Religious Discrimination Bill 2019 – 2nd Exposure Draft

Submission from Freedom for Faith

January 30th 2020

Freedom for Faith welcomes the considerable efforts that the Government has made to consult on the drafting of this Bill, including responding to the concerns of many churches and other faith communities by putting out a second exposure draft. The second exposure draft is a great improvement on the first.

While it is much better, we consider still that the Bill is very limited in certain respects. In particular, the Government would be unable to say that it gives much protection to freedom of conscience. It also gives limited protection to freedom of speech. These ought to be protected under the international human rights conventions to which Australia is signatory, notably the ICCPR. The failure in this respect is largely because of the Government's reluctance to insist that the laws of the States and Territories are consistent with Australia's international human rights obligations.

Nonetheless, we welcome the protection provided in this Bill for statements of belief that do not cross certain thresholds such as vilifying other people.

In recommending further changes, there will be at least some repetition of what was said in our submission on the first exposure draft. This is because changes have not been made which seem entirely uncontroversial or which are technically necessary, in our view, to give effect to the Government's stated policy. Notwithstanding some repetition, we urge the Government to look afresh at these suggested amendments.

Unnecessary complexity

The Bill, in its first exposure draft, and even more so, in the second, is extraordinarily complex. We consider, with respect, that there are much simpler ways to achieve what the Government wants to achieve.

This will in turn make the law easier to understand and therefore more likely to be effective. People are most likely to obey laws that they understand and that equate with common sense. The more complex the law is, the more confusion it will cause in the community and the less likely it is that the legislation will accomplish the purposes for which it is written. When people and non-profit organisations need expensive legal advice just to understand their basic rights and obligations, the law has failed.

Why is this proposed law so complex? There are two reasons. First, the drafting strategy in this Bill was to include employment of staff issues and provision of service matters in the same section and addressed by the same provisions. They are fundamentally different issues. There is an important distinction between those people whom an organisation serves and by whom those people are served. The great majority of faith-based aged care homes, child care centres and hospitals serve all who come to them for services that they provide; but in order to maintain the religious and cultural ethos of an organisation, it is necessary that the faith-based service provider has a right to prefer staff who practise the faith with which the organisation is associated and by which it is motivated. There may be situations where preserving the religious ethos of an organisation necessitates restrictions on making facilities available to those of another faith or no faith – an example would be restrictions on the use of a chapel in an aged care facility – but generally there are fewer issues around service provision.

The second reason is that the Government seemed particularly concerned about discrimination in the provision of purely commercial services. The Explanatory Notes to the first exposure draft, at paras [170-175], referenced refusal to provide goods and services in an everyday commercial context (e.g. bakers and same-sex weddings). Concern that bakers should not be allowed to refuse to bake cakes for same-sex weddings (an issue in any event governed by the Sex Discrimination Act) seems to have become the tail wagging the dog in terms of the drafting of the legislation. The vast majority of religious organisations are not-for-profit bodies that only charge fees for services which are provided in fulfilment of a religiously motivated mission. A Christian campsite, for example, may charge fees; but it is not there to make money. It provides a venue for church youth groups and other Christian youth organisations to build up young people in their faith.

By trying to deal with staffing and service provision issues in the one section (originally s.10, now s.11), concerns about service provision unnecessarily complicate the proposed laws on staffing and lead to a zenith of complexity.

We urge therefore that the issues of staffing and the issue of service delivery in s.11 be separated. This will solve a lot of problems in the current draft of this Bill. We will suggest simple solutions first in relation to staffing and then on the issue of commercial activities.

Staffing policies in faith-based institutions

The problem that was identified, not only in our submission but across a broad spectrum of churches and other faith communities, was the importance to religious organisations of being able to retain their identity and ethos through their staffing policies, at least by way of preference.

We note that now, throughout the Bill, it is made clear that the provisions made concerning staffing apply equally to giving preference to the employment of those of the same faith.

