



Anglican Church of Australia

Public Affairs Commission

Submission of the Public Affairs Commission of the Anglican Church of Australia on the Religious Discrimination Bill 2021 and associated bills

20 December 2021

1. This submission is made by the Public Affairs Commission (PAC) of the Anglican Church of Australia (ACA). The PAC is a body set up, amongst other matters, to respond to aspects of public affairs as referred by the Primate, Standing Committee or General Synod of the ACA or initiated by the PAC. The views expressed in this submission are only the views of the PAC and should not be taken to reflect the opinion of the ACA, the Primate, the Standing Committee or any of the Dioceses.
2. The PAC had previously made submissions in relation to the two exposure drafts of Religious Discrimination bills expressing concern about various aspects of the drafts that appeared to facilitate discrimination. We welcome the opportunity now to make submissions on the following bills:
 - Religious Discrimination Bill 2021 (“RDB”);
 - Religious Discrimination (Consequential Amendments) Bill 2021 (“RDCAB”);
 - Human Rights Legislation Amendment (Freedom of Religion) Bill 2021 (“HRB”).

Although there are three Bills, all our comments below, except where specifically stated, are in relation to the RDB only.

Summary of these submissions

3. While the PAC would much prefer to see comprehensive human rights legislation, with religious freedom protected as one aspect of human rights, in the absence of such comprehensive legislation, the PAC supports the principle of legislation to prohibit religious discrimination in line with anti-discrimination legislation for other protected attributes.
4. The PAC, however, remains concerned about the particular RDB provisions which go beyond the form of typical anti-discrimination legislation. We are pleased that some of the worst aspects of the exposure drafts of the RDB have been removed, namely dealing with employer conduct rules (commonly nicknamed the “Folau clause”) and dealing with health practitioner conduct rules. However, we are still greatly concerned about:
 - a. The way statements of belief override other anti-discrimination legislation; and
 - b. The extent of the exceptions for religious bodies enabling them to discriminate.

We believe the RDB still gives too much unnecessary scope and encouragement for harmful discriminatory behaviour in the name of religion in a manner that unfairly overrides other equally important human rights to be free from discrimination.

We stress that most Anglican bodies like schools, welfare agencies, aged care facilities and the like have no intention of discriminating against people on the grounds of religion in provision of services and indeed the doctrines of our faith require consideration and care for the most vulnerable within society, regardless of their religion. However, we recognise that the proposed legislation has to cater for a vast range of religions and religious views. It is also the case that some exceptions will be required to enable religious bodies to maintain their character as religious bodies. To enhance and support the rights of others to be free from discrimination, these exceptions will need to be reframed to limit any adverse impact on the wider community, especially the vulnerable.

We therefore urge that the RDB be amended as outlined below as we cannot support it in its current form.

Support for human rights legislation and legislation prohibiting discrimination, including religious discrimination

5. The PAC has previously urged that it would be better for anti-discrimination laws to be consolidated and for religious freedom to be protected as part of a coordinated statute protecting human rights. This is because human rights are indivisible and should not be pitted against each other. The PAC has also supported consolidated anti-discrimination legislation where the need to protect against all types of discrimination is seen in a similar context and on similar terms. However, in the absence of comprehensive human rights legislation, the PAC has previously called for and supported the enactment of legislation to prevent direct and indirect discrimination on the grounds of religion. Given the piecemeal nature of anti-discrimination laws, it is essential that such laws protecting against religious discrimination are designed in a way that is consistent with the operation of other anti-discrimination statutes and do not derogate in any way from those protections. It is essential to protect *all* human rights of vulnerable people.
6. The reason for our support for legislation to prevent direct and indirect discrimination on the grounds of religion is not so much for concern about any discrimination against fellow Anglicans, which is extremely rare, but for minority religious groups. In recent times, there has been a frightening rise of hostility and discrimination against Muslims in particular, but there is often also indirect discrimination against a range of minority groups whose days of rest or religious obligations or religious clothing may not comply with the standard requirements designed for the majority. In addition, First Nations people regularly have their sacred places damaged, their beliefs denigrated and have difficulties with access to sacred places and time off to perform necessary rituals. There needs to be legislation that can address these concerns. Members of minority religious groups need to be assured that they are valued members of our society and that their human rights matter.

