



## Anglican Church Diocese of Sydney

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# Submission to the Senate Legal and Constitutional Affairs Committee on the exposure draft of the Human Rights and Anti-Discrimination Bill 2012

## By the Standing Committee of the Synod of the Anglican Church Diocese of Sydney

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### 1 Introduction

#### 1.1 Who we are

- (a) The name of our organisation is the Anglican Church Diocese of Sydney (**Diocese**).
- (b) This submission is made by the Standing Committee of the Synod of the Diocese. The Standing Committee is the executive of the Synod which is in turn the principal governing body of the Diocese constituted under the *Anglican Church of Australia Constitutions Act 1902* (NSW).
- (c) The Diocese is an unincorporated voluntary association comprising various bodies constituted or incorporated under the *Anglican Church of Australia Trust Property Act 1917* (NSW) and the *Anglican Church of Australia (Bodies Corporate) Act 1938* (NSW). These bodies, together with the diocesan network of 269 parishes, are accountable to the members of the Church through the Synod of the Diocese.
- (d) More broadly, the Diocese, through its various component bodies and through its congregational life is a provider of a wide range of programs including in social welfare, education, health and age care, youth work and for the homeless. In addition to the congregational life of the Diocese, the bodies which provide services to the community across the Diocese include large social welfare institutions such as Anglicare, as well as other charitable institutions including Anglican Youthworks, and 40 Diocesan schools.
- (e) We appreciate the opportunity to comment on the exposure draft of a Bill to consolidate the Commonwealth's anti-discrimination laws.
- (f) Our contact details are –

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## 2 Summary of Submission

- (a) The objects of the Bill should include giving effect to Australia's international obligations to prevent unjustified forms of discrimination in a manner which upholds rights to freedom of religion, freedom of association, freedom of speech and cultural expression, as well as any other relevant human rights. We recommend certain amendments to section 3(a) of the Bill.
- (b) It is insufficient to make provision for rights of freedom of religion, freedom of association, freedom of speech and cultural expression through exceptions. While exceptions are necessary, casting the protection of these rights in a wholly negative manner, in the form of 'exceptions', does not do justice to their importance. It suggests they are to be merely tolerated rather than positively recognised and upheld as legitimate and important in themselves.
- (c) We submit that reference to the need for a comparator should be retained in the definition of discrimination in section 19 of the Bill.
- (d) We strongly object to the inclusion of conduct that "offends, insults or intimidates" another person (section 19(2)(b)) in the meaning of unfavourable treatment. We recommend deletion of section 19(2)(b).
- (e) We recommend a new section 19(3) be inserted in the Bill to provide that "any act or matter, done reasonably and in good faith, for academic, artistic, religious instruction, scientific or research purposes or for other purposes in the public interest, including discussion or debate about and expositions of any act or matter" does not constitute unfavourable treatment.
- (f) We submit that a new section should be inserted in the Bill to provide that the right to be free from discrimination includes an obligation on the part of employers to make reasonable accommodation for an employee's religious beliefs. We submit that an employee should not be required by their employer to undertake particular tasks or

provide services in a particular context that are contrary to the employee's genuinely held religious convictions where this is reasonable.

