In this respect, the fact that services are provided with Commonwealth funding should not be relevant. **A body established for religious purposes which provides Commonwealth-funded aged care should lawfully be able to conduct itself and its affairs in conformity with the doctrines, tenets or beliefs of the particular religion,** and residents cannot reasonably expect that such organisations to do otherwise.

In addition, **the term "Commonwealth-funded aged care" is defined too broadly.** "Commonwealth-funded aged care" is defined in clause 6 as:

- aged care, within the meaning of the *Aged Care Act 1997* (Cth) (AC Act) that is provided by an approved provider, within the meaning of that Act and in relation to which the approved provider has responsibilities under that Act;
- care or services in relation to which a grant has been paid under Chapter 5 of the AC Act; or
- care or services of a class prescribed by the regulations for the purpose of this paragraph.

As the Explanatory Notes explain, the effect of the definition of the term "Commonwealth-funded aged care" is that the carve-out to the exception in clause 33(2)¹⁰

"applies regardless of whether the Commonwealth is the sole or even dominant funder of these services (that is, this applies even if the services are provided with a combination of Commonwealth and other resources)."

8. Explanatory Notes at page 42.

9. Explanatory Notes at page 41.

10. Explanatory Notes at page 42.

7.3 Clause 53

We are concerned that clause 53(1) impinges too greatly on freedom of speech. **We recommend amending clause 53(2) to include subclause (c): “for religious purposes”.** This would enable a person, reasonably and in good faith, to publish or display material for religious purposes.