

Australian Catholic University

Submission to the Australian Government Consultation on Religious Discrimination Bills

October 2019

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EXECUTIVE SUMMARY

Australian Catholic University (ACU) welcomes the opportunity to provide feedback on the Australian Government's draft bills pertaining to religious discrimination (collectively, 'the Bills'), namely the:

- Religious Discrimination Bill 2019;
- Religious Discrimination (Consequential Amendments) Bill 2019; and
- Human Rights Legislation Amendment (Freedom of Religion) Bill 2019.

ACU affirms its strong support for religious freedom, as both a fundamental human right and as a defining and foundational feature of any free, just and equal society.

Freedom of religion is a right contemplated by, and variously enshrined in, the Australian Constitution, federal, state and territory laws, and international covenants to which Australia is a signatory. Moreover, a commitment to religious freedom is reflected in the life and culture of the nation.

ACU supports the broad objectives of the Bills, particularly their:

- efforts to protect the rights of religious and non-religious people to engage in discussions concerning their beliefs without fear of discrimination;
- recognition that freedom of religion is a universal human right; and
- express affirmation that human rights are indivisible and owed to every human being as a consequence of their inherent equality and dignity.

ACU notes that the Australian Law Reform Commission (ALRC) is currently completing its inquiry into the *Framework of Religious Exemptions in Anti-discrimination Legislation* and is not due to report to the Government until December 2020. Given the potential for significant overlap between the ALRC's work and the content of the Bills, ACU recommends that introduction of the Bills be delayed until the ALRC has completed its work. This is in the interests of achieving effective and coherent reform in this complex policy area. For instance, it remains unclear how conduct protected by the Bills' provisions would be treated in the context of other anti-discrimination legislative regimes – for example, relating to matters such as sexuality under the *Sex Discrimination Act 1984* (Cth), amongst others.

ACU considers it would be premature for the Government to seek to finalise and progress the Bills to Parliament in advance of the ALRC's final report.

LIST OF RECOMMENDATIONS

ACU makes the following recommendations with respect to the exposure draft of the Religious Discrimination Bill 2019 (hereafter 'the Bill'), which include some suggested amendments to strengthen its provisions.

1. Technical amendments should be made to Section 10 to provide greater clarity and avoid potential unintended consequences with respect to interpretation of the Bill. Specifically:
 - a) A new subclause 10(4) should be included to the following effect:

For the purposes of subclause (2), a person is a religious body if the person satisfies at least one of the categories of religious body set out in paragraph 2(a), paragraph 2(b) or paragraph 2(c) of clause 10.

b) Paragraph 10(2)(b) should be amended as follows [suggested amendments are underlined]:

(2) **Religious body** means:

...

(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 with non-charitable purposes); or

...

2. Consideration should be given to revising clause 10(2) and the definition of a “religious body” to:
 - Accommodate charities strongly associated with religious communities and driven by a clear religious and charitable purpose; although they may engage in “commercial” activity as a dimension of their work.
 - Include hospitals and aged care facilities established and conducted in accordance with the doctrines, tenets, beliefs and teachings of a religion.
3. The Bill should contain an express provision that states it is lawful (and not discrimination) for a religious body (as defined in clause 10), as well as other religious institutions, to exercise a preference in the employment and promotion of staff for those who are supportive of their religious beliefs and teachings – including those who are adherents to their particular faith or from other faith traditions, or none at all.
4. The Bill should be drafted in a manner that avoids judges being required to make determinations about what are, and are not, the “doctrines, tenets, beliefs or teachings” of a religion. This lies outside the expertise of judges and is a matter that should be left to the relevant religious community alone to determine. This is particularly the case in the context of clauses 5 and 41 pertaining to statements of belief.
5. Consideration should be given to include clear definitions of words such as “malicious”, “harass”, “vilify” and “incite hatred” in the Bill, notably in the context of clauses 8 and 41.
6. Additional wording should be included in the Bill to explicitly provide that conduct (including employment decisions) which is reasonably in accordance with *the established ethos and character* of a religious body does not constitute discrimination.
7. There should be a clear rationale behind the proposed definition and parameters of “relevant employer” (clause 5) as a non-government employer with revenue of at least \$50 million in the previous financial year. At present, this threshold appears somewhat arbitrary.
8. The term “unjustifiable financial hardship” in clause 8(3) should be defined in the Bill, for greater clarity.
9. The term “unjustifiable adverse impact” should be defined in the Bill, with a view to avoiding it being used to broadly defeat the protection intended to be provided under clause 8(6).
10. The definition of “health practitioner” in clause 8(5) should be expanded to include students enrolled in a course or degree leading to a qualification as a health practitioner. Alternatively, a new definition of ‘health practitioner student’ could be inserted and corresponding amendments made to subclauses 8(5) and (6) so that relevant students are able to avail themselves of the protections contained in those subclauses. A corresponding amendment to ‘health practitioner conduct rule’ should also be incorporated into clause 5.
11. The Bill should be amended to ensure that individuals who are yet to be admitted to a health profession (such as tertiary level graduates of health courses) are not vulnerable to exclusion from the Bill’s protections, particularly compared to health practitioners who are already established in their professions.
12. ACU recommends the Government not finalise the Bills until the ALRC has completed its inquiry into the *Framework of Religious Exemptions in Anti-discrimination Legislation*.

ACU provides the following feedback, along with some observations, on the exposure draft of the Religious Discrimination Bill 2019 ('the Bill').

