Religious Discrimination Bill – Exposure Draft

Your Submission

Submission on the Exposure Draft of the Religious Discrimination Bill

By Anglican Community Services trading as Anglicare Sydney

About Anglican Community Services

Anglican Community Services, trading as Anglicare Sydney, is a not-for-profit organisation of the Anglican Church Diocese of Sydney and one of the largest Christian community service organisations in Australia. Anglicare Sydney was formed on 1 July 2016 by the merger of the Sydney Anglican Home Mission Society (formerly trading as Anglicare Sydney) and Anglican Retirement Villages. Anglicare Sydney exists to serve people in need in our community, enrich lives, and share the love of Jesus. We respect and value every person as made in the image of the living God. We seek to serve those who are ageing, vulnerable or marginalised by meeting their material, physical, emotional, social and spiritual needs. In partnership with parishes and others, we provide a range of services that promote dignity, safety, participation and wellbeing for people in their relationships, homes and communities.

We operate a wide range of community and aged care programs across the Sydney Metropolitan, Blue Mountains, Illawarra and Shoalhaven regions of New South Wales with an annual revenue of $380m and assets of $1,740m. Our 3,900 staff and more than 2,000 volunteers operate across a diverse range of community services including: foster care and adoption services; early intervention family support; counselling and family support services; family relationship centres; residential and community aged care services; retirement village living; services for migrants and refugees; carer support services; disability respite services; mental health support; youth services; emergency relief for people in crisis; social and affordable housing; opportunity shops providing low-cost clothing; emergency management in times of natural disaster; and chaplains in hospitals, prisons, mental health facilities and juvenile justice institutions. Even though Anglicare Sydney operates largely within Greater Sydney, Blue Mountains, Illawarra and Shoalhaven areas, it is one of the largest community and residential aged care providers and retirement
living operators in Australia. Governed by the Anglican Church, Diocese of Sydney, Anglicare Sydney is the largest member within the Anglicare Australia network and actively participates in national matters of network interest.

Anglicare is a Public Benevolent Institution, regulated by the Australian Charities and Not-for-Profits Commission and has charity subtypes of advancing religion, advancing health and advancing social or public welfare.

Support for Submissions

Anglicare Sydney has taken the opportunity to consult with the Anglican Diocese of Sydney and Freedom For Faith and we formally express our endorsement for these two independent submissions, which in our view more fully set out the considerable issues for support and concern regarding the draft legislation. This submission will not duplicate the matters raised in those separate submissions but will focus solely on the major concern that Anglicare Sydney has with the draft legislation. This is the issue of the freedom of Anglicare Sydney to employ personnel at all levels of the organisation and in diverse locations and functions who will support the ethos and purposes of the organisation.

The “commercial activities” test will disqualify Anglicare Sydney from being a Religious body.

We are gravely concerned at what are perhaps unintended consequences of the current drafting of clause 10.

The definition of religious body in Clause 10(2) excludes registered charities and other religious institutions which “engage solely or primarily in commercial activities”. In the commentary in the Explanatory Memorandum (paragraphs 170-175), this test is given a broad scope, in that it is intended to capture bodies “operating in the secular marketplace” and “providing goods, services or facilities to the public, or sectors of the public, on a fee basis”. Religious Hospitals (eg. St Vincent’s) and religious aged-care providers such as Anglicare Sydney) are NOT religious bodies, according to paragraph 174 of the Explanatory Memorandum.

Many religious bodies use a market mechanism in the provision of goods and services – this in no way diminishes the religious character of those activities.

As noted above, Anglicare Sydney is the social welfare arm of the Anglican Church, Diocese of Sydney. The largest components of Anglicare Sydney’s ministry relate to its retirement villages and aged care services. These ministries are unashamedly Christian in their approach. Anglicare Sydney welcomes people of other faiths as residents but has a long-standing policy of preferring to employ Christians where possible, mandatorily in chaplaincy, pastoral care roles and in senior management, because this goes to the essence of organisational purpose in providing Christian care in a Christian context. However, since more than 51% of Anglicare’s income and activities are “commercial” (in the sense that people pay fees for accommodation and services), Anglicare Sydney does not qualify as a “religious body” for the purposes of clause 10.
Paragraph 170 of the Explanatory Memorandum evidences a world-view assumption that demonstrates prejudice against religious bodies and activities. In particular, the use of the term “secular marketplace” presupposes that the marketplace is secular. This is not true and has never been the case. Australia is not a secular nation in the sense that the expression of religious views are absent from the public square or are excluded from the public square, including the commercial sphere. Australia is a civil society, a pluralist society which celebrates a multi-cultural richness, where religion and faith positions are found in all of life and its expressions in work and play. There is no valid reason why religion should be pushed to the margins of society by the claim that there is only a secular marketplace. If this term has been unadvisedly used, then it should be deleted from the explanatory memorandum. If the use has been intentional, then the writer’s understanding of the place of religion in the life of the people in Australia is seriously flawed and out of step with a more multi-cultural, pluralist society.