The 2nd exposure draft is much better than the first and we thank the Government for taking account of our concerns. However, the proposed solutions, which rely to a large extent on adding to the list of exceptions for religiously-based hospitals, aged care facilities and accommodation-providers are, in our view, unnecessarily awkward and cumbersome, and the problems in relation to staffing are not entirely resolved.

The logic of the Bill, so far as it concerns employment of staff, may be expressed in the following propositions:

1. Religious bodies may select or preference staff on the basis of religious adherence, but only if they fall within the rather unusual definition of a religious body (s.11). This includes:
   - Educational institutions established on a religious basis
   - Religious public benevolent institutions
   - Other religious bodies, as long as they do not engage "primarily or solely in commercial activities".

   The definition specifically excludes hospitals, aged care facilities and accommodation providers. Outside these specific categories, few religious organisations are public benevolent institutions, and if they are not educational institutions, then their position concerning employment turns on how a court or tribunal is likely to understand what it means to engage "primarily or solely in commercial activities". Because the Bill does not define commercial activities, there is huge scope for disagreement about what this phrase means, leading to unnecessary discord and litigation.

2. To have the right to select or preference staff on the basis of religious adherence, the religious body must be able to show that a person of the same religion as the religious body could reasonably consider it to be in accordance with the doctrines, tenets, beliefs or teachings of that religion or that the employment decision was made, in good faith, to avoid injury to the religious susceptibilities of adherents of the same religion as the religious body. Changes to the Bill in this draft make it clear that if it is in accordance with the doctrines, tenets, beliefs or teachings of the religion to *select* staff on the basis of religious adherence, then it is also in accordance with those beliefs to *preference* staff on this basis.

   The Explanatory Notes at para 216 and 245-247ff do not elaborate on these tests much further. The Bill remains unclear on the issue of whether faith-based organisations will be able to select or prefer staff of the same faith. The Government certainly intends this, but does the Bill achieve it? The problem is that a court may find that while an organisation's staffing policy may be consistent with its religious purpose, and its need to retain its religious identity and ethos, it cannot point to specific doctrines, tenets, beliefs or teachings of the religion that require or justify this. Doctrines and beliefs tend

to be of a theological character, representing propositions about God or such other deities as the religion may believe in, and about the relationship between God and humankind. We would much prefer to see reference to a religious purpose, rather than having to justify staffing policies by reference to one or more doctrinal propositions. Expressing the law in the manner we suggest would be consistent with international human rights instruments, including Article 6(b) of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.

3. An institution that is a hospital or aged care facility, or that solely or primarily provides accommodation, is not a religious body even if it is in fact, a body that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion. This is so, even if it is not engaged primarily or solely in commercial activities (unless it is a public benevolent institution). This may exclude charitable hospices for the dying and accommodation for victims of domestic violence from being included as religious bodies unless they fall under the umbrella of a public benevolent institution.

4. Even though a hospital or aged care facility, or a body that solely or primarily provides accommodation, that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion is not a religious body, it may still select, or prefer to select staff on the basis of their religious adherence, *as if it were* a religious body, because exceptions contained in s.32 apply. This makes it hard to understand why, so far as employment issues are concerned, these organisations are not simply included in the definition of a religious body.

5. Religious publishing houses and bookshops may ordinarily not select or prefer to select staff on the basis of religious adherence, even though their purpose is to further a religious objective, because they publish books for sale, or are retailers of those books. They may select or promote staff on the basis of religious adherence if it is an inherent requirement of the position (s.32 and Explanatory Notes at [229]), but they may not prefer staff on the basis of religious adherence because a mere preference is incompatible with a characteristic being an inherent requirement.

6. The position of other faith-based organisations that charge fees for services is unclear, because of the failure to define commercial activities. Would faith-based marriage counselling organisations, radio stations, and other such ministries be prohibited from advertising for staff of that faith unless adherence to faith was accepted by a court as an inherent requirement of the position? These may be just as much faith-based organisations as religiously-based schools.