7. Religious freedom and protection from discrimination on the grounds of religion are vital aspects of universally recognised human rights. Such freedoms sit alongside other recognised rights to freedom from discrimination on grounds of race, gender, sexuality, disability etc. All such rights need to be protected as much as possible, especially for minority groups and those who are vulnerable. We are pleased that the Bills will require regard to the indivisibility and universality of all human rights which have equal status in international law. We also support the principle that every person is free and equal in dignity and rights (s3(2) of the RDB and to be inserted by the HRB into the other Commonwealth Anti-Discrimination legislation).
8. This principle of indivisibility and equal status of human rights means that it is essential that religious freedom should *not* be protected at the expense of other equally important human rights such as the right not to be discriminated against on the grounds of sexuality, gender, race, disability and the like. Efforts must be made to find ways of protecting all these rights as far as possible and to avoid providing a licence to discriminate against others.

Impact on other Anti-Discrimination Statutes – s12 RDB

S12 should be removed and operation of other anti-discrimination laws preserved

9. This is at the heart of our objections to the Bill. In line with the need to protect equal and indivisible human rights, our concerns are that this provision provides that statements of belief of the kind discussed above do not constitute discrimination under a long list of all the anti-discriminations laws, state and federal. This provision gives an immunity to religious believers to make statements that may be totally racist, sexist or which may ridicule people with disabilities and the like. It inappropriately privileges religious (or anti-religious) statements of belief above other people's rights to be free from discrimination. It also gives religious-based statements a licence to be discriminatory in a way that would be unlawful for other kinds of statements. Removal of s12 would not prevent a person from making statements of belief, as long as these do not amount to discrimination under other laws.
10. Furthermore, the statement of belief as defined in s5 RDB does not have to be an accepted belief within the religion but just something that the individual genuinely believes is part of their religion, no matter how deranged or idiosyncratic that view may be. This means there could be a wide range of unexpected and prejudicial statements that could qualify as a statement of belief.
11. The only limitations are those in s12(2) of the RDB. These require a high bar of being malicious or threatening, intimidating, harassing or vilifying, in the sense of inciting hatred and violence. It does not prevent statements of belief that may not reach that bar, but still be entirely humiliating and insulting, and may even be intended to denigrate others, albeit in sincerity.

12. We note that the Explanatory Memorandum says that s12 is only aimed at overriding matters that may amount to discrimination, not to other provisions such as harassment or vilification provisions such as those in the *Racial Discrimination Act* (Cth). However, s12 also singles out s17(1) of the Tasmanian *Anti-Discrimination Act* which is not about discrimination but in a section dealing with harassment and vilification. This makes the logic behind s12 inconsistent and raises questions about other laws which might be prescribed to be overridden by s12 in future.
13. We continue to urge that s12 be removed and replaced by an express provision to confirm that this Act is not intended to exclude or limit the operation of any other anti-discrimination law which is capable of operating concurrently with the RDB. This would be the only way to ensure all rights are protected equally. This will also require consequential amendments to sections referring to s12 such as s18(4)) and others that imply it, such as 3(1)(d).
14. Alternatively, if our submissions are not accepted, we urge at very least that the s12(2)(b) limitations be expanded to also exclude protection of statements of belief that a reasonable person would consider would humiliate or insult a person or group.

Conduct may still be discriminatory under other Commonwealth anti-discrimination legislation

15. Apart from statements of belief, we are pleased that there is an indication of an intent that other *conduct* in breach of other anti-discrimination legislation is not intended to be affected by the RDB, such as in note 2 to s7(2) and (4) and the note to s9(3) and (5) to that effect.
16. As there is a danger that attempts may be made to avoid other anti-discrimination legislation by arguments that the discrimination was on the grounds of a person's religion, not their sex or race, age or ability, we urge that rather than leave such matters in notes, that there should be an explicit statutory provision that states that nothing in sections 7 to 9 of the RDB permits conduct by religious bodies that is otherwise unlawful under other Commonwealth law.
17. We still have remaining concerns about whether such wording is sufficient to prevent other anti-discrimination laws from being subverted. For instance, will it still be a breach of the *Sex Discrimination Act* if the body tries to argue that the ground for the differential conduct was not, for example, a person's sexuality but their religious beliefs about sexuality? This could be aided by a further explicit provision to make it clear that even if one of the reasons for conduct is a person's religious beliefs or activity, if there is another reason that may give rise to a breach of other anti-discrimination legislation, then the conduct may still be unlawful under that other legislation. We recommend further that examples could be given in a note or in the explanatory memorandum to demonstrate that.

Religion: Indigenous spirituality

18. We are pleased that the Explanatory Memorandum confirms that religious belief (undefined) is intended to capture Indigenous spirituality