TECHNICAL AMENDMENTS

Clause 10(2) —Definitional issues

Clause 10 of the Exposure Draft of the Bill provides:

10 Religious bodies may act in accordance with their faith

- (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 accordance with the doctrines, tenets, beliefs or teachings of the religion in relation to which the religious body is conducted.*
- (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).*
- (3) *This section applies despite anything else in this Act.*

As a matter of general principle, ACU broadly supports the underlying premise of clause 10 that certain conduct engaged in by religious bodies in accordance with their faith is not considered discrimination under the Bill. It is appropriate that clause 10 is not exception based. ACU also supports the alignment between clause 10 of the Bill and section 38 of the *Sex Discrimination Act 1984* (Cth), as referred to in paragraph 167 of the Explanatory Notes to the Bill (hereafter 'Explanatory Notes').

However, ACU recommends the following amendments should be made to Clause 10 to provide greater clarity and avoid potential unintended consequences in interpretations of the Bill.

- A new subclause 10(4) should be included in clause 10 of the Bill to the following effect:

For the purposes of subclause (2), a person is a religious body if the person satisfies at least one of the categories of religious body set out in paragraph 2(a), paragraph 2(b) or paragraph 2(c) of clause 10.

Rationale: The use of the separator "or" between paragraphs 10(2)(a), 10(2)(b) and 10(2)(c) would ordinarily result in non-cumulative alternatives (i.e. one or the other); which is consistent with general principles of legislative interpretation. However, in situations where an institution falls under more than one category, this would potentially render it liable to an either/or application of clause 10(2). For example, if an institution or body is both an educational institution *and* a registered charity, the fact that it may satisfy paragraph 10(2)(a) may not be sufficient to avoid it triggering paragraph 10(2)(b), and hence a consideration as to whether it "engages solely or primarily in commercial activities"). There is no mechanism under clause 10(2) for a religious body to identify the principal indicia of its status. In other words, there is no mechanism that would allow a religious body to elevate its status as an educational institution over its status as a registered charity (or vice versa) for the purposes of this subclause.

Therefore it is recommended that, in the event that a religious body satisfies at least one of the categories in paragraphs 10(2)(a), 10(2)(b) and 10(2)(c), this should be sufficient to characterise them as a 'religious body' for the purposes of the Bill.

Furthermore, it is unclear whether subclause 10(2) is structured as a cascading provision (i.e. if paragraph 10(2)(a) does not apply, then paragraph 10(2)(b) applies and so on). If subclause 10(2) is

intended to be subject to a hierarchy of interpretation (commencing with paragraph 10(2)(a) and concluding with paragraph 10(2)(c)) this ought to be made clear.

Paragraph 238 of the Bill's Explanatory Notes indicates that clause 18 of the Bill (which prohibits discrimination in education) is subject to clause 10. This suggests that either the 'one or the other' interpretation or the 'if not this, then that' interpretation of subclause 10(2) would apply.

In order to clarify these issues of statutory interpretation, and for the avoidance of doubt, it is submitted that a new subclause 10(4) as suggested above be inserted into clause 10 of the Bill.

Paragraph 10(2)(b) should be amended as follows [suggested amendments are underlined]:

(2) **Religious body** means:

...

(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 with non-charitable purposes); or

...

Rationale: The concept of "commercial activities" in paragraphs 10(2) is unclear, liable to cause confusion and should be revised. In particular, the scope of what "primarily" constitutes "commercial activities" should be defined, along with the method of calculation.

ACU suggests that the concept of "commercial activities" advanced by the High Court of Australia in *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Limited* (2008) 236 CLR 204 (Word Investments) ought to be preferred for this purpose. The majority in that case (comprising Gummow, Hayne, Heydon and Crennan JJ) found (at 221, paras 26–27) that:

...[26] The activities of Word in raising funds by commercial means are not intrinsically charitable, but they are charitable in character because they were carried out in furtherance of a charitable purpose. ...[27] Word is not a company with both charitable and non-charitable purposes which carried on commercial businesses and incidentally conferred benefits on charity; Word is a company having purposes which are solely charitable and which carried on commercial businesses only in order to effectuate those purposes.

To avoid any doubt in the provisions and their interpretation, and in light of the *ratio decidendi* in Word Investments, ACU therefore recommends that clause 10(2)(b) should be amended as suggested above.

Clause 8(5) – Health Practitioners

Clause 8(5) of the Exposure Draft Religious Discrimination Bill 2019 provides:

8 Discrimination on the ground of religious belief or activity—indirect discrimination

....

Conditions that are not reasonable relating to conscientious objections by health practitioners

- (5) For the purposes of paragraph (1)(c), if a law of a State or Territory allows a health practitioner to conscientiously object to providing a health service because of a religious belief or activity held or engaged in by the health practitioner, a health practitioner conduct rule that is not consistent with that law is not reasonable.

Note: A requirement to comply with a health practitioner conduct rule that is not reasonable under this subsection is also not an inherent requirement of work (see subsection 31(7)).

ACU submits that the definition of "health practitioner" in the above context should be expanded to include students enrolled in a course or degree leading to a qualification as a health practitioner. Alternatively, a new definition of "health practitioner student" could be inserted and corresponding amendments made to subclauses 8(5) and (6) so that relevant students may be able to take advantage of the protections contained in those subclauses. A corresponding amendment to 'health practitioner conduct rule' should also be incorporated into clause 5.

Rationale: Clause 8(5) provides that a “health practitioner conduct rule” (as defined in clause 5) that would have the effect of restricting or preventing the health practitioner from conscientiously objecting to providing the health service because of a religious belief or activity held or engaged in by the health practitioner, would not be reasonable.

However, students of religious bodies that are tertiary education institutions participating in practicum, placements as an essential requirement of their degree in disciplines such as nursing, midwifery and allied health, do not fall within the definition of “health practitioner” for the purposes of the Bill as they are not persons “registered or licensed to provide a health service”.

Accordingly, while such students may be subject to the equivalent of a health practitioner conduct rule applied to employees as a condition of their placement, they may not receive the protections contemplated by subclauses 8(5) and/or 8(6) unless they can be characterised as a “prospective employee” under subclause 8(8).