It is common knowledge that faith-based, usually Christian faith charities have built substantial numbers of schools, hospitals, residential aged care homes, social and affordable housing – the list goes on. This infrastructure on which the country depends was developed as an active expression of the faith of the adherents to serve people who are vulnerable, frail, marginalised and socially isolated. This definition of religious body at Clause 10(2) effectively disenfranchises a huge number of organisations from operating in the manner necessary in order to effectively and genuinely pursue their objects and purposes. The effect of this definition of religious body will be to neuter the Christian character and ethos of Christian charitable organisations like Anglicare Sydney because they will not be able to require the appointment of people who live the faith of the organisation. The exemptions contained in Clause 31 are not sufficient to ensure that the Christian culture of Anglicare Sydney will be maintained.

The exemption in Clause 31 for where a religious faith is an inherent requirement of the role, such as for chaplain roles and senior leadership positions are grossly inadequate. A current example of what an employee’s Christian faith can mean to Anglicare Sydney can be given concerning a central laundry employee. These are a female employee’s words (extracted from a talk given to her fellow workers in early September:

“We come here in this place from Monday to Friday, but has it ever come to your mind that we are not just here to work but to be a pleasing person in the eyes of God as well? We have the chance to do a full day's work with honesty. Following our day's schedule, from the time we clock in, do our exercise, going to our stations, start working and finish the day by clocking out are all time based. By following all these allotted times with honesty makes us a better worker in the eyes of God. If we choose to cheat and bludge for even 5 minutes a day that is almost 22 hours a year. Imagine the loss to Anglicare if 5 workers in one department would do that! So let us always be reminded of why we are here every day: to work; to bring home the bacon; and of all to be a pleasing person in the eyes of God. God has given us the gift of skills. Treasure that gift and be a good steward of those skills. And lastly, always give THANKS to God for the life, health and work that He always gives us. Be a thankful person at work. Don't be among the complainers. - Let your thankfulness to God overflow in a humble spirit of gratitude to others. Be known as the hope-filled, humble, thankful one at work.”

This person has no direct contact with our residents and customers, but her attitude as evidenced below shows what a profound impact her faith makes in the performance of her work, even in tasks like
processing bulk laundry. There would be countless examples of the difference a Christian employee makes in the delivery of services to their customers in Anglicare Sydney. The above example was chosen to illustrate that this plays out in all areas of our organisation – even in the non-client-facing roles.

The commercial activities exclusion as illustrated in paragraph 174 of the Explanatory Memorandum focuses on the intended prohibition of discrimination by a religious hospital against a potential or existing patient on the basis of the patient’s religious belief or activity. In an aged care context, Anglicare Sydney does not discriminate in its service provision against residents on the basis of their religious identity, or on the basis of any other protected attribute under existing anti-discrimination law. For example, discrimination on the basis of sexuality is prohibited already under Paragraph 37(2) of the Sex Discrimination Act 1984 in the context of Commonwealth funded aged care services.

We urge the Government to remove the sub-clauses in 10(2)(b) and 10(2)(c) that excludes a religious entity “that engages solely or primarily in commercial activities’. As a matter of principle, there is no good argument that receiving a fee must nullify the religious character of an activity – a religious activity can at the same time be a commercial activity, and vice versa. A test which disqualifies a religious body based on whether it engages “primarily in commercial activities” is novel in Australian charity and anti-discrimination law, and should not be included in this Act. As noted in paragraph 173 of the Explanatory Memorandum, the current drafting creates the anomaly that a not-for-profit religious charity (which is recognised as such by the ACNC for the purposes of charity law) can be defined as not being a religious body for the purpose of the Religious Discrimination Act. Similar confusion will arise in relation to the definitions in applicable state and territory law.

There are very significant implications for a religious entity that is not recognised as a “religious body” for the purposes of clause 10. Clause 10 stipulates that it is not discrimination when a religious body engages in conduct that may reasonably be regarded as being in accordance with its doctrines. But if a body is not covered by clause 10, then it is discrimination when there is an adverse impact to people of other faiths (or no faith) that arises when the religious entity acts in accordance with its religious purpose.

For example, as clause 10 currently stands,

- It would be unlawful discrimination under clause 13 (“Employment”) for Anglicare Sydney to recruit only Christians as counsellors and social workers to run its counselling services.
- It would be unlawful discrimination under clause 20 (“Goods, Services and Facilities”) for Anglicare Sydney to allow residents to use a chapel only for Christian services (and not allow a resident of another faith to use the chapel for services of that religion).
- It would be unlawful discrimination under clause 21 (“Accommodation”) for Anglicare Sydney to give any preference to former ministers of religion and former Christian missionaries in the provision of retirement living accommodation.

For these reasons, we cannot support passage of the Religious Discrimination Bill if Clause 10 remains in its current form. We recommend that the “commercial activities” test be removed. Clause 10(2) would then read

10(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 not-for-profit religious entity that engages solely or primarily in commercial activities
(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).

