

Your Submission

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Introduction – NSCA and school chaplaincy

1. This submission is made on behalf of the National School Chaplaincy Association (NSCA), which is an association of employers of government school chaplains across Australia. These employing bodies are the providers of school chaplaincy services, through the chaplains they employ, in more than 2300 schools across Australia.
2. While chaplains must have underlying qualifications in youth work, community work or equivalent, school chaplaincy is religious in nature – providing social, emotional and spiritual support for students. Chaplains are religious workers.
3. Chaplaincy services are partly funded under the Commonwealth’s National School Chaplaincy Program, which requires that chaplains must be ‘recognised through formal ordination, commissioning, recognised religious qualifications or endorsement by a recognised or accepted religious institution’. [definition of ‘chaplain’ in clause 32(a) of Commonwealth Project Agreement, found at http://www.federalfinancialrelations.gov.au/content/npa/education/project-agreement/National_School_Chaplaincy_Program-20181221.pdf]

Recognition of religious bodies acting according to their faith

4. We appreciate the approach of the draft Bill in defining discrimination, and providing that certain conduct by religious employers is not discrimination. This avoids a negative implication that a religious employer's conduct is prima facie discriminatory (but permitted, for example under an exemption or defence).

Definition of Religious body

5. The categories of employers in clause 10(2)(b) and (c) are too narrow because of the exclusions based on engaging in commercial activities, which potentially exclude religious bodies operating on a not-for-profit basis, including providing services of a religious in nature (for a fee or otherwise).
6. The model of school chaplaincy across Australia includes financial grants made by the commonwealth to states which, in the some states, is directed to schools, which then use the funds to purchase a school chaplaincy service from a religious body (the school chaplaincy provider). Similar arrangements can apply for funds raised within the school, or provided by a state government.
7. While funds may be in the nature of a grant at one level, if the grant is to the school the nature of the payment (by the school) to the chaplaincy employer may be as a fee for service. If that characterisation is used, then there is a risk that, by providing religious chaplaincy services, the chaplaincy employers are engaging in a commercial activity.
8. If that is right, then providers of religious chaplaincy would not enjoy the freedom to act in accordance with their faith as contemplated by clause 10(1) of the Bill as drafted, despite being a registered charity or body conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion, and despite the services being religious in nature. There would be other religious services in the same situation.

9. We therefore suggest there commercial exclusion be omitted.

Scope and wording of Clause 10(1)

10. Clause 10(1) of the draft Bill defines the conduct that is not discrimination if engaged in by certain religious employers. For a religious employer's conduct to fall within clause 10, it must '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'. This is too narrow, in practical terms, in a number of respects, which we explain below.

11. Employment-related decisions (including for religious work) are administrative- and management-related matters, whereas religious doctrine, tenets, beliefs and teachings tend to be theological in nature.

12. Each religious employer will have employment practices appropriate for the kind of work the employer provides, and to build the kind of culture the employer is seeking to create as a religious body. However, it is an impractical standard to require each instance of employment-related conduct (management) be 'in accordance with' a particular religious (theological) doctrines, tenets, beliefs and teachings.

13. For example, a religious body may regard it as essential for the establishment and maintenance of its character as a religious body that some or all of the employees and volunteers of the body hold certain beliefs, and demonstrate those beliefs in the way they live.

14. The particular beliefs, and views about how those beliefs should be lived out, may be matters emanating from the religious body's religious views. However, it is an impossible standard to require a religious employer to draw a line of proof from those beliefs and teachings to all relevant employment-related decisions about roles, responsibilities, codes of conduct, employment conditions, employment policies, recruitment procedures, disciplinary policies and procedures, etc. Those would be practical employment matters, rather than being found in 'doctrines, tenets, beliefs or teachings of the religion'.

15. Such employment-related decisions, policies, procedures etc. are in the character of engaging in conduct the religious body in good faith regards as reasonably necessary for the establishment or maintenance of the character or culture of the religious body, or the character of activities or services of the religious body.

