

SUBMISSION TO:
Religious Discrimination Bill 2019
Second Exposure Draft

AUSTRALIAN CHRISTIAN LOBBY

About Australian Christian Lobby

Australian Christian Lobby's vision is to see Christian principles and ethics influencing the way we are governed, do business, and relate to each other as a community. ACL seeks to see a compassionate, just and moral society through having the public contributions of the Christian faith reflected in the political life of the nation.

With more than 170,000 supporters, ACL facilitates professional engagement and dialogue between the Christian constituency and government, allowing the voice of Christians to be heard in the public square. ACL is neither party-partisan nor denominationally aligned. ACL representatives bring a Christian perspective to policy makers in Federal, State and Territory Parliaments.

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The Hon. Christian Porter MP
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31 January 2020

RE: Religious Discrimination Bill 2019 (Second Exposure Draft)

Dear Attorney General,

The Australian Christian Lobby is pleased to provide a submission in response to the second exposure draft of the Religious Discrimination Bill 2019.

We welcome this additional opportunity to contribute to the very important process of getting the Bill right.

There have been some improvements made to the Bill. However, as outlined in our attached submission, the Bill still contains fundamental deficiencies which need to be addressed.

We would be pleased to meet with you to discuss the further changes that we consider necessary to deliver on the government's promise that people of faith will not be discriminated against.

We give permission for the attached submission to be published online.

Yours sincerely,



Dan Flynn
Chief Political Officer

1. Introduction

The Australian Christian Lobby welcomes the opportunity to make submissions on the Second Exposure Draft of the Religious Discrimination Bill (2ED Bill) that was released for comment on 10 December 2019.

The Government has clearly made an effort to take into account the multitude of responses from faith groups to the first exposure draft of the Bill (1ED Bill) including endeavours to address two of the following seven issues that were raised by us on 2 October 2019.

1. “Lawful religious activity” must be adequately defined;
2. “Unjustifiable financial hardship” should be no defence;
3. “Relevant employer” should include a government employer;
4. The word “vilify” is not sufficiently clear; (*partly addressed*)
5. Religious bodies undertaking “commercial activities” should not be excluded;
6. The “reasonable” qualifier to indirect discrimination should be replaced with “necessary”;
7. The objects clause should note the equal status of human rights. (*addressed*)

We recognise that some positive improvements have been made to the 2ED Bill which are to be commended. However, the 2ED Bill fails to address the essential concerns that we identified in the 1ED Bill as fundamental flaws. These still need to be remedied prior to introduction of the Bill in Parliament.

2. Improvements in the 2ED Bill

We first address the improvements that we consider have been made to the 2ED Bill.

- (a) **Statements of Belief.** The word ‘vilify’ in cl 42 has been defined in the 2ED Bill. This removes potential ambiguity and the potential for the judiciary to set a low bar for what constitutes vilification that would disqualify a statement of belief for protection.

However, we note with concern that new wording of “threaten” and “seriously intimidate” have been added. Commissions, Tribunals and Courts will be able to knock out an otherwise protected statement of belief where it meets the low threshold of being likely to “threaten” or “seriously intimidate”. These additional qualifying terms are as problematic as leaving ‘vilify’ undefined. There is a danger that any statement of belief that is unpopular may be deemed threatening or seriously intimidating. If the test is whether a statement of belief might be likely to “threaten” and “seriously intimidate”, then only the most mild and non-controversial statements of belief will be protected by cl 42. This would rob this clause of much practical effect.

Clause 42(1) of the 2ED Bill should also extend protection to any offence under the stated Acts in the clause, not just discrimination. Clause 42 already sets a standard for vilification which will not be protected and therefore should override the varying standards for vilification in other statutes.

Recommendation: Clause 42 of the 2ED Bill be further amended as follows:

42 Statements of belief do not constitute discrimination etc.

- (1) A statement of belief, in and of itself, does not:
 - (a) constitute ~~discrimination~~ a breach for the purposes of any anti-discrimination law (within the meaning of the *Fair Work Act 2009*); or
 - (b) contravene subsection 17(1) of the *Anti-Discrimination Act 1998* (Tas.); or
 - (c) contravene a provision of a law prescribed by the regulations for the purposes of this paragraph.
- (2) Subsection (1) does not apply to a statement of belief:
 - (a) that is malicious; or
 - (b) that would, or is likely to, harass, ~~threaten, seriously intimidate~~ or vilify another person or group of persons; or
 - (c) that is covered by paragraph 28(1)(b).

- (b) **Definition of Religious Body.** The definition of religious bodies in clause 11(5) of the 2ED Bill has been widened to include Public Benevolent Institutions (PBI).

However, this change is of limited practical effect. Very few religious charities are PBIs. Also, the definition still contains the commercial activities test which will exclude many clearly religious charities. This qualification should be removed, as it will mean that the religious character of many not-for-profits and charities will be under threat. Regardless of whether they are commercial or not, faith-based charities must be able to operate in accordance with their religious character and purpose.