Recommendations

- Technical amendments should be made to Section 10 to provide greater clarity and avoid potential unintended consequences with respect to interpretation of the Bill. Specifically:

A new subclause 10(4) should be included in clause 10 of the Bill to the following effect:

For the purposes of subclause (2), a person is a religious body if the person satisfies at least one of the categories of religious body set out in paragraph 2(a), paragraph 2(b) or paragraph 2(c) of clause 10.

Paragraph 10(2)(b) should be amended as follows [suggested amendments are underlined]:

(2) **Religious body** means:

...

(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 with non-charitable purposes); or

...

- The definition of “health practitioner” in the context of clause 8(5) should be expanded to include students enrolled in a course or degree leading to a qualification as a health practitioner. Alternatively, a new definition of “health practitioner student” could be inserted and corresponding amendments made to subclauses 8(5) and (6) so that relevant students may be able to take advantage of the protections contained in those subclauses. A corresponding amendment to “health practitioner conduct rule” should also be incorporated into clause 5.

PRINCIPLES OF RELIGIOUS FREEDOM – OBSERVATIONS AND SUGGESTED AMENDMENTS

In addition to the above, the following feedback is provided through the adoption of a principles-based approach to the Bill's provisions. Observations are made on the Bill, along with some suggested amendments, guided by a set of principles which attempt to define religious freedom and demonstrate why it is important.

These ten principles were set out in the 2018 publication *Chalice of Liberty: Protecting Religious Freedom in Australia*, produced by ACU's public policy think tank, the PM Glynn Institute.¹

The “ten principles of religious freedom” are listed below. Further explanation on their development and commentary on each principle, is provided at Attachment A.

Ten principles of religious freedom:

1. *Freedom of religion and belief is a universal human right.*
2. *Religious freedom is based on respect for individual freedom.*
3. *Religious freedom protects human dignity.*
4. *Religious freedom should be exercised in solidarity with other people.*
5. *Religious freedom is more than freedom of worship or a right to tolerance.*
6. *Religious freedom allows individuals to practise their religion freely and publicly as citizens, and not just in private life.*
7. *Religious freedom means people are entitled to live out their beliefs in the way they serve the rest of the community.*
8. *Religious freedom is not a claim for special treatment.*
9. *Religious freedom reinforces other fundamental rights.*
10. *Religious freedom makes democratic societies stronger.*

These principles inform, guide and ground the feedback provided below.

Principle 1: Freedom of religion and belief is a universal human right

The Bills clearly reflect this principle by:

- seeking to protect the rights of religious and non-religious people to engage in discussions concerning their beliefs without fear of discrimination and providing some important protections from discrimination in their religious activities;
- providing (in clause 3 of the Bill) that human rights are indivisible and owed to every human being as a consequence of their inherent equality and dignity, an essential provision which will be added to the objects of other federal anti-discrimination laws by the Human Rights Legislation Amendment (Freedom of Religion) Bill 2019; and
- including atheism and agnosticism and other forms of belief “which are defined by a lack of religious belief” in the definition of religious belief and activity (clause 5; Explanatory Note, para. 66).

Noteworthy is that Clause 3 and the inclusion of analogous clauses into other Commonwealth anti-discrimination acts are intended to affect judicial interpretation of this Bill and other anti-discrimination legislation (Explanatory Notes, para. 48).

It has frequently been noted that in a “contest” of rights, the right to religious freedom tends to lose out. The insertion of this clause provides an important additional consideration for a court interpreting the legislation, and underscores that, wherever possible, particular rights should be approached as part of an integrated whole and should not be placed in opposition to each other.

¹ This work was published in the book Frank Brennan, M A Casey & Greg Craven, *Chalice of Liberty: Protecting Religious Freedom in Australia* (Kapunda Press, Redland Bay: 2018), 49-53.

How this clause may affect interpretation will, evidently, have to be seen. However, on its face, it would seem to be an important measure for helping to ensure that religious freedom is treated as a right of equal importance to others, and as an essential part of human freedom - and not one that can be overridden by others.

The Bill's approach to evidencing religious belief or activity is informed by the decision of the High Court in *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)*² (Explanatory Notes, para. 72), one of the separate judgements of which identified among the "indicia" of religion, belief in a supernatural being or principle, and "canons of conduct" to give effect to that belief. However, there is no guiding and comparable commentary with respect to forms of belief "defined by a lack of religious belief".

For example, while atheism and agnosticism hold particular attitudes towards belief in a supernatural being, it is not clear what canons of conduct might follow from this to give effect to that belief. The main question posed by the absence in the Bill of definitions of "not holding a religious belief" and "not engaging in, or refusing to engage in, lawful religious activity" is how forms of belief such as atheism and agnosticism might establish themselves as such before a court (clause 5), in the event that a person or a body brings a claim of religious discrimination.

Principle 2: Religious freedom is based on respect for individual freedom

The Bill is based on respect for individual freedom. It protects a person's right to hold (or not hold) a religious belief and, implicitly, a person's right to change their belief as they wish.

The Bill recognises the interconnection of human rights in its objects – specifically in clause 3(2), which states that when giving effect to the Bill:

...regard is to be had to:

- (a) the indivisibility and universality of human rights; and
- (b) the principle that every person is free and equal in dignity and rights.

Another aspect of this principle is respect for a person to practise their religion in the public and private spheres without suffering discrimination. This is recognised in the Explanatory Notes and provides part of the basis for the Bill.

The main focus of the Bill is preventing discrimination on religious grounds and regulating relations between people in regard to religion when engaging in public life. The substantive clauses of the Bill relate to direct and indirect discrimination, and expand on this basic framework to provide specific instances of unlawful discrimination: for example, in employment, and commercial activities including accommodation, sport, and voluntary associations such as clubs.