- (g) With the exception of racial discrimination, we support discrimination being unlawful in specific activities in specific areas of public life rather than expanding the test to "discrimination connected with any area of public life". The meaning of "public life" (as opposed to private life) is vague. We also submit that discrimination laws should only apply to persons in positions of authority or power; they should not regulate personal relationships at the horizontal level. We recommend that section 22 be recast.
- (h) We are deeply concerned about extending the meaning of employment to include "voluntary or unpaid work". The line between voluntary work, leisure, private activities and community service is often very unclear. The Bill will potentially put an onus on a volunteer not to discriminate in relation to the persons to whom they direct their altruism. This is an unwarranted overreach of the law. We recommend deletion of paragraph (c) in the definition of 'employment'.
- (i) We support the justifiable conduct exceptions in section 23 of the Bill, in addition to other more specifically targeted exceptions. However we recommend that the Bill be amended to make it clear that the protection, advancement or exercise of another human right protected by the International Covenant on Civil and Political Rights is a legitimate aim for the purposes of section 23.
- (j) We submit that the exception for religious organisations and schools needs to be cast more broadly to ensure that these organisations and schools are able to positively select staff who share their values and beliefs who will further the purposes of the organisation. We recommend certain amendments to section 33.
- (k) We are concerned at the proposal to review the exceptions in the Bill after a period of 3 years and the potential for this review to be used to erode freedom of religion. We recommend that sections 32 and 33 of the Bill be excluded from the review.
- (l) We support allocating the full burden of proof to the complainant consistent with the existing approach in Commonwealth anti-discrimination laws and those of the States and Territories.
- (m) We submit that it should remain the case that the unsuccessful party pay the costs of the successful party except to the extent that the successful party may have caused an increase in costs due to acting unreasonably.
- (n) We are concerned at the cumulative effect of removing the need for a comparator, allowing representative actions, shifting the burden of proof onto respondents and requiring each party to bear its own costs. We consider that the complaints process in

the Bill unfairly disadvantages respondents. The process leaves little incentive for a respondent to contest an unmeritorious complaint.

- (o) We support the Australian Human Rights Commission having a conciliatory function and consider that it should not arbitrate disputes.

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### **3 Achieving a better balance with religious freedom and other human rights**

#### **3.1 Anti-discrimination should not trump other human rights**

- (a) A focus of this submission is to encourage the Government to ensure there is a better balance between the legitimate expectation arising under international human rights instruments that a person will not be subject to unjust discrimination with equally important human rights, such as those relating to freedom of religion, freedom of association, freedom of speech and cultural expression.
- (b) We object to naming the Bill the *Human Rights and Anti-Discrimination Bill 2012* if the Bill remains in its present form. Presently the Bill substantially deals only with the right not to be unjustly discriminated against. The limited recognition given to other equally important human rights is incidental to the dominant anti-discrimination focus of the Bill. To use the term “human rights” in the title to the Bill is therefore not only misleading in terms of the scope of the protections it offers but also in what it implies, namely that the right of non-discrimination trumps all other human rights. The United Nations Human Rights Committee has noted that there is no hierarchy of rights under the International Covenant on Civil and Political Rights. There is therefore no justification for this apparent elevation of the right of non-discrimination above other human rights.
- (c) We note that the Bill makes some allowance for rights of freedom of religion, freedom of association, freedom of speech and cultural expression through exceptions. However, while exceptions are necessary, casting the protection of these rights in a wholly negative manner, in the form of ‘exceptions’, does not do justice to their importance. It suggests they are to be merely tolerated rather than positively recognised and upheld as legitimate and important in themselves.
- (d) We also note that the exceptions in the Bill are to be reviewed after a period of 3 years. We are concerned that this review process (along with subsequent further review processes in the future) will be used to gradually erode the limited accommodation that is given in these exceptions to other human rights. There is a need for positive recognition of and support for freedom of religion, freedom of association, freedom of speech and cultural expression in the Bill, among other human rights.

- (e) We note that Freedom 4 Faith, in its submission, has suggested way that these other human rights can be recognised. We support these amendments.

### **3.2 Recognising other human rights in the objects clause**

- (a) Our concerns at this point are highlighted by the absence of any reference in the objects of the Act to the importance of other human rights.
- (b) We therefore submit that the objects of the Bill should include giving effect to Australia's international obligations to prevent unjustified forms of discrimination in a manner which upholds rights to freedom of religion, freedom of association, freedom of speech and cultural expression, as well as any other relevant human rights.
- (c) **Recommendation**: We support the amendment to section 3(a) proposed in the submission from *Freedom 4 Faith*, namely that section 3(a) be amended to read as follows –

“(a) to deal with discrimination, sexual harassment and racial vilification, consistently with Australia's obligations under the human rights instruments and the ILO instruments (see subsections (2) and (3)), and taking account of the other rights and freedoms protected by those instruments including freedom of speech, religion, and association.”