7. Employment issues about discrimination because of religion are also dealt with in s.351 of the Fair Work Act 2009. While the Religious Discrimination Act will be included in the list of Acts to which reference is made therein, s.351 also references State and Territory anti-discrimination laws and makes lawful under s.351 whatever is lawful under any of the referenced Acts. There is disagreement about the meaning of this: see the view recently expressed by Perram J in *Rumble v The Partnership trading as HWL*

Ebsworth Lawyers [2019] FCA 1409 (3 September 2019) at [143], contrasted with *Cameron v Goldwind Australia Pty Ltd* [2019] FCCA 1541 at [43]ff.

Section 62 of this Bill also deals with the interaction between the Religious Discrimination Act and State and Territory anti-discrimination laws. These interactions between the Religious Discrimination Act, the Fair Work Act and the State and Territory anti-discrimination laws could add another layer of complexity to this area.

The consequence of all this is that, so far as employment in faith-based organisations is concerned, the proposed law is incoherent, convoluted and complex. As legal experts in this area, we would find it very difficult to provide legal advice to religious bodies concerning their employment rights with any assurance of its accuracy in various contexts that might arise.

The aim, so far as staffing is concerned, should be to provide one consistent law for the country about the right of faith-based organisations to select or prefer staff who adhere to the beliefs and values of the organisation. This does not seem to be a controversial issue. There is no large pressure group or constituency which has any problem with faith-based organisations having staffing policies to maintain their identity and ethos. Every faith community accepts that this is an existential issue for every other faith community.

The issue has nothing whatsoever to do with LGBT+ issues which are dealt with in the Sex Discrimination Act. The policy of ensuring that faith-based organisations can maintain their identity and ethos would appear to have bipartisan support at the federal level. As recently as 2013, when the Labor government introduced the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013,* it was careful to distinguish between employment issues and service provision issues. While, as a consequence of these amendments, there is no exemption on religious grounds in service provision relating to the provision of Commonwealth-funded aged care, s.37(2) of the SDA nonetheless preserves religious freedom in relation to employment of staff. The Explanatory Memorandum in relation to that section provides:

> 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. <u>This recognises that organisations should be able to engage staff who share their values and organisational ethos</u>.

For these reasons, we would like to see a simple and clear law for the nation to the effect that that it is lawful for a religious body, a faith-based educational institution or a charity established for religious purposes, to appoint, or prefer to appoint, staff who practise the religion with which the organisation is associated, notwithstanding anything to the contrary in a State or Territory law or in other Commonwealth legislation. We are unable to understand the reluctance to make such a positive and simple affirmation of a fundamental freedom with which no lobby group seems to have a problem, except perhaps a fringe minority of militant secularists.

The provision of goods and services

If the employment provisions are dealt with in one section, then the question of provision of goods and services can be dealt with in a separate section, in which the issue of "commercial activity" can be addressed.

The express provisions in the new draft concerning aged care facilities, hospitals and accommodation providers are better than they were, but we still consider the Government is creating unnecessary problems by relying on exceptions. We would again respectfully urge that the law be drafted to place as little reliance as possible on exceptions and exemptions. This can be achieved if staffing policies are separated out from the provision of goods and services in section 11, and if there is a clear definition of commercial activity as we propose. Then an amended section 11 or new section 12, can do most of the "work" in protecting religious liberty in this area without reliance on exceptions.

We urge this because there could not have been a clearer and more consistent message from religious leaders to the Government for some years now that we want to get away from the language of having a "right to discriminate". There is a lot of opposition from the left of politics to any exemptions under anti-discrimination laws. It is likely therefore that exemptions for religious organisations will come under continuing scrutiny and will be subject to campaigns for repeal. Indeed, the Australian Human Rights Commission has been conducting consultations on the basis of a recently released Discussion Paper: *Priorities for Federal Discrimination Law Reform* (August 2019). It does not like exemptions in anti-discrimination laws. Indeed, it has expressed the view (p.16) that exemptions should:

- only exist in a permanent form in circumstances that are strictly necessary and which result in the minimum intrusion on people's rights that are required
- be regularly reviewed to ensure that they reflect community standards and appropriately balance competing rights.

