Religious Discrimination Bill – Exposure Draft

Your Submission

1. Religious bodies are not necessarily permitted to “preference” religious staff

Section 10 of the Religious Discrimination Bill 2019 (Bill) states that a religious body does not discriminate by engaging in conduct that may reasonably be regarded as being in accordance with doctrine. The Explanatory Note accompanying the Bill (EN) gives two examples of religious bodies, who on the basis of doctrine insist that all staff are of the relevant faith (see EN paragraphs 180-181.)

However, most religious bodies are not like this. They preference the employment of staff, so that the organisation will have a “critical mass” of staff of faith, but do not require all staff to be of that faith.

Additionally, it is not clear that hiring practices are necessarily “activities” in conformity to the doctrines, tenets, beliefs and teachings of a religion. While hiring staff who share the Catholic faith might assist us in our mission, it is not necessarily an activity that conforms with Catholic doctrine.

Religious bodies need full flexibility to determine employment matters.

2. Protections do not apply to religious bodies with commercial activities

Section 10 exempts from protection those religious bodies that solely or primarily engage in commercial activities. This could have the effect of capturing entities like St Vincent de Paul (because of the operation of its stores) and retreat centres.

The EN specifically excludes hospitals and aged care facilities from protections under this section (see EN paragraph 174.)

While these elements of the Church’s ministry might be established as special purpose vehicles, they should not be viewed in isolation.

Religious bodies need full flexibility to structure their activities as appropriate, without being denied protection due to the commercial nature of some elements of their overall mission.

3. Only “lawful” religious belief activity is protected

The definition of religious belief or activity protected by the Bill is limited to “lawful” religious belief or activity. Paragraph 70 of the EN explains that the intention of the restriction to “lawful” activity is to prevent protecting religious activities which are criminal conduct, such as forced or child marriages.

However, the limitation to “lawful” activity could mean that a state law or even local regulation could limit the activities covered by the Bill. For example, a state law could – under the guise of a ban on “conversion therapy” – make illegal or even criminal any Church formation on chastity, or ministries for those struggling with same-sex attraction.

Protection should be given to religious activities that are not serious criminal offences, not merely “illegal.”

4. Allowing judges to determine what is “reasonably in accordance with” religious doctrine

The test in the definition of “statement of belief” and in sections 5 and 10 of the Bill is whether the belief or action is ‘reasonably in accordance with’ religious doctrine. Tests of what is “reasonable” are determined by judges. Judges are not qualified to determine the extent of religious belief, and it is not appropriate for them to do so.

Given that so many openly dissent from religious teaching, it is unclear how a judge is going to determine with an individual’s belief is in accordance with “the doctrine of the religion.”
The “reasonableness” test should be removed, or judged with reference to an adherent of the religion, rather than the ordinary “reasonable person,” who may not be of faith at all.

5. The “Israel Folau” clause

Section 8(3) of the Bill seeks to deal with statements of belief made outside of work.

For employers with an annual turnover of $50 million or more, it is unreasonable for an employer to restrict the expression of religious belief outside of the employment context, unless it is “necessary to avoid unjustifiable financial hardship to the employer.”

There are several problems with this section.

Firstly, in terms of large companies, it could encourage boycotts, sponsorship or advertiser withdrawals in order to enliven the exception under section 8(3).

It also implies that small or medium-sized companies are permitted to restrict the expression of religious belief of employees outside or work, as well as the expression of all employees inside the workplace.

People of faith should not fear consequences to their employment for expressing their faith in public or on social media.

6. Vilification

Section 41 of the Bill provides that statements of belief are not discrimination, and specifically seeks to override the Tasmanian law that was the basis of the claim against Archbishop Julian Porteous. That section prohibits offending, humiliating, intimidating, insulting or ridiculing a person on the basis of a protected attribute.

However, protections in the Bill are expressed to not apply to statements of belief that vilify (cf. sections 8(4)(b) and 41(2)(b)). The EN says that this includes the restriction of “religious expression where it may cause harm to a person, group of persons or the community at large” (EN 132.)

The term “vilification” is not defined, leaving it open to certain groups to argue that statements of religious belief cause “harm” to them. For example, the transgender woman who filed the complaint against Archbishop Julian Porteous would simply have had to argue that the statement “vilified” her and others in the LGBTI community, rather than offended, humiliated, insulted etc. to make the claim.

People of faith should be free to express their beliefs without being at risk that someone will suggest their speech is “vilification.”

7. Limited protection for religious bodies

The definition of “person” in section 5 of the Bill allows the inclusion of bodies corporate, meaning that they could be afforded protection under this Bill. However, it is not clear how a corporate body could establish that it holds a religious belief and – if so – what that belief is. For example, the Cobaw v Christian Youth Camps case from Victoria stated that a corporate body cannot “cannot have a conscious state of mind amounting to a religious belief.”

The Bill needs a specific rule that determines how a religious belief can be attributed to a religious body.

8. “Inherent Requirements” test

Section 31(2)-(5) of the Bill allow for discrimination on the basis of religious belief in employment if the religious belief makes a person unable to carry out the “inherent requirements” of a job. The EN provides a number of examples, largely to do with food preparation or senior leadership of a religiously-inspired business. However, it could open up the ability for employers to require that a certain belief about marriage or sexuality or gender is an “inherent requirement” of a job (eg, a Christian psychologist might be told that it is an “inherent requirement” of the job that they do not hold to a Christian teaching on marriage.)

An inherent requirement should only be applicable where a particular religious belief is required to fulfil a religiously-linked role.

9. The law does not “cover the field”

Section 60 states that the Bill is not intended to override state and territory laws, meaning that if a state or territory law decided to further restrict religious freedom, the Commonwealth law would provide no protection.

For example, the Northern Territory is currently contemplating amending its anti-discrimination laws to prevent religious schools from preferencing people who share the religious faith of the school for employment or enrolment. Schools in the Northern Territory would have no protection under this Bill.

The Bill should protect people of faith against state laws that restrict religious freedom.

10. Charities Act 2013 Amendments

In addition to the Bill, the suite of legislative changes proposed by the Attorney-General also includes an amendment to the Charities Act to make it clear that a traditional view of marriage is not, of itself, a disqualifying purpose. However, this should not just be about marriage, but any religious belief or activity should not be a “disqualifying purpose.” Additionally, sections 5-6 of the Charities Act should be amended to make clear that allowing religious charities for the propagation of religious belief satisfies the public benefit test.