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## **4 Meaning of Discrimination**

### **4.1 Retention of comparator test**

- (a) We submit that a comparator test should be retained. We do not support a detriment test which merely examines whether a person has been treated unfavourably.
- (b) We note that paragraph 106 of the explanatory statement indicates “it is not necessary to make a comparison with any other persons to determine whether treatment is unfavourable”.
- (c) Discrimination, by its very nature, involves differential treatment. We cannot see how this can be avoided by changing the test to unfavourable treatment.
- (d) It may be difficult for a person against whom a complaint has been made to prove that their treatment of another person was not because of that person's protected attribute if they cannot rely on evidence which demonstrates that they would have treated those without the protected attribute in much the same way. It is not clear how a person could otherwise prove that the protected attribute was not the reason for the detrimental treatment. This issue is especially acute given the proposal to shift the burden of proof

to respondents. Not only will respondents bear the burden of proof but they will have a diminished capacity to adduce evidence to discharge that burden.

- (e) **Recommendation:** Recast section 19 of the Bill to include reference to a comparator. We support the amended form of section 19 proposed in the submission from *Freedom 4 Faith* which addresses this concern, along with other concerns we have with section 22 of the Bill which we outline below.

#### **4.2 Conduct that offends or insults**

- (a) We strongly object to the inclusion of conduct that offends, insults or intimidates another person (section 19(2)(b)) in the meaning of unfavourable treatment. We submit that the Bill in fact ought to expressly circumscribe such conduct from the meaning of unfavourable treatment.
- (b) The law must not establish a right not to be offended or a right to freedom from speech. In a liberal democracy people must have confidence to express their genuinely held opinions on matters without being fearful that it may be unlawful to do so. Frankly, we are aghast that our Government would even contemplate such a law, let alone include such a provision in exposure draft legislation.
- (c) It is difficult to see how we could have a balanced and free public debate on important social issues if it becomes unlawful to cause offence or insult. For instance, such laws would potentially mean that it would be unlawful to state publically that a child has a right to a father and a mother given that some same-sex persons have indicated they regard this comment to be offensive and insulting.
- (d) Such an example is not hypothetical. Recently in the United Kingdom an employee of the Trafford Housing Trust in Greater Manchester was demoted after writing on his private Facebook account, outside work hours, that same-sex marriage in churches was “an equality too far”. A mild comment which, at the time, reflected government policy. The Trust demoted the employee on the basis that he had upset colleagues, promoted religious views and potentially damaged the Trust’s reputation for diversity. Justice Briggs of the High Court found against the Trust. His Honour noted –

The frank but lawful expression of religious or political views may frequently cause a degree of upset, and even offence, to those with deeply held contrary views, even where none is intended by the speaker...This is a necessary price to be paid for freedom of speech.<sup>1</sup>

- (e) Notwithstanding this, the employee received very minimal compensation, with Justice Briggs stating as follows -

Mr Smith was taken to task for doing nothing wrong, suspended and subjected to a disciplinary procedure which wrongly found him guilty of gross misconduct, and then demoted to a non-managerial post with an eventual 40 per cent reduction in salary. The breach of contract which the Trust thereby committed was serious and repudiatory. A conclusion that his damages are limited to less than £100 leaves the uncomfortable feeling that justice has not been done to him in the circumstances.<sup>2</sup>

- (f) We submit that equality laws, in particular those which outlaw conduct which may be offensive or insulting to some, encourage employers and others to take the type of action taken by the Trust in this case. The Government needs to exercise leadership in standing up for freedom of speech and not creating an environment where those in authority feel the need to take a heavy-hand to the legitimate expression of religious or political opinions.
- (g) We support laws which outlaw hate speech and vilification provided they are accompanied by express limitations which allow for legitimate and reasonable forms of expression. See further 4.3.
- (h) **Recommendation**: Delete section 19(2)(b) of the Bill.