The Bill also provides exceptions from the general prohibition against religious discrimination in certain circumstances pertaining to social or private arrangements. For example, exceptions are provided for people employing persons to work in their private homes, persons renting out rooms in their private homes, disposing of property (specifically land) by means of gifts or wills and any such conditions a person sees fit to add (clauses 31-35).

ACU broadly supports this approach.

Principle 3: Religious freedom protects human dignity

The Bill upholds the intrinsic dignity of people through provisions which aim to protect them from discrimination, exclusion or punishment because of their religious beliefs.

The Bill provides some limited protection for persons to manifest their beliefs in religious activity, and provides that statements of one's beliefs will not generally constitute discrimination if a religious belief is held by a person, is made in good faith, and "may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion" (clause 5).

² (1983) 154 CLR 120.

This is reinforced by clause 41, which stipulates that statements of belief do not constitute discrimination under any Commonwealth or state and territory anti-discrimination law unless they are malicious, likely to “harass, vilify or incite hatred or violence”, or counsel, promote, encourage or urge “conduct that would constitute a serious offence” (clauses 41 & 27).

Clause 41 is apparently intended to address circumstances such as those of the Archbishop Porteous case in Tasmania, and also raises questions about the limits of protection for statements of belief in the Bill.

In the Archbishop Porteous case, the Catholic Archbishop distributed a pamphlet setting out a belief in a traditional view of marriage to families of students in Catholic schools within the archdiocese. A complaint was then lodged that the pamphlet was in breach of s17(1) of the *Anti-Discrimination Act 1998* (Tas), by being offensive, intimidating, insulting or ridiculing of the complainant and same-sex couples. The complaint was eventually withdrawn.

The Bill expressly provides that a statement of belief does not contravene s17(1) of the Tasmanian *Anti-Discrimination Act*.

Under clause 41 of the Bill, statements of belief do not constitute discrimination under any state or Commonwealth law if they meet the necessary conditions for such statements (cf. clause 5).

In the example of Archbishop Porteous’s case, this would require the Archbishop to show that:

- (i) he held the belief;
- (ii) he made the statement in good faith; and
- (iii) it was reasonably connected with “the doctrines, tenets, beliefs or teachings” of Catholicism.

It would be easy enough to demonstrate that Archbishop Porteous held the belief, both through evidence from the Archbishop himself and a general expectation of beliefs held by a Catholic archbishop. It is also perhaps easily established that the average person would reasonably believe that the views expressed in the pamphlet published by Australian Catholic bishops accorded with Catholic belief and teaching. However, ultimately this is a question which would have to be answered by the court. Evidently, the circumstances and considerations of each case will vary.

Thus, there is a danger that the Bill will require judges to make determinations about what are, and are not, the beliefs and teachings of a religion. In addition to this being a question outside the expertise of judges, a further problem is the risk it brings of courts reaching into matters which should properly be left to the religious community alone to decide i.e. what a religious community chooses to believe. The Bill should be drafted in such a way as to avoid these dangers.

ACU also recommends that consideration be given to including clear definitions of words such as “malicious”, “harass”, “vilify” or “incite hatred” in the Bill.

Recommendations

- The Bill should be drafted in a manner that avoids judges being required to make determinations about what are, and are not, the “doctrines, tenets, beliefs or teachings” of a religion. This lies outside the expertise of judges and is a matter that should be left to the relevant religious community alone to determine. This is particularly the case in the context of clauses 5 and 41 pertaining to statements of belief.
- Consideration should be given to include clear definitions of words such as “malicious”, “harass”, “vilify” or “incite hatred” in the Bill, notably in the context of clauses 8 and 41.

Principle 4: Religious freedom should be exercised in solidarity with other people

The Bill reflects the principle that religious freedom should be exercised in solidarity with others through:

- Its limitations on statements of religious beliefs and religious activity, which are intended to protect the rights of others and the common good.
- The provisions requiring that interpretation of the Bill must have regard to the indivisibility of human rights and equal dignity of each person (clause 3(2)).

On the latter, as the Bill's focus is on anti-discrimination, it is concerned primarily with equality; placing citizens on equal footing in the public sphere and protecting them from discrimination due to their religious beliefs, or lack thereof (clause 3(1)(a); 3(1)(b)). It does not necessarily enshrine a right to religious freedom and the other rights that may flow from it.

Instead, it could perhaps be said that the main right that the Bill protects is the right of religious people to tolerance. While tolerance is certainly important, it does not necessarily result in generosity towards religious beliefs and ways of life that others do not share.

The approach of the Bill seems to be that, while religious freedom is an essential part of human dignity and needs to be protected, it cannot be allowed to undermine society and the common good, or give rise to a harm to other people. An underlying concern seems to be that freedom of religion is in some ways a dangerous right. This is reflected in the limitations on statements of religious belief in clause 41, which while they are reasonable and prudent in themselves, associate statements of religious belief (at least in some circumstances) with malice, vilification and incitement to hatred or violence. It is also reflected at points in the Explanatory Notes, where for example concern is expressed about religious beliefs "caused by mental illness" or "motivated by criminal intent" (Explanatory Notes, para. 65), or religious hospitals discriminating against patients because of their religious beliefs (Explanatory Notes, para. 174).

It is important to approach tensions between rights in a spirit of generosity rather than suspicion and to resolve them on the basis of principles which apply to everyone, rather than treating religious people as being particularly prone to discriminate against others or as a danger to a secular society. The objects of the Bill, which insist on the indivisibility of human rights and "that every person is free and equal in dignity and rights" (clause 3(2)), point in this better direction.

Principle 5: Religious freedom is more than freedom of worship

The importance of the right to manifest religious belief in community with others is protected in the Bill. The Bill enables a person to discuss their religious beliefs without it resulting in a breach of another discrimination Act. Furthermore, it enables religious societies, clubs and charities to carry out activities in line with their religious beliefs, and to employ or engage people who share these beliefs.