In April this year, the Attorney-General gave a reference to the Australian Law Reform Commission to make recommendations about limiting or removing altogether (if practicable) religious exemptions to prohibitions on discrimination, "while also guaranteeing the right of religious institutions to conduct their affairs in a way consistent with their religious ethos."

It does not make much sense to create new exemptions in legislation at the same time as two organisations that report to the Attorney are working to reduce or eliminate them.

The problem of multiple service organisations

We consider in any event that the Government's suggested definition of a religious body, and the exceptions created by s.32, are unworkable when considered in the context of organisations that provide a range of different services under the one organisational umbrella.

The difficulties created by the Government's approach can be illustrated by the example of a large Christian welfare organisation which provides a range of services including residential aged care, retirement villages, home-based support for the elderly, and a range of other community services. It is a public benevolent institution. Consequently, but for the clause excluding hospitals, aged care facilities and providers of accommodation from the definition of a religious body, it would fall within the definition of a religious body given in s.11. This organisation strongly identifies as one that is conducted in accordance with the doctrines, tenets, beliefs or teachings of the Christian faith. It is associated with a mainstream Christian denomination.

Is it a religious body? It is not an "aged care facility"; for while it runs some such facilities, it is not in itself an aged care facility and these entities are not financially or organisationally independent. If it is 'solely or primarily providing accommodation', then it is not a religious body even though it is a registered public benevolent institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion. However, if it is not *primarily* providing accommodation, then the exclusion does not apply, and being a registered public benevolent institution, it is defined as a religious body.

It is almost impossible to say with any certainty whether this large public benevolent institution is a religious body as defined in this Bill. In 2018-19, 63.5% of its revenue came from either aged care or retirement housing. Importantly, aged care is not institutionally separated from other services, so all employees, in whatever role they serve, are employees of the one institution.

If 63.5% of an organisation's revenue comes from providing 'accommodation' to the elderly, is it 'primarily' providing accommodation? According to the Explanatory Notes, that question cannot be answered by reference to revenue. The Explanatory Notes do not elaborate on the meaning of 'primarily' providing accommodation. However, in relation to the similar language of 'primarily' engaging in commercial activities, the Notes have this to say (at [227]:

> For the purposes of determining whether a body solely or primarily engages in commercial activities, whether or not the body's income is derived primarily from commercial activity is irrelevant. The relevant consideration is the range of activities in which the body is engaged. For example, if a body was engaged in pastoral and outreach work, community engagement, counselling, and support services, and those activities made up 90% of its work, but it also incidentally operated a religious camp on a for-profit basis which cross-subsidised its other operations, the body would not be primarily or solely engaged in commercial activities, regardless of the fact that the vast bulk of its income was derived from a commercial enterprise.

So it seems that 'primarily' is to be determined by the range of activities; but lawyers and courts would be little the wiser for this guidance.

Further complications arise from the exception concerning accommodation in s.32. The relevant public benevolent organisation referred to above is clearly one that 'establishes, directs, controls or administers' aged care facilities within the meaning of s.32. On a literal reading of these provisions, it means it may discriminate in terms of employment in all its activities, and not just

residential aged care. Indeed, if an organisation runs a hospital or aged care facility that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion, then it is exempt from the application of s.14 of the Act concerning discrimination in employment even if the aged care facility represents only 10% of its total revenue (provided of course that the other conditions for exemption are satisfied).

That doesn't cause any difficulties in this instance, for in all its work other than in providing residential aged care and other accommodation, it fulfils the requirement for being a religious body. It is, after all, a public benevolent institution. However, this example illustrates not only the unnecessary complexity of the Exposure Draft but also begs the question why the organisation should satisfy the definition of a religious body for one third of its work but rely on an exception for the other two thirds.