### 4.3 Attribute based harassment

- (a) Subject to certain provisos, we support, in principle, treating as a ground of unlawful discrimination, harassment of a person based on their protected attribute. However, similar to the concerns expressed above, the conduct comprising harassment for this purpose needs to be carefully limited to ensure that legitimate and reasonable conduct does not fall within its ambit merely because the complainant finds it offensive.
- (b) Many religious bodies hold to particular doctrines concerning matters of sexual practice (for instance) and it is possible for the exposition of such doctrines or even reading religious texts in public<sup>3</sup> (such as in the workplace) to cause offence and give rise to a

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<sup>1</sup> *Smith v. Trafford Housing Trust* [2012] EWHC 3221 (Ch) at 82.

<sup>2</sup> *Ibid* at 106.

<sup>3</sup> On 20 April 2010 Mr Dale McAlpine, a street preacher, was held in a cell for several hours and charged with an offence under the Public Order Act (UK) for listing homosexuality as a sin among others when expounding chapter 1 of 1 Corinthians from the Bible. [<http://www.dailymail.co.uk/news/article-1270364/Christian-preacher-hooligan-charge-saying-believes-homosexuality-sin.html>.] There is also the case of Mr Jamie Murray, owner of the Salt and Light Café in Blackpool, who was approached by police on 19

harassment claim. This may be increasingly so if the inherent requirements of a position are construed narrowly and religious bodies are forced to employ people who may not share their values and beliefs and who may object to the overt expression of these beliefs and values in the workplace.

- (c) It is insufficient to provide protection for such acts by way of exception. We submit that there needs to be positive recognition within the definition of discrimination that legitimate forms of expression do not constitute unfavourable treatment in the first place. They need to be positively recognised and valued and not merely tolerated by way of exception.
- (d) **Recommendation**: Include a provision similar to section 49ZT(2)(b) of the *Anti-Discrimination Act 1997* (NSW) in the Bill. We suggest a new section 19(3) as follows (with consequential renumbering of the existing subsections) -

“To avoid doubt, unfavourable treatment does not include an act or matter, done reasonably and in good faith, for academic, artistic, religious instruction, scientific or research purposes or for other purposes in the public interest, including discussion or debate about and expositions of any act or matter.”

#### 4.4 Duty to make reasonable adjustments (or accommodation)

- (a) We submit that the right to be free from discrimination should include an obligation on the part of employers to make reasonable accommodation for an employee’s religious beliefs. An employee should not be required by their employer to undertake particular tasks or provide services in a particular context that are contrary to the employee’s genuinely held religious convictions where this is reasonable.
- (b) There have been examples in the United Kingdom where employees have been forced to undertake tasks that are contrary to their religious beliefs or face discipline.<sup>4</sup> Often the matters giving rise to conscientious objection are a minor part of the person’s employment and it would be quite feasible for another employee in the workplace to

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September 2009 and told that it was in breach of the Public Order Act for him to use a set of DVDs in the café through which successive verses from the New Testament were displayed on a screen in the café on the basis that some verses were homophobic and insulting. [<http://www.dailymail.co.uk/news/article-2041504/Police-tell-cafe-owner-Stop-showing-Bible-DVDs-arrest-you.html?printingPage=true>]. Although the both matters arose under public order legislation rather than equality laws and did not result in prosecutions, they are nonetheless pertinent examples of freedom of religion and speech being unreasonably curtailed due to inadequate protections in the law.

<sup>4</sup> Some examples: 1. Dr Sheila Matthews, a paediatrician and member of the Northhamptonshire county council’s adoption panel, was forced to resign because her employer refused to accommodate her request to abstain from voting on the placement of children with same-sex couples. The UK Employment Tribunal dismissed her claim of religious discrimination on 16 November 2010. 2. Mr Gary McFarlane, a relationship counsellor, whose employment was terminated when he refused to confirm that he would provide sex therapy to same-sex couples. The Employment Tribunal in Bristol dismissed Mr McFarlane’s application for unfair dismissal and discrimination on 5 January 2009. On 30 November 2009 that decision was upheld by the Employment Appeal Tribunal. The matter is before the European Court of Human Rights. 3. Ms Lillian Ladele, a registrar, was forced to resign from her employment when she refused to conduct civil partnership ceremonies involving same-sex couples. On 3 July 2008 the Employment Tribunal in London found that Ms Ladele had been discriminated against but this was overturned by the Employment Appeal Tribunal on 19 December 2008. Ms Ladele was refused leave to appeal to the Supreme Court on 4 March 2010. She has taken her case to the European Court of Human Rights.

undertake those tasks without disruption to the business of the employer. We submit that not to allow reasonable accommodation in this regard would constitute an unwarranted limitation on freedom of religion.