Importantly, clause 10 of the Bill stipulates that conduct by religious bodies undertaken in good faith and in accordance with the beliefs and teachings of their faith does not constitute discrimination, and that this applies to employment and other areas of public life. Establishing this as a principle in anti-discrimination law is very welcome, and suitably, moves away from treating religious conduct as an exception to a general prohibition on discrimination.

There are, however, two aspects of clause 10 and its interpretation that should be clarified. The Explanatory Notes for clause 10 emphasise that:

In order for conduct to be protected by clause 10, the religious body's conduct must have been engaged in in good faith and must be conduct that may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the relevant religion. (Explanatory Notes, para. 176).

The examples of this as listed in the Explanatory Notes (see paras. 176-178) include staffing decisions to maintain the religious ethos of a religious body. So it would not be unlawful for a religious school or charity "to require that all staff" be adherents of the particular faith and to refuse to employ or engage those of

other faiths, “provided this was in good faith and in accordance with the doctrines, tenets, beliefs and teachings” of the religion (see Explanatory Notes, paras. 176-81).

There are two significant problems with this explanation.

First, there are, perhaps, few religious entities that would require all staff or volunteers to be of their particular religion. To illustrate, for example, very few, if any, Catholic entities would require that *all* staff or volunteers be Catholic. Most would certainly require that their leadership be Catholic and most would also want either a majority or at least a critical mass of their staff to share a commitment to the Catholic faith, to preserve the religious ethos and commitment of the organisation. If, under clause 10, protection for employing staff who belong to the relevant religion depends on *all* staff of an entity being adherents of that religion, very few Catholic services and agencies would be protected.

Therefore, ACU recommends that there should be an express provision in the Bill to provide that it is lawful (and not discrimination) for religious bodies as defined under clause 10 and other religious institutions to exercise a preference in the employment and promotion of staff towards those who are supportive of their religious beliefs and teachings – including those who are adherents of their particular faith or from other faith traditions, or none at all, as the religious entity best determines for itself and the requirements of its mission.

Second, if the protection afforded under clause 10 is conditional on a formal doctrine or teaching of the religious community requiring that (all or most or some) staff be adherents of the religion, some religious communities (perhaps many) are unlikely to be protected. This is not the sort of requirement that is usually set out in the doctrines, tenets, beliefs and teachings of a religion. While some such requirements may be set out in guidelines, directives or constitutions concerned with the establishment or governance of different religious entities, these are not the same as formal beliefs or teachings.

Therefore, given the uncertainty in clause 10 provisions, it is suggested that additional wording be included in the Bill to explicitly provide that conduct (including employment decisions) that is reasonably in accordance with *the established ethos and character* of a religious body is not discrimination.

This would allow a court to consider a broader range of factors than formal beliefs and teachings in determining whether employment decisions by religious bodies are protected.

Recommendations

- The Bill should contain an express provision that states it is lawful (and not discrimination) for a religious body (as defined in clause 10), as well as other religious institutions, to exercise a preference in the employment and promotion of staff for those who are supportive of their religious beliefs and teachings – including those who are adherents to their particular faith or from other faith traditions, or none at all.
- Additional wording should be included in the Bill to explicitly provide that conduct (including employment decisions) which is reasonably in accordance with *the established ethos and character* of a religious body does not constitute discrimination.

Principle 6: Religious freedom allows individuals to practise their religion freely and publicly as citizens and not just in private life

In the context of a person's profession or occupation, the Bill allows individuals to practise their religion freely and publicly in certain respects. However, further clarification is needed on some aspects of the Bill, particularly with respect to clause 5 and clause 8.

It is recommended that:

- The term “unjustifiable financial hardship” in clause 8(3) should be defined in the Bill, for greater clarity.

- There should be a clear rationale behind the proposed definition and parameters of “relevant employer” (clause 5) as a non-government employer with revenue of at least \$50 million in the previous financial year. At present, this threshold appears somewhat arbitrary.

In determining the reasonableness of a requirement or condition imposed by an employer, clause 8(2)(d) makes the limits it imposes on an employee’s ability to have a religious belief or to engage in religious activity a consideration. Clause 8(3) concerns employer conduct rules that unreasonably constrain employees from making statements of religious belief outside work (with statements that are malicious, or “likely to harass, vilify, or incite hatred or violence” excluded from protection). This only applies to conduct rules imposed by “a relevant employer”, which is defined as a non-government employer with revenue of at least \$50 million in the previous financial year (as per clause 5). Any such rules imposed by large employers will be unreasonable, unless they are necessary “to avoid unjustifiable financial hardship to the employer” (clause 8(3)).

However, key terms such as “unjustifiable financial hardship’ is not defined in the Bill.

It is also not clear why the provision is not given a wider application beyond the largest employers, including government employers and smaller businesses.

Furthermore, while health practitioners established in their professions have at least some qualified protection in situations where they are unable to provide medical services deemed to be inherent requirements of a job because of their religious belief or activity, those who are yet to be admitted to a health profession are much more vulnerable.

Clause 31(4) provides an exception to the general prohibition in clause 15 on qualifying bodies (i.e. professional accreditation bodies) refusing to confer or renew a qualification or authorisation on the grounds of a person’s religious belief or activity. Under clause 31(4), if a person is unable to carry out the inherent requirements of a profession because of their religious belief or activity, it is not unlawful for a qualifying body to discriminate against them; that is, to withhold or refuse admission to the profession.

If, as some have argued, willingness to provide or assist with medical procedures such as abortion or assisted suicide should become inherent requirements of some health professions, health care graduates from universities such as ACU could be excluded from them under this Bill, solely on the grounds of their religious belief. Therefore, further consideration should be given to address these potential issues.