Aged care facilities for specific ethno-religious groups

There are a few aged care facilities (and there may be other services such as hospices), which are registered charities and provide for minority faith communities with specific religious, linguistic or cultural needs (or a combination thereof). They are not general providers of aged care.

Section 12 almost certainly covers such facilities that meet the needs of specific religious or ethno-religious groups. Indeed, para [260] of the Explanatory Notes states that "it would be reasonable for a person to provide aged care services that were carefully targeted to meet the needs of Jewish Holocaust survivors." However, that may not be clear to many readers of the Bill. We suggest a note or example would clarify the application of this section in this context.

Uses of property inconsistent with a religious purpose or religious beliefs

A further issue arises from the use of exceptions to deal with issues arising for faith-based hospitals, aged care homes and accommodation providers. Creating exceptions rather than articulating principles in a positive way risks the problem of not anticipating situations where legitimate religious freedom issues arise.

As presently drafted, section 32 deals with employment issues for hospitals, aged care homes and accommodation providers and section 33 addresses issues concerning accommodation. There are no exceptions for hospitals, aged care homes and accommodation providers in relation to access to premises (discrimination being unlawful under s.20) and the provision of goods and services, including renting out facilities (discrimination being unlawful under s.21).

The consequence is that faith-based hospitals, aged care homes and accommodation providers will have no defence to an allegation of discrimination in terms of the renting out of facilities. Yet it is possible to envisage situations where there may be good faith religious objections to the use of premises. Imagine, for example, a Jewish organisation that provides aged care for Jewish people and which lets out the hall in the aged care home to community groups. Could it never refuse an anti-religious group that denigrates Judaism? Similar examples may arise with faith-

based hospital facilities or conference centres in circumstances where they are not providing "accommodation" within the meaning of s.22, but simply renting out facilities for a couple of hours, within the meaning of s.21. If an exception model is to continue in the next draft of the Bill, then the provisions concerning faith-based hospitals, aged care homes and accommodation providers should extend to renting out of facilities in s.21.

Section 20 will require amendment as well. A particular concern of faith-based aged care services is complicity with the practice of euthanasia. This could arise in the following way. A particular State or Territory passes a law that allows euthanasia and is silent on the position of a faith-based aged care home that does not want to permit the death to be caused at the home itself. The normal position is that residents can access their own medical treatment at the aged care home and indeed, doctors quite regularly visit their patients in their rooms. The aged care home forbids access to a medical practitioner for the purposes of euthanasing a resident in the home, on the basis of the religious beliefs of the organisation. The resident, or indeed the doctor, claims discrimination on the basis of his or her religious belief inasmuch as he or she has no religious objection to euthanasia and sees the discrimination as religious in character. That would appear to be a justified claim on the basis of s.20 (access to premises) or s.21 (making facilities available). The aged care home would not be protected under s.11 because, according to the definition in this section, it is not a religious body – however devoutly religious the organisation may in fact be. Indigenous aged care and service providers who oppose euthanasia for reasons of belief and culture will also face this problem.

There will be other such situations involving organisations that are conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion, which are not public benevolent institutions, and which may be considered to engage solely or primarily in commercial activities. Without the tight definition of "commercial activities" that we have recommended above (the activity does not intrinsically have a religious purpose), an indeterminate number of faith-based organisations may be affected. Indeed, they may only know they have broken the law if and when a court or tribunal decides that they do not fall within the very imprecise definition of a religious body.

These examples illustrate again the difficulty of legislating by exceptions not general principles. Religious freedom – a freedom that has been so widely accepted in the past as not to need legislative protection – should not rest upon grudging exceptions to otherwise applicable laws. The principles should be stated in a positive form.