- (c) **Recommendation**: Include a new section in the Bill to require employers to make reasonable accommodation for an employee's religious beliefs.

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## 5 Protected Attributes

### 5.1 Protecting any area of public life

- (a) Subject to one exception, we support continuing to make discrimination unlawful in specific activities in specific areas of public life rather than expanding this to “discrimination connected with any area of public life” (section 22(1)). The exception is discrimination on the grounds of race which should continue to be unlawful in any area of public life (section 9 of the *Racial Discrimination Act*).
- (b) There is almost universal acceptance within the community that all forms of discrimination on the grounds of race which cause detriment are wrong. It is therefore appropriate that a broad approach be taken to the matters that may constitute racial discrimination rather than limiting it to particular areas and activities.
- (c) However there are sincerely held differences of opinion in the community in relation to other protected attributes, for example those related to sexual practice. As a community we are a long way from consensus that it is wrong to discriminate on the grounds of sexual orientation, gender identity or marital/relationship status in all contexts. It is important that the areas and activities of public life to which anti-discrimination law applies in relation to protected attributes related to sexual practice (for instance) are clearly expressed so that –
  - (i) specific consideration can be given as to whether it is appropriate for those areas and activities to be so regulated, and
  - (ii) members of the community are clear about the areas and activities of public life to which anti-discrimination laws apply.
- (d) We expect the line between public and private life will be very unclear in many contexts. This may be particularly so if work and work-related areas include volunteer work. It will be unclear whether a volunteer is undertaking some activity in public life or privately. When a parishioner of a church chooses to provide a meal for a needy member of the community but not another (who happens to have a protected attribute) is that discrimination in an area of public life? We submit that anti-discrimination law has no

place regulating such matters. Volunteers ought not to be subject to such requirements in relation to their altruistic endeavours. We take up this issue in more detail below.

- (e) The broad meaning of public life also means that a complaint can be lodged against any person. This is a significant expansion in anti-discrimination law. Currently the law generally only regulates those in positions of authority such as employers, landlords and so forth. We submit that the Bill ought only to regulate those in such positions of authority and not be used by one person against another to settle their personal differences.
- (f) **Recommendation**: Recast section 22 of the Bill to remove the concept of ‘public life’ (except in relation to racial discrimination) and instead set out an exhaustive list of circumstances in which discrimination may arise. We support the amendment to section 22 in the submission from *Freedom 4 Faith*. Section 7 should also be deleted as a consequential amendment.

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## 6 Extending the definition of “employment” to include voluntary and unpaid work

- (a) Section 6 of the draft Bill defines “employment” as including “voluntary or unpaid work” whether full-time, part-time or casual. We strongly oppose extending the definition in this manner. This, coupled with the extension of discrimination to all areas of public life, represents a significant expansion of the reach of anti-discrimination laws in our country.
- (b) It is generally quite clear when a person is in a traditional form of paid employment. However the line between voluntary work, leisure, private activities and community service is often very unclear. The law should be clear and unambiguous in relation to the conduct that it regulates.
- (c) To extend anti-discrimination laws to conduct concerning volunteers will impose a significant additional burden on charities and not-for-profits in particular, who are already suffering additional regulatory burden with the commencement of the *Australian Charities and Not-for-Profits Act 2012*.
- (d) Charities and not-for-profits appoint people to voluntary positions on a regular basis. Most of these appointments are relatively insignificant. For example, in the church context it might include matters such as cleaning the church, welcoming people at services, collecting the offertory, preparing and serving morning tea, reading the Bible in Church, helping at a working bee and so forth. All of these activities potentially constitute “voluntary or unpaid work” and the rector of the church (or other appointing party) would face the prospect of a complaint being lodged with the AHRC in relation to decisions they

make about these appointments. We submit that there is no rationale for such over-regulation.