Recommendations

- The term “unjustifiable financial hardship” in clause 8(3) should be defined in the Bill, for greater clarity.
- There should be a clear rationale behind the proposed definition and parameters of “relevant employer” (clause 5) as a non-government employer with revenue of at least \$50 million in the previous financial year. At present, this threshold appears somewhat arbitrary.
- The Bill should be reviewed and amended to ensure that individuals who are yet to be admitted to a health profession (such as tertiary level graduates of Health courses) are not vulnerable to exclusion from the Bill’s protections, particularly compared to health practitioners that are already established in their professions.

Principle 7: Religious freedom means people are entitled to live out their beliefs in the way they serve the rest of the community

This principle that people should be able to live out their beliefs in the way they serve the rest of the community is given considerable protection in the Bill.

As discussed above, the Bill makes it clear that conduct reasonably undertaken in accordance with a religious body's beliefs and teachings does not constitute discrimination. This gives significant protection to religious communities to establish and operate services (such as the provision of community services) according to their religious beliefs. However, the definition of religious bodies in clause 10(2) excludes registered charities (and other entities) that engage "solely or primarily in commercial activities". For these entities, acting in accordance with their religious beliefs may constitute discrimination because the Bill expressly provides that discrimination in a commercial setting is unlawful.

It is recommended that consideration should be given to revising clause 10(2) and the definition of a "religious body" to:

- Accommodate charities strongly associated with religious communities and driven by a clear religious and charitable purpose; although they may engage in "commercial" activity as a dimension of their work.
- Include hospitals and aged care facilities established and conducted in accordance with the doctrines, tenets, beliefs and teachings of a religion.

Rationale:

Charities driven by a clear religious and charitable purpose engaged in ancillary commercial activity

The Victorian case of *Christian Youth Camps v Cobaw*³ demonstrates the limitations of current clause 10(2) provisions on the definition of a "religious body" with respect to registered charities and other bodies.

In that case, a Christian camp centre refused to hire out the camp to a same-sex attracted suicide prevention event. The organisation complained and the Victorian Supreme Court eventually held that there was no nexus between the Christian beliefs of the camp's owners and hiring out a camping space. Therefore, refusing the booking in this case amounted to discrimination. The Bill would yield the same result.

As a provider of camping spaces to the general public on a commercial basis, Christian Youth Camps would not meet the definition of a religious body under clause 10. As a consequence, its refusal of the booking in accordance with the religious beliefs of the community which operated the site would still constitute discrimination.

Related to this example, but distinct from it, is the situation of charity shops, such as those run by the St Vincent de Paul Society and Salvation Army. These shops are operated both as a service to people on low incomes, by selling new and second-hand at very cheap prices, and as one means of raising funds to support their broader charitable activities.

Though owned by registered charities, which operate on a not-for-profit basis, these shops are undoubtedly engaged in commercial activities, and the Explanatory Notes suggest the definition of a religious body does not apply to them (Explanatory Notes, para. 173). It is another question, however, as to whether the St Vincent de Paul Society and the Salvation Army are no more than registered charities "which primarily sell goods to the general public on a commercial basis". In important respects, these shops are ancillary and secondary to the main work of the charities, which have as their primary functions the relief of poverty and care of those who are suffering hardship.

This example illustrates the narrow definition of a religious body in clause 10, and the unexpected results it might produce, whereby charities strongly associated with religious communities and driven by a clear religious and charitable purpose are treated as commercial organisations because of other dimensions of their work. Therefore, consideration should be given to whether the definition of 'religious body' under clause 10 could be extended to accommodate these sorts of religious entities.

³ [2014] VSCA 75.

Religious hospitals and aged care providers

Clause 10 excludes religious hospitals and aged care providers from the definition of religious body on the grounds that “they provide services to the public on a commercial basis and are not otherwise captured by the definition of “religious body” (Explanatory Notes, para. 174).

Providing care for the sick and the old are two of the foundational works of service in the major religious traditions. They arise from a religious conviction, and religious communities establish hospitals and aged care facilities to put this conviction into action for the service of the general community.

It is difficult to understand how these hospitals can be seen as bodies engaging “*solely or primarily* in commercial activities”, even with the commercial dimensions that their operations necessarily entail. Therefore, it is recommended that the definition of “religious body” under clause 10(2) should be extended to include hospitals and aged care facilities established and conducted in accordance with the doctrines, tenets, beliefs and teachings of a religion.

Recommendations

Consideration should be given to revising clause 10(2) and the definition of a “religious body” to:

- Accommodate charities strongly associated with religious communities and driven by a clear religious and charitable purpose; although they may engage in “commercial” activity as a dimension of their work.
- Include hospitals and aged care facilities established and conducted in accordance with the doctrines, tenets, beliefs and teachings of a religion.

Principle 8: Religious freedom is not a claim for special treatment

One of the foundation principles of religious freedom is that it is not a claim for special (that is unequal) treatment but, rather, a matter of basic fairness for people to be able to put their beliefs into practice and not to be forced to act against them.

A particular area of concern for religious freedom in Australia is the interpretation and impact of anti-discrimination laws. Most of these laws at state and federal level include accommodating “exemptions” or “exceptions” for religious communities (and other communities for various purposes). In this way, exemptions are a form of protection for religious freedom, although the word “exemption” tends to suggest a special privilege which exempts a religious community from the laws which apply to everyone else.

Protection in the Bill for this principle – namely, that religious freedom is not a claim for special treatment – is limited but important.

Most significantly, clause 10 ensures that conduct in good faith in accordance with a religious body’s beliefs and teachings does not constitute discrimination.

Health Practitioners

With respect to health practitioners specifically, the Bill provides (under clauses 8(5) & (6)):

- A health practitioner conduct rule cannot force a health practitioner to engage in conduct to which they conscientiously object on religious grounds.
- A health practitioner rule inconsistent with state or territory law granting protection for conscientious objection on religious grounds to certain procedures or services, is unreasonable and “therefore unlawful discrimination” under the Bill (Explanatory Notes, para. 141).