Recommendation: That the definition of “religious body” in clause 11(5) of the 2ED Bill be deleted and replaced as follows:

- (5) **Religious body** means:
 - (a) a private educational authority that has adopted the doctrines, tenets, beliefs or teachings of a particular religion, or
 - (b) a charity registered with the Australian Charities and Not-for-profits Commission under the *Australian Charities and Not-for-profits Commission Act 2012* of the Commonwealth that has adopted the doctrines, tenets, beliefs or teachings of a particular religion, or
 - (c) any other body that has adopted the doctrines, tenets, beliefs or teachings of a particular religion.
- (6) A religious body may adopt a belief as a belief the religious body holds by:
 - (a) including the belief in its governing documents, organising principles, statement of beliefs or statement of values; or

- (b) adopting principles, beliefs or values of another entity which include the belief; or
- (c) adopting principles beliefs or values from a document or source which include the belief; or
- (d) acting consistently with that belief.

In relation to religious bodies, we submit that the view expressed in paragraph 66 of the Explanatory Notes “The Act is intended primarily to protect individuals from discrimination and does not envisage that non-natural persons, such as bodies corporate, will hold or engage in religious beliefs or activities. However, the Act does not preclude bodies corporate or other non-natural persons from being ‘persons aggrieved’ for the purposes of the AHRC Act in appropriate cases.” This displays a fundamental misunderstanding of the practice of religion. Religious people have organised themselves in bodies corporate for millennia. It is clear law that bodies corporate both hold and engage in “religious beliefs or activities.”¹ The terms of the 2ED Bill (interpreted in the light of the *Acts Interpretation Act 1901*) should be amended to recognize that religious bodies have religious beliefs and engage in religious activities.

- (c) ***Equal Status of Human Rights.*** The objects clause now includes a positive affirmation of the equal status of all human rights. We welcome this change in the 2ED Bill.

3. **Previously raised concerns that have not been addressed.**

We note that the 2ED Bill fails to address the three most important areas of concern that were raised in our original submission on the 1ED Bill.

- “Lawful Religious Activity” is not defined.
 - “Unjustifiable financial hardship” of an employer should not be a defence for discrimination against an employee who makes a statement of belief outside of work.
 - “Relevant employer” does not include government employers.
- (a) ***Lawful Religious Activity.*** Without definition, “lawful religious activity” is likely to be given an artificially narrow interpretation by Courts. (*e.g. Cobaw*) Therefore, lawful religious activity needs to be defined to include any activity which is consistent with a religious belief, provided it is not a serious criminal offence. Also, the bill’s protections would be ineffective in the face of a State law banning certain religious activity.

¹ *Christian Youth Camps Limited & Ors v Cobaw Community Health Services Limited & Ors* per Redlich J at [481].

Recommendation: that a broad definition of religious activity is included in the Bill as follows:

religious activity includes:

- (a) engaging in religious activity of worship, observance, practice or teaching; and
 - (b) conduct, refusal, omission, expression, and association carried out in accordance with, in connection with, based upon, constitutive of, supportive of or a corollary of a religious belief; and
 - (c) seeking, receiving and imparting religious beliefs either orally, in writing or in print, in the form of art or through any other media; and
 - (d) any activity or manifestation motivated by a religious belief,
- whether in public or in private, and whether individually or in community with others, but does not include any activity that would constitute a serious offence under Commonwealth or State Law.

- (b) ***Protection of Statements of Belief.*** Cl 8(5) of the Bill has extended protection of statements of belief to professionals and tradesmen. This is welcome. It is important that such protection should also be extended to students and staff at higher educational institutions. Clauses 8 (4) and (5) of the 2ED Bill continue to give insufficient protection to statements of belief. We again emphasise the importance of removing “likely to cause unjustifiable financial hardship” as a defence against a religious discrimination claim. This defence will enable large employers to limit statements of belief of their employees, for example, by asserting (in staff inductions or meetings) that “potential losses are likely to result from an employee’s statements of religious belief, concerning sexual orientation or gender identity, made outside work hours.” Furthermore, this defence for large companies invites boycotts and media/publicity campaigns. Cl 8 of the Bill should protect reasonable statements of belief whether made during employment or outside employment hours.
- (c) ***Relevant Employer.*** The definition of “relevant employer” in the Bill remains unchanged and continues to be too narrow. The definition of relevant employer should be widened to remove the arbitrary \$50M threshold and to include Government employers. People of faith should be able to express their beliefs reasonably regardless of the size of their employer and regardless of whether they work in the public sector or the private sector. There is no persuasive reason to provide differential protection to statements of belief by individuals in their own personal time depending on the nature of their employer.
- (d) ***“Reasonable” discrimination.*** The test for what indirect religious discrimination is “reasonable” in clause 8(2) of the 2ED Bill is largely unchanged despite our previous submission. This goes to the very heart of the provisions of the Bill. The current definition remains inconsistent with Article 18 of the International Covenant on Civil and Political Rights and sets a low bar that in other

jurisdictions has resulted in disproportionate discrimination falling within the definition of “reasonable”. We consider that the definition of reasonable in cl 8(2) must be amended to provide that discrimination is not reasonable unless it is necessary. Appropriate drafting should draw on Article 18(3) of the ICCPR and the Siracusa Principles.