- (e) Much volunteer work is also undertaken through personal initiative and does not arise through formal appointment by a person in authority. The Bill will potentially place an onus on a volunteer not to discriminate in relation to the persons to whom they direct their altruism. We submit that anti-discrimination law should not regulate such matters.
- (f) One consequence of such over-reach may be that there is a reduction in the engagement of volunteers by certain charities and not-for-profits, and also a reluctance for people to volunteer their services.
- (g) Another consequence may be less transparency and public appeal for the engagement of volunteers in order to avoid the potential for making an adverse decision on the grounds of a protected attribute. It may become more common for volunteers to be hand-picked and approached privately. This would be an unfortunate outcome.
- (h) We note the exception in section 32(2)(iii) of the Bill may cover some of these appointments to the extent that they are connected with religious observance or practice. However there would be great uncertainty over whether or not some activity is sufficiently connected to religious observance or practice to attract the protection of the exception. Many churches impose belief and conduct standards on those who are appointed to positions of public ministry (as broadly understood) since the appointment evidences that the person is in good standing within the church.
- (i) **Recommendation**: Delete paragraph (c) in the definition of “employment” in section 6 of the Bill.

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## 7 Exceptions and Exemptions

### 7.1 General limitations clause

- (a) We support the justifiable conduct exception in section 23, in addition to other more specifically targeted exceptions.
- (b) We recognise the benefit in having flexibility to allow conduct which may not fall within the existing exceptions but which is nonetheless in furtherance of a legitimate object. However we submit that the Bill should give the courts further guidance as to the types of matters that are legitimate aims.
- (c) To this end we submit that the protection, advancement and exercise of another human right protected by the International Covenant on Civil and Political Rights (ICCPR) should be expressly stated in the Bill to be a legitimate aim. This would also go some

way to achieving a better balance between the right to not be unjustly discriminated against and other human rights.

- (d) **Recommendation:** Insert a provision to make it clear that the protection, advancement or exercise of another human right protected by the ICCPR is a legitimate aim.

## 7.2 Inherent requirements exception

- (a) We support a broad inherent requirements exception applicable to all attributes.
- (b) We are concerned that section 24 of the Bill is cast in such a way that it only applies to discrimination by reason of a person having a protected attribute or a combination of protected attributes. It would not appear to apply where a person is unable to carry out the inherent requirements of the position because he or she does not have a protected attribute or combination of protected attributes.
- (c) Commonly for faith-based organisations the inherent requirements of the position are not met because a person does not have a protected attribute rather than because they do have one. For instance a faith-based school may wish to insist that teachers or other staff members be Christians given they are role models for the students and may also be required to lead Bible Studies or devotions with the children (among other requirements).
- (d) **Recommendation:**
  - (i) Replace the words “particular work” with “particular position” to make it consistent with the *Fair Work Act 2008*.
  - (ii) Recast section 24(2)(b) to make it clear that the exception applies where a person is unable to carry out the inherent requirements of the position because the persons does not have a protected attribute.

## 7.3 Religious exceptions

- (a) We recognise that the Government is showing continuing support for freedom of religion through retaining exceptions for religious organisations and educational institutions. However there are aspects of these exceptions that cause us concern.
- (b) Firstly, we consider that it is insufficient to merely provide for freedom of religion in a negative manner by way of exemption. This matter is taken up in some detail above.
- (c) Secondly, we submit that the exception needs to be cast more broadly to ensure that organisations established for particular legitimate purposes are able to positively select staff who share their values and beliefs who will further the purposes of the organisation.