Clause 8(6) seems to provide implicit protection for health practitioners in states and territories where there is no express provision for conscientious objection on religious grounds to certain procedures, by stipulating that any health practitioner rule - presumably including those which purport to compel conscience - will be unreasonable (and therefore unlawful discrimination) unless “the rule is necessary to avoid an unjustifiable adverse impact” on the provision of a health service or the health of a person. However, “an unjustifiable adverse impact” is a key term left undefined in the Bill.

The Explanatory Notes underscore that these clauses are intended “to recognise that health practitioners should not be forced or coerced into acting in contravention of their fundamental religious beliefs” (Explanatory Notes, para. 139). However, the Explanatory Notes also claim that “statutory conscientious objections provisions are primarily a matter for the states and territories”, and thus that the Bill defers to and reinforces state and territory law in this area where it exists (Explanatory Notes, para. 140).

These provisions expose a serious issue with the Bill with respect to its intention to recognise that health practitioners should not be coerced to act against their fundamental religious beliefs. The Bill provides no right to conscientious objection, and defers to limits which state and territory laws may impose on this right to effectively undermine it in some circumstances. Nor does it make provision for religious health facilities to refuse to provide services to which they object on religious grounds.

With respect to the latter, this problem might be avoided if religious hospitals and aged care facilities are accommodated in the definition of religious bodies in clause 10, so that they may act in accordance with their religious beliefs. As the Bill stands, however, conscience protection for health practitioners is limited and qualified, and it may be unlawful discrimination for a religious hospital or aged care facility to refuse to provide certain procedures in accordance with its religious beliefs.

In light of the above, it is recommended that the term “unjustifiable adverse impact” should be defined in the Bill, with a view to avoiding it being used to broadly defeat the protection intended to be provided under clause 8(6). Furthermore, as recommended above, consideration should be given to include religious hospitals and religious aged care facilities within the definition of “religious bodies” under clause 10 of the Bill, to address the issues raised above.

Recommendation

- The term “unjustifiable adverse impact” should be defined in the Bill, with a view to avoiding it being used to broadly defeat the protection intended to be provided under clause 8(6).

Principles 9 & 10: Religious freedom reinforces other fundamental rights; Religious freedom makes democratic societies stronger

The Bill broadly recognises the above principles in different ways. First, the Bill’s objects refer to the indivisibility of human rights and their reliance on one another. Second, as the Explanatory Notes make clear, the Bill protects a person’s right to state their religious beliefs “civily and as part of public discourse”, as well as the role this plays in strengthening freedom of speech and the interrelation of religious freedom and freedom of expression. The Explanatory Notes acknowledge this as “an essential part of maintaining a healthy and functioning democracy” (Explanatory Notes, para. 402).

Furthermore, it is noteworthy that the provision in the Bill that a statement of belief does not constitute discrimination under any Commonwealth or state and territory anti-discrimination law, is a particularly important reinforcement of freedom of speech, as well as freedom of religion. The Bill also reinforces freedom of association through its provisions for religious bodies to act in accordance with their faith (clause 10), and offers some qualified protection for freedom of conscience in its provisions on health practitioner conduct roles.

However, as discussed above, the protection of some important aspects of religious freedom, and therefore the degree to which they help to reinforce other rights, is limited in some cases and/or needs to be extended in some circumstances.

CONCLUDING OBSERVATIONS

In the interests of achieving sensible and effective legislative reform in this complex policy area, ACU strongly recommends that the Government does not finalise the Bills until the ALRC has completed its inquiry into the *Framework of Religious Exemptions in Anti-discrimination Legislation*.

The significance of the ALRC's work to the present reform proposals should be recognised. For instance, while the Bills' provisions outline exceptions to discrimination on religious grounds, it remains unclear whether conduct protected under these provisions will conflict with protections under other anti-discrimination legislative regimes – for example, relating to matters such as sexuality under the *Sex Discrimination Act 1984* (Cth), amongst others. ACU considers it would be premature for the Government to seek to finalise and progress the Bills to Parliament in advance of the ALRC's final report.

Recommendation

- ACU urges the Government not to finalise the Bills until the ALRC has completed its inquiry into the *Framework of Religious Exemptions in Anti-discrimination Legislation*.

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ATTACHMENT A

Ten Principles of Religious Freedom

In 2017, the PM Glynn Institute published *Chalice of Liberty: Protecting Religious Freedom in Australia* (Kapunda Press). The book sets out ten principles of religious freedom in an attempt to clarify what religious freedom is and why it is important. These principles start from the fact that religious belief is a considered and deeply-held conviction which powerfully informs the way believers live, the actions they take, and the shape of communities. It is not just another form of subjective or personal opinion significant only for the individual who holds it. Religious freedom arises from the universal human search for the truth about our nature, the world we live in, and how we should live.

This submission has offered some observations on the Exposure Draft of the bill based on these ten principles. The principles as they are explained in *Chalice of Liberty* are set out below:

1. Freedom of religion and belief is a universal human right.

Religious freedom belongs to every person, because most people look for answers to questions of meaning and value in something greater than themselves. Many religious people look to God, but non-religious people also draw on ultimate sources of meaning which are not of their making, such as ideas about human dignity, justice, freedom, equality, and the environment. In one sense, questions of meaning and value are religious questions even when our answers are atheism or agnosticism.

2. Religious freedom is based on respect for individual freedom.

“The act of faith is of its very nature a free act” (*Dignitatis humanae* §10). Religious freedom is the right to believe or *not* to believe, to adopt, reject or change beliefs as we decide for ourselves. It protects freedom by protecting people from having the beliefs of others —religious, secular or political — imposed on them. Catholic beliefs too are not to be imposed on anyone, but proposed for people to accept or reject as they decide freely for themselves.