Recommendation: that clause 8(2) of the 2ED Bill be amended as follows:

(2) Subject to subsections (3), (4), (6) and (7), whether a condition, requirement or practice is reasonable depends on whether, in all the relevant circumstances of the case, the condition requirement or practice: including the following:

(a) is necessary to respond to a pressing public or social need; and

(b) pursues a legitimate aim that is consistent with the protection of public safety, order, health or morals or the fundamental rights and freedoms of others; and

(c) is proportionate to that aim; and

(d) provides reasonable accommodation for a person holding religious beliefs; and

(e) is no more restrictive than is required.

~~(a) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the condition, requirement or practice;~~

~~(b) the feasibility of overcoming or mitigating the disadvantage;~~

~~(c) whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the condition, requirement or practice;~~

~~(d) if the condition, requirement or practice is an employer conduct rule—the extent to which the rule would limit the ability of an employee to hold or engage in the employee’s religious belief or activity;~~

~~(e) if the condition, requirement or practice is a qualifying body conduct rule—the extent to which the rule would limit the ability of a person to hold or engage in the person’s religious belief or activity.~~

4. Submissions on additional changes to the 2ED Bill

(a) **Modified Test for Statement of Belief.** The modified test for what constitutes a statement of belief (cl 5) and religious conduct by a religious body (cl 11) and which is used in various exceptions (cl 32 and 33) of the 2ED Bill is a welcome response to concerns raised about Courts stepping into the shoes of theologians. However, the modified test now adds an extra element that a statement of belief or conduct is protected if it is such that “a person of the same religion as the first person could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of that religion.” This will present significant evidentiary difficulties for a victim of religious discrimination. This is a problem because:

- Courts will be invited to step into the place of theologians and determine religious definitions and doctrines in a two-step process. Firstly, a Court would need to determine who is a “person of the same religion” and then

they will have to determine whether that person could reasonably consider a statement of belief to be in accordance with that religion.

- Given the wide range of beliefs that are held within various religious bodies there is the likelihood of the Court being required to be a theological arbitrator of conflicting theological evidence.

The Bill should adopt the simple test of the High Court in the *Scientology* case and recognised at international law – that belief/conduct must arise from a sincerely and genuinely held belief which is not fictitious capricious or an artifice which the person genuinely considers are in accordance with, or in furtherance of, the doctrines, tenets and beliefs of the person’s religion. This will remove the problem of judges being called upon to determine theology.

- (b) ***Conscientious Objection.*** The 2ED Bill adds a definition of “conscientiously object” that gives narrow protection to the conscience of religious adherents who provide health services. This definition together with the protections extended to conscience in clauses 8(6) and 8(7) do not strike the right balance. The Bill should include a requirement for employers to make reasonable accommodation for religious adherents with conscientious objections where such accommodation is reasonable (e.g. such as where alternative service providers are available). This will strike the right balance between ensuring that all prospective patients receive healthcare and that the freedom of conscience rights of health practitioners are protected.
- (c) ***Exceptions for Religious Bodies.*** Clauses 32 and 33 introduce exceptions for certain religious bodies such as hospitals, aged care facilities and accommodation providers in relation to employment and conduct. The intent of these section is welcome, and we commend the Government for this step forward to widen protection for religious bodies. However, the use of exceptions gives rise to the illusion that religious bodies are given “special treatment” when in fact what is being protected is a positive religious right. If the definition of “religious body” is properly formulated, then these bodies would naturally fall under cl 11(1) of the Bill. This would simplify the Bill and would also recast this “exception” more appropriately as a balancing clause. It would also provide better protection to religious organisations to provide services in accordance with their faith ethos. For example, preserving the right of faith-based hospitals to refuse to provide euthanasia.

The 2ED Bill also does not clearly express that nothing in the Bill is meant to prevent schools which are set up exclusively for the adherents of a particular faith (for example Orthodox Jewish faith, a Greek Orthodox School or Islamic faith) from being able to continue to only enrol students of that faith. This should be made expressly clear.

Recommendation: Add new clause 11(5) to the Bill as follows:

11(5) A religious body that is an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion and which is established solely for the education of the children of members of that religion does not discriminate by only enrolling or continuing to only enrol children of members of that religion.

5. Conclusion

The 2nd Exposure Draft requires considerable amendment before it is an effective Religious Discrimination Bill.

We look forward to working with the Government and Members of Parliament to help facilitate changes to protect the Australians from religious discrimination.