- (d) Positions within religious organisations (and indeed any organisation that exists to promote belief or ideology) must not be viewed purely in terms of their function but also in terms of their contribution to the culture and ethos of the organisation. The staff of an organisation determine its culture and identity, particularly over time. Many of the Christian charities that have maintained their Christian identity over time have done so because they have strict recruitment practices.
- (e) This is uncontroversial in other areas of society. An environmental group would not be expected to employ people who do not believe in climate change and a political party would not be expected to employ staff who do not share its ideology, whether in a front-line position or otherwise.
- (f) Thirdly, we are deeply concerned at the proposal to review the exceptions after 3 years and at the prospect of exceptions granted to religious organisations being further limited at this time. If there is to be a review, it should cover the Bill in its entirety.
- (g) **Recommendation:**
  - (i) Expand the exception in section 33 of the Bill to include discrimination that is connected with the appointment or retention of persons to work within the religious body to ensure that they share the religious commitment of that body or are supportive of its religious purpose. *Freedom 4 Faith* has suggested amendments to section 33(2) to this end which we support.
  - (ii) Amend section 47 of the Bill to exclude sections 32 and 33 from the 3-year review of exceptions.

#### **7.4 Commonwealth-funded aged care**

- (a) We note that the exception for religious bodies in section 33 of the Bill is subject to a limitation in the case of Commonwealth-funded aged care (apart from the employment of staff to provide that care).
- (b) The Explanatory Notes do not outline any reasoning for the limitation, other than to state that care or services provided under Commonwealth grants cannot be provided in a discriminatory manner. However we note that the Attorney General's media release dated 20 November 2012 states that the limitation "is consistent with the introduction of protection for sexual orientation and gender identity discrimination and in recognition that aged care services become a person's home".
- (c) We are sympathetic with the reasoning behind the limitation but wish to draw attention to some of the difficulties it may present for both aged care providers and residents.

- (d) However we are deeply concerned that the same reasoning will be used in future to limit the other types of services provided by faith-based organisations which receive government funding (eg. that faith-based schools must not discriminate in the provision of education). We consider that the argument is misconceived and is selectively applied against religious organisations. It also ignores the community nature of many services.
- (e) It is true that an aged care facility is a person's home. However it is also a community of persons. It should be recognised that a faith-based aged care service will be operated in a manner that is consistent with and supportive of the religious beliefs which underpin it. The majority of residents will tend share those religious beliefs or will be sympathetic to them.
- (f) It may be unsettling to these communities to have residents who do not share their beliefs, values and ethos facility on matters of sexual practice (for example). We are concerned, given the significant expansion in coverage of the Bill to all areas of public life and the inclusion of a detriment test, that anti-discrimination laws may in the future be used by residents against other residents or to prevent faith-based activities within facilities that a resident may find offensive or uncomfortable by reason of their protected attribute.
- (g) If an aged care limitation is to be included in the Bill there needs to be protection for faith-based aged care providers to ensure they are not forced to discontinue or restrict those elements of their services which reflect the beliefs, values and ethos of the provider.
- (h) We also note that many aged care providers are not faith-based. If a person has a legitimate choice of providers it seems to us that there is no utility in forcing the faith-based provider to alter its activities in a way that adversely affects others in order to cater for the person with a protected attribute.<sup>5</sup>
- (i) We have no objection to Commonwealth-funded aged care facilities being established by others which specifically cater for persons in the same-sex community, for example. We consider that Government funding should be applied in a manner that fosters diversity among service offerings rather than requiring all organisations to provide a homogenous service that attempts to cater to all parts of the community.

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<sup>5</sup> This was apparent in *OV & OW v Members of the Board of the Wesley Mission Council* [2010] NSWCA 155 which concerned the placement of children with foster carers. OW and OV could have applied to Barnardos or the Department of Community Services to foster children. However they chose Wesley which had a policy of not placing children with same-sex couples based on the doctrine it holds to concerning sexual practice and the proper environment for the raising of children. Wesley won the case on the basis of the religious exception. However it is difficult to see how the same-sex couple suffered practical disadvantage from Wesley's policy given that there were alternative foster care providers available.