16. We suggest the correct standard for such decisions is a subjective one ('the religious body regards'...), but with a requirement of good faith – and with a reasonable connection to the religious character of the employer. Hence, we suggest the words 'the religious body in good faith regards as reasonably necessary..'.¹

17. If conduct is engaged in with good faith, it should be for the religious body to decide what is reasonably necessary for the establishment or maintenance of the character or culture of the religious body, or the character of the activities or services of the religious body.

Whose 'doctrines, tenets, beliefs and teachings' and 'religion'?

18. Clause 10(1) refers to 'the doctrines, tenets, beliefs or teachings of the religion in relation to which the religious body is conducted'. That risks:

a. a line of inquiry (by a Tribunal or court) about which generic or particular religion applies to the religious body (which, if the religious body is not a particular religion's peak body, means mapping the religious body to a religion external to the body itself); then

b. an inquiry about what are that (external) religion's doctrines etc. – rather than an inquiry about the particular doctrines etc. of the religious body itself.

19. This is an issue for religious bodies that operate across denominations of a particular faith, but also for a body that seeks to perform work as an expression of faith, within a wider religious tradition.

a. In the first case, the cross-denominational religious body may have to synthesise or choose a set of doctrines etc. that allow the body to work harmoniously across the relevant denominations, but might not have complete alignment with all the doctrines etc. of all the relevant denominations of a particular religion.

b. In the second case, the body may have beliefs or doctrines that are specific to the work of the body, or its context, that may be more specific or contextually different from the generic doctrines etc., of the denomination or religion in which it sits.

20. In our submission, it should be for the religious body to identify for itself what is the relevant religion, and the content of the doctrines, tenets, beliefs or teachings in relation to which the religious body is conducted - whether a particular denomination or sub-category of a faith, a particular basis of theology, an identified religion in general, or otherwise. This should be made express in the Bill.

21. We think this is necessary to avoid difficulties encountered in the NSW Wesley Mission Case at first instance, where a tribunal imposed its view of the content of the relevant doctrines etc., based on the tribunal's view of the relevant

religion. While the NSW Court of Appeal adopted a preferable approach, this did not put beyond doubt that it is the particular religious doctrines adopted by the religious employer, rather than generic doctrines of a wider religion, which apply.

22. Perhaps this could be addressed by clause 10(1) referring to 'conduct that may reasonably be regarded as being in accordance with the religious doctrines, tenets, beliefs or teachings in relation to which the religious body is conducted.'

A particular religion

23. A similar issue arises in the language in clause 10(2)(a), (b) and (c) referring to a 'particular religion'.

24. In our submission, the language should instead refer to an [educational institution / registered charity / body] conducted in accordance with religious doctrines, tenets, beliefs or teachings.

Statements of religious belief by employees of a religious body

25. We think it is reasonable for a religious employer to expect that the religious beliefs its employees express are beliefs shared by the employer.

26. In this respect, religious employers are different from other employers to whom clause 8(3) of the draft Bill applies, because religious employers' core purpose may be precisely about the content of expressed religious beliefs. It would be untenable for a religious employer to have an employee whose work involves expressing religious views of the employer, but for that employee to express inconsistent views at a time other than when the employee is performing work on behalf of the employer.

27. Therefore, it is important that a provision be added to clause 10 of the Bill expressing that conduct under s10(1) may include an employer imposing an employer conduct rule that would have the effect of restricting or preventing an employee of the religious body from making a statement of religious belief inconsistent with a doctrine, tenet, belief or teaching of the religious body (and regardless of whether the statement is made when the employee is performing work on behalf of the employer, or at some other time).

28. Perhaps it could be clarified that the employer conduct rule of the religious body must not counsel, promote, encourage or urge a religious belief of the kind described in clause 8(4) (malice, harass, vilify, incite hatred or violence etc.).