The problem can be easily solved by defining commercial activities in the way in which we have proposed, thereby including the vast majority of religious bodies within the general policy that is articulated by means of s.11. If this is done, faith-based hospitals, aged care facilities and accommodation providers should be once again included within the definition of "religious body", and the specific exemptions relating to these organisations in sections 32 and 33 would not be required. If there are remaining concerns about service provision, these can be explicitly dealt with in a new provision, or part of s 11, addressing that topic.

The work of the Freedom of Religion Commissioner

We welcome the inclusion of this new Commissioner in the AHRC. There should be a specific, new appointment made to this position rather than having an existing commissioner, or the President, doubling up in the new role.

While the first Commissioner to be appointed is likely to be a person familiar with the operations and issues of one or more communities of faith and with the history, models and challenges of religious discrimination and religious freedom, there is no guarantee that will continue with subsequent appointments. A later Religious Freedom Commissioner might have no significant understanding of the beliefs and practices of religious communities and individuals, of the problem of religious discrimination or the principles of freedom of religion and conscience. Such a Commissioner is likely to contribute to, rather than stand against, the current secularist trend seen in the media and many human rights bodies of effectively demoting or marginalising the rights of religious individuals and communities to other human rights and interests.

We are not suggesting that the Commonwealth prescribe some religious test as a qualification for the office, which it cannot do under section 116 of the Constitution; but rather than leave the criteria for appointment entirely in the hands of the Minister of the day, we recommend that clause 46(4) be amended to require that: a person is not qualified to be appointed unless the Minister is satisfied that the person demonstrates a good understanding of the beliefs and practices of religious individuals and one or more communities of faith, and of the experience of religious discrimination.

There is much work for the Commissioner to do. We are particularly concerned about the rising incidence of anti-Semitism and hostility to people of the Islamic faith. We are also concerned about the increasing acceptability of open hostility to, and discrimination against, Christians in areas of our public life.

In our submission to the Ruddock Inquiry, we set out the following functions of the Commissioner.

- To comment upon draft legislation both federally, and in the States and Territories, that might have impacts upon legitimate religious freedom concerns.
- To advocate for changes to State, Territory or Federal laws that improperly encroach upon freedom to manifest religious belief.
- To engage with State, Territory and Federal education authorities if issues arise concerning the legitimate freedoms of religious schools to maintain their identity and ethos.
- To engage with State, Territory and Federal education authorities if issues arise concerning the rights of parents to raise their children in accordance with their religious and moral values (Article 18.4, ICCPR).
- To engage with State, Territory and Federal education authorities about issues concerning religious education programs in state schools.

- To meet annually with such religious leaders, of all faith communities, as wish to meet, in order to listen to their concerns about religious freedom issues.
- To have a voice in relation to the balances to be found between religious freedom and community safety issues, particularly when considering legislation, policies and practices that aim to address the threat of terrorism.
- To advise the Australian Charities and Not-for-Profit Commission, if requested, in relation to issues that may arise concerning religious charities and organisations.
- To conduct research or hold public inquiries concerning issues where freedom of religion may be under threat.
- To intervene in significant court cases where religious freedom issues arise.
- To raise awareness in the community about issues concerning religious freedom through speeches, conference presentations, and commentary in the media.
- To support the protection of the right to religious freedom internationally, through liaison with the UN's Special Rapporteur on Freedom of Religion or Belief, the United States Commission on International Religious Freedom and other national, regional or international bodies concerned with human rights and freedoms.

While we do not suggest that such a detailed description of the role should be provided in the legislation, we propose that either in the legislation or some other public document, the key roles and responsibilities of this office-holder be set out. We also recommend that reference be made to the protection of conscience, especially in the workplace, as this is emerging as another key issue.

Other issues

A range of significant issues with the drafting are addressed in the comprehensive submissions of the Institute for Civil Society and the Anglican Church Diocese of Sydney. Freedom for Faith endorses the concerns raised in these submissions and highlights the following matters:

Section 5: Definition section: meaning of 'person'

Section 2C of the Acts Interpretation Act 1901 makes clear that the word 'person' includes a corporation. (It is somewhat odd that a definition of 'person' drawing the reader's attention to this which was included in the first draft of the Bill, has been removed from the second draft. It would make sense to reinstate it.) However, it ought to be made clearer in the Bill than through s.9 that 'person' includes an unincorporated association. Most Baptist churches, for example, are unincorporated associations and this is true of other churches as well. Religious student societies on campuses are often unincorporated associations that may be subject to discrimination by the governing boards of student unions. In other Commonwealth laws, the position is clearer. See e.g. *Work Health and Safety Act* 2011 (Cth) s 5(2) which specifically refers to unincorporated associations.

Section 5: definition of relevant employer

We note that the Government is not proposing to amend this definition with the effect that the relevant provision continues to be applicable only to organisations with a $50 million annual revenue or greater.

Surprisingly, the definition excludes any organisation, however large, that is a body established for a public purpose by or under a law of the Commonwealth, a State or a Territory. That includes most if not all universities, which typically have a governing statute and are established for a public purpose. The Government ought to have particular concern for freedom of speech in universities.

It is also surprising that the exemption for governmental bodies is so broad. Of course, as the High Court indicated in *Comcare v Banerji* [2019] HCA 23, a government has a legitimate interest in requiring public servants not to criticise government policy publicly. However it has no legitimate interest in preventing staff who it happens to employ from discussing religious issues unrelated to public policy outside of work hours. Governments, of course, are major employers; and people of faith are as entitled to have their private religious views respected by governments as much as by large private sector employers.

Section 5: Definition of 'unlawful'

We welcome the clarification in new sub-section 5(2) that the definition of "unlawful" for the purposes of the definition of "religious belief or activity" does not include local by-laws. However, we remain concerned that confining religious activity protected by the Act to "lawful" activity will still leave open the possibility that a State or Territory Parliament may in effect override Commonwealth law by providing that certain religious activities are unlawful.

The interaction of this part of the definition with the provisions designed to protect conscientious objections by health practitioners (in sub-sections 8(6) and (7)) is also complex and unclear. While it is clear that some broad limit is needed on protection of religious activity, a better way of framing that may be to adopt the definition of "serious offence" in sub-section 28(2), and to provide specifically that an activity is not "lawful" for the purposes of the definition of "religious belief or activity" only if it amounts to the commission of a "serious offence".

Section 8, ss. (3) and (4): Statements of belief outside of the scope of employment

The attempt to protect statements of belief is welcome. We also welcome the addition of subsection (4), although it needs to be made consistent with s.42.The provision should also apply to educational institutions that play a role in preparing a person to join a profession.

We note that the Government has decided not to amend the provision on relevant employers other than to conform with the language of other employment laws; so we will not repeat our concerns about this provision. We welcome the clarification of the meaning of this section in para [142] of the Explanatory Notes.

It might be observed that the term 'employer conduct rule' is a little odd. The issue really is about rules governing employees' conduct.

Sections 8(5) and (6): freedom of conscience

Like other provisions in the Bill, these subsections limit the operation of Commonwealth law so that State and Territory laws that provide inadequately for freedom of conscience are unaffected by Commonwealth law. For example, the law in Victoria and elsewhere requires a medical practitioner who has a conscientious objection to abortion to refer to another practitioner who has no such conscientious objection. That is a rule falling within subsection (6); so subsection (7) will not assist a doctor whose conscientious objection is not adequately respected by the relevant State law.

The case of Dr Mark Hobart in Victoria is illustrative of the need for better protection of freedom of conscience. Dr Hobart, a GP, was requested by a couple to refer them to an abortion practitioner. The woman was 19 weeks' pregnant at the time. The reason for the request was that during a routine ultrasound, they had discovered that the baby was a girl. As Dr Hobart understood it, the requested abortion was purely for sex selection purposes. He refused to refer. The couple found another practitioner (information being widely available on the internet and elsewhere), and the abortion was carried out one week later. Nonetheless, there was a complaint against Dr Hobart. The Medical Board of Victoria conducted an investigation into his refusal to refer, resulting in a formal caution in 2013 after an investigation lasting 8 months, during which time Dr Hobart had cause for concern about his professional registration.

If the law is that a doctor has to be able to name another doctor who is comfortable performing a sex selection abortion, then the reality is that the doctor may have some difficulty in so doing. The same might be true for an abortion of a healthy baby late in pregnancy that is not necessary to protect the life of the mother or to prevent serious harm to her health. The Commonwealth has obligations in international law to protect freedom of conscience. It ought to take the modest and reasonable step of legislating for freedom of conscience for medical and health professionals, with compulsion against conscience to be possible only in circumstances of urgency involving risk to life or serious damage to physical health. No harm is caused to patient care by implementing such protection – as patients are well able to source alternate care providers who do not have the same conscientious concerns.

One way of doing this, which could be applied more generally, is to require employers to make reasonable accommodation for conscientious objection to the performance of a certain kind of work. Consider, for example, a situation where an employee is eminently capable of performing a job, but issues of conscience make it hard for him or her to perform a particular task in a small proportion of instances; if there are other employees who have no such conscientious objection, then the employer ought to make reasonable accommodation for that conscientious objection. An example is the provision of IVF treatment where the doctor has a genuine conscientious objection in the particular circumstances of the case. If there are others who could perform the service then his or her genuine and deeply held conscientious objection should be respected.

Section 11 and elsewhere: test in relation to religious belief

For the reasons given in the Anglican Church Diocese of Sydney submission, the test of what another person of the same religion might reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of that religion is highly problematic. Much depends on who this hypothetical person is. Even within a Christian denomination, there can be quite different understandings of what the doctrines, tenets, beliefs or teachings of the Christian faith are on any given issue, and denominations accommodate different beliefs on a range of issues that are not seen as central to the faith.

Section 32(6) and (7): inherent requirements

There is a slight anomaly with the current drafting of s 32. It does correctly clarify in s 32(6) that a freedom given by s 8(3) (not to comply with an "employer conduct rule") cannot be removed by making compliance with such a rule an "inherent requirement" of employment. A similar pattern is found in s 32(7) by providing that an unreasonable "health practitioner conduct rule" as defined in s 8 cannot be made an inherent requirement; but we now have a new s 8(4) providing protection against unreasonable "qualifying body conduct rules". It seems that, to be consistent with the other provisions, there ought to be a specific sub-clause in s 32 clarifying that an unreasonable "qualifying body conduct rule" cannot be seen to be an "inherent requirement" of a particular profession.

Section 42: State and Territory laws

This section incorporates by reference, the list of anti-discrimination laws contained in s.351(3) of the Fair Work Act 2009. However, this list does not include the *Racial and Religious Tolerance Act* 2001 in Victoria, which is particularly appropriate for inclusion in this context. That legislation concerns statements of belief, and was the subject of expensive litigation at great cost to community harmony in the Catch the Fire ministries case. It is precisely the kind of legislation that has to be covered by section 42 in order to protect statements of belief.

It should also be made clearer that a statement of belief in and of itself, as well as not amounting to "discrimination", does not amount to "vilification" under the relevant "anti-discrimination laws".

Section 45 – advertisements

The way this is drafted is problematic. A person commits an offence if someone else could reasonably understand that he or she has an intention to engage in unlawful conduct, even if the court finds that in fact, the person did not so intend or the intended conduct is not unlawful. This follows from the wording that does not make it a necessary condition for committing the offence that the advertisement involves unlawful discrimination.

The *Human Rights Legislation Amendment (Freedom of Religion) Bill*

This proposes an amendment to the *Charities Act 2013* (Cth). For the reasons given in other submissions, the issue of public benefit needs to be addressed, and the text needs to go beyond belieds about marriage.