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## **8 Complaints and Compliance Framework**

### **8.1 Burden of Proof**

- (a) We support allocating the full burden of proof to the complainant consistent with the existing approach in Commonwealth anti-discrimination laws and those of the States and Territories.
- (b) We submit that the person making a complaint ought to be required to prove the allegation. A person should not be required to prove their innocence. Shifting this onus may lead to complainants making allegations based merely on suspicion without any evidence of whether there is in fact a discriminatory basis to the course of action taken by the respondent. A respondent may incur significant expense and reputational damage in disproving a suspicion.
- (c) We note that section 124 of the Bill only shifts to burden of proof to the respondent once the complainant has adduced evidence from which the court could decide, in the absence of any other explanation, that the reasons or purpose of the respondent's conduct is that alleged by the complainant. This is a very low threshold. A complaint would only need to demonstrate a circumstantial case. It may be enough for example for a complainant to adduce evidence of their mature age and the younger age of the successful applicant for an employment opening in order to shift the burden, even though the respondent may not have done or said anything that suggests the complainant's age had any part in the decision to employ the younger person.

### **8.2 Costs**

- (a) Section 133 provides that each party is to bear its own costs. We object to this.
- (b) We submit that it should remain the case that the unsuccessful party pay the costs of the successful party. It is a fundamental tenant of litigation that costs follow the event unless it can be shown that the successful party has caused an increase in costs due to acting unreasonably.

- (c) Whether or not costs will be paid is a significant consideration for a respondent in deciding whether to defend an action brought against them. If respondents are in a position where they consider they have acted lawfully but will not have their costs paid even though successful, many will make a commercial decision to settle, unless there is some matter of principle that justifies the cost of defending the action. We would regard this outcome as unfortunate.

### **8.3 Representative Actions**

- (a) We would not oppose representative actions per se. We accept that the complexities of the court system can be difficult and costly for complainants.
- (b) However we are concerned that in removing barriers by allowing representative actions, in conjunction with reversing the burden of proof and requiring each party to bear its own costs (in the ordinary course of events), that there will be a spike in unmeritorious and speculative actions.

### **8.4 The cumulative effect**

- (a) The effect of all of these provisions when taken together needs to be carefully considered. We consider that more work is needed to devise a complaints system that is fairer for respondents. Presently there is little in the Bill that imposes a disincentive on a complainant for bringing an unmeritorious claim. While section 117(2) of the Bill provides for discretion to reject complaints that a “frivolous, vexatious, misconceived or lacking in substance”, experience suggests that such powers are only exercised after a complaint has gone all or a substantial way through the process.

### **8.5 The role and functions of the Australian Human Rights Commission**

- (a) We support the conciliatory role and function given to the Australian Human Rights Commission as provided for in the Bill.
- (b) In anticipation that others may wish for the Commission to have a stronger role in arbitrating complaints, we offer the following comments.
- (c) An overreliance on law to arbitrate conflict does not enable a populace to navigate their differences civilly. Invoking a third party to arbitrate causes the parties to the dispute to avoid engaging with and understanding each other. Furthermore enforcement is unlikely to lead to change on the part of a respondent; in fact the opposite may be true.
- (d) We endorse the views of Professor Patrick Parkinson when he argues,

‘Where ... governments impose standards of behaviour through law on a reluctant population, they risk more than they gain. Compliance is coerced rather than voluntary and the legislation undermines belief in a shared

community of interest between governors and governed. ... Legislation defines legality and illegality, but legitimacy is something different. ... It is the legitimacy of law, and not its constitutional legality, which matters most for stable and harmonious societies'<sup>6</sup>

- (e) AHRC has an impressive record in social cohesion initiatives that do not always require powers of enforcement. A good example is the Unlocking Doors report of 2007, which began meaningful engagement between local communities and police.
- (f) We also consider that the good work the AHRC is undertaking in conciliating complaints will be undermined if it is given an enforcement role. Respondents are likely to be guarded in conciliation with the AHRC if it has enforcement powers, even if information disclosed at conciliation is not able to be formally tendered as evidence in litigation.

20 December 2012

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<sup>6</sup> Patrick Parkinson, 'Enforcing Tolerance: Religious Vilification Laws in Australia.' Paper delivered to the Eleventh Annual International Law and Religion Symposium: Religion in the Public Sphere: Challenges and Opportunities, Provo, Utah, October 2004, pp. 14-15.