3. Religious freedom protects human dignity.

Religious freedom upholds the intrinsic dignity of people who think, believe, worship and live differently. It protects them against pressure to hide their beliefs, or from being forced to censor themselves or limit their participation in society to avoid bullying or intimidation. It defends them from discrimination, exclusion or punishment because of their beliefs. Religious freedom is especially important in protecting people whose beliefs or ideas others find strange, ridiculous or even “offensive”, and particularly communities which may be hated and feared because of their beliefs.

4. Religious freedom should be exercised in solidarity with other people.

Like many rights, religious freedom is not an absolute. It is limited by respect for both the rights of others and the common good. Because our sense of autonomy is often stronger than our sense of the common good, agreeing on the limits of rights can be fraught. Tensions between rights should be resolved wherever possible in a spirit of mutual respect, not suspicion, and with generosity towards beliefs and ways of life we do not share or even oppose. Restrictions on religious freedom should be made only on the basis of principles which apply to everyone.

5. Religious freedom is more than freedom of worship or a right to tolerance.

The persecution of people in different parts of the world because of their religious beliefs shows how important basic protections such as freedom to worship and the right to be tolerated are, but religious freedom does not end there. It is a much larger freedom which makes it possible for individuals and faith communities to give witness to their beliefs with integrity and as full members of their society, not only in worship but in professional life, public life and service to the wider community.

6. Religious freedom allows individuals to practise their religion freely and publicly as citizens, and not just in private life.

The claim that religious people should quarantine their beliefs from public debate and even from the way they carry out their profession or occupation is unfair and discriminatory, because it allows everyone

except religious people to act on their beliefs. No human being lives in neatly divided public and private worlds. Beliefs about meaning and truth, right and wrong — religious and non-religious alike — are conclusions about what is real and important in life. For everyone, they serve as a basis for their action in the world.

7. Religious freedom means people are entitled to live out their beliefs in the way they serve the rest of the community.

Coming together around a common purpose and shared beliefs to help those in need is one of the main ways in which religious communities encourage participation in society and work to build up a sense of solidarity. Religious freedom protects not only the right of people to live out their beliefs in co-operation with others who share their faith, but also the right to establish and operate services for the wider community that are faithful to the beliefs which inspired them, and which are reflected in their work.

8. Religious freedom is not a claim for special treatment.

It is a basic fairness for people to be able to put their beliefs into practice and not to be forced to act against them. Religious freedom protects this basic fairness. It is not a claim for a special privilege or an exemption for religious communities from laws which apply to everyone else, and describing it in these terms is misleading. Religious freedom is a fundamental right which ensures there is a space for religious communities to live out their beliefs, while also respecting the dignity and freedom of other people.

9. Religious freedom reinforces other fundamental rights.

Religious freedom is part of a larger whole. It does not sit in isolation but is an integrated and essential part of human rights. Because these rights protect the different things we need to make a full life possible, they have to go together and they should not be placed in opposition to each other. Freedom of religion both depends on respect for rights such as freedom of conscience, freedom of thought, freedom of expression, and freedom of assembly, and supports and reinforces them in turn. Placing religious freedom in doubt places these other rights in doubt as well.

10. Religious freedom makes democratic societies stronger.

Religious freedom protects not only the right of individuals and religious communities to fully participate in the life of a democratic society, but also the contribution they make to building it up. Because religious freedom and related protections such as conscientious objection protect people from being compelled to co-operate with activities which they hold, as a matter of conviction, to be wrong, they also help to encourage people to speak out against injustice and evil when no one else will. Good societies need these voices.

ATTACHMENT B

Australian Catholic University Profile

Australian Catholic University (ACU) is a publicly funded Catholic university, open to people of all faiths and of none, and with teaching, learning and research inspired by 2,000 years of Catholic intellectual tradition.

ACU operates as a multi-jurisdictional university with eight campuses, across four states, one territory, and overseas. ACU campuses are located in North Sydney (NSW), Strathfield (NSW), Canberra (ACT), Melbourne (Victoria), Ballarat (Victoria), Brisbane (QLD), Adelaide (SA), and Rome (Italy).

ACU is the largest Catholic university in the English-speaking world. Today, ACU has around 34,000 students and 2,000 staff.⁴

ACU graduates demonstrate high standards of professional excellence and are also socially responsible, highly employable and committed to active and responsive learning.

ACU has built its reputation in the areas of Health and Education. ACU produces more nursing and teaching graduates than any other university in Australia, serving to meet significant workforce needs in these areas.⁵

ACU has four faculties: Health Sciences; Education and Arts; Law and Business; and Theology and Philosophy. This consolidation of ACU's previous six faculties in 2014 has created a more efficient and competitive structure focused on the needs of industry and employment partners. ACU has also moved towards the adoption of a shared services model where suitable, to improve efficiencies, internal processes and better allocate resources.

ACU is committed to targeted and quality research. ACU's strategic plan focuses on areas that align with ACU's mission and reflect most of its learning and teaching: Education; Health and Wellbeing; Theology and Philosophy; and Social Justice and the Common Good. To underpin its research intensification efforts, ACU has appointed high profile leaders to assume the directorships, and work with high calibre members, in its research institutes.⁶ ACU is a world-leading research university in its priority areas of education, health, and theology and philosophy.

⁴ Student numbers refer to headcount figures while staff numbers refer to full-time equivalent (FTE).

⁵ Department of Education and Training, '2017 Special Courses' in *Selected Higher Education Statistics – 2017 Student Data* (2018). Accessible via <https://www.education.gov.au/selected-higher-education-statistics-2017-student-data>.

⁶ See Australian Catholic University, 'Research at ACU' via <http://www.acu.edu.au/>.