The deleted phrases in Clauses 10(2)(b) and (c) above are not needed, because there is no evidence that religious institutions are currently exploiting “loopholes” in the definition of a religious entity in state and territory-based legislation to operate commercial enterprises unrelated to their religious purpose arising because of the definition.

However, if there was evidence of this mischief, then the appropriate way would be a very limited exclusion in clause 10, to the effect that

“Clause 10 does not apply to the provision of goods or services to the public or a section of the public in return for payment which is unrelated to the religious purpose or activities of the religious body”.

Merely preferring (instead of requiring) religious staff may not be “in accordance with doctrine”

Clause 10 applies to “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.”

The examples in the Explanatory Memorandum refer to a Jewish school (para 180) and a Catholic charity (para 181) being permitted to require that all staff were Jewish or Catholic respectively, provided that this was “in accordance with” Jewish/Catholic teaching.

However, many religious schools and other institutions do not insist that 100% of staff are adherents of the faith of the institution. Some religious schools, for example, will seek to ensure that there is a “critical mass” of teachers of that religion, and require other teachers to “support the religious ethos of the school” (or words to that effect).

Clause 10 in its current form would not appear to allow this flexibility, because religions do not generally have a “doctrine” that prescribes a percentage of teachers in a religious school who must be of that faith.

This could be rectified by a small addition to Clause 10(1), as follows below.

10(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 furtherance of, or in accordance with the doctrines, tenets, beliefs or teachings of the religion in relation to which the religious body is conducted.

The Explanatory Memorandum should then give an example which clarifies that the preferencing of staff who hold or support the religious belief of the organisation, or (for a school) the enrolment of...
students of that faith, is conduct which is validly in pursuit of the religious purposes of that institution.

An alternative means of achieving the same result would be to add a new clause

10(3) Without limiting the generality of sub-section (2), for the avoidance of doubt, a religious body does not discriminate against a person under this Act by giving a preference in its hiring decisions, or (if it is an educational institution) its decisions in relation to enrolment, to persons who support the doctrines, tenets, beliefs and teachings of the religion in relation to which the body is conducted.

**Religious Bodies should be no-worse off as a consequence of the legislation proposed**

The Prime Minister has stated, and it is a general understanding that religious bodies should not be made worse-off from the introduction of legislation that is intended to protect religious freedom. However, the following is an example of how Anglicare Sydney is worse off under the proposed legislation.

The proposed legislation effectively removes current protections that Anglicare Sydney as an employer has under Commonwealth legislation. Specifically, under Section 37 of the Sex Discrimination Act 1984, a religious body currently has certain exemption from the operative provisions of the Commonwealth Sex Discrimination Act.

Under Paragraph 37(1)(d) Anglicare Sydney maintains a protection for our practice of positively selecting Christian employees to perform employment duties which flow from our ordinance, vision, mission and values. The exclusion from that protection under Paragraph 37(2) of the Sex Discrimination Act does not apply in our context as although Anglicare Sydney is engaged in the delivery of Commonwealth funded aged care the “discrimination” is exercised in the selection of employees to perform that work. This is a confusingly worded provision introduced in the last days of the last Federal Labor Government by the Honourable Mark Dreyfus AG (in the form of Section 49B of the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013. The amendment was explained it in the Explanatory memorandum as follows:

“5. This amendment inserts the main qualification on the general exemption for religious organisations for the provision of Commonwealth-funded aged care services. It inserts a new subsection 37(2) to provide that current paragraph 37(d) of the SDA (to be renumbered as paragraph 37(1)(d) by new item 49A) does not apply to conduct connected with the provision of Commonwealth-funded aged care services.

6. The qualification was included in the HRAD Bill as there was significant feedback during the development of the HRAD Bill 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. This 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). This position is also consistent with the Government’s broader aged care reforms.

7. This qualification was not included in this Bill at the time of introduction as the Government was in the process of examining the Senate Legal and Constitutional Affairs Committee’s inquiry report on the HRAD Bill. While this examination is still underway, the Government considers that the aged-care qualification should be included in this Bill as a matter of priority.

8. Proposed new paragraph 37(2)(b) makes it clear that this qualification only applies in the context of service provision. That is, an aged-care provider can still make employment decisions which conform to the doctrines or tenets of the religion or are necessary to avoid injury to religious sensitivities of adherents of that religion. This recognises that organisations should be able to engage staff who share their values and organisational ethos.

9. The qualification does not impose any new obligations on aged care providers—only those religious organisations which had previously chosen to discriminate will be affected. Equally, this simply ensures that religious providers of aged care services are in the same situation as non-religious providers of the same services, who have always been prohibited from discrimination by anti-discrimination legislation.”

Paragraph 8 above makes it very clear that particular employment decisions are protected. The effect of the proposed definition of Religious body in Clause 10 and the consequent exclusion of religious bodies like Anglicare Sydney from that definition will mean that this current protection will be lost to Anglicare Sydney. As a consequence, Anglicare Sydney will lose its freedom to recruit Christian employees in all areas of its operations and it will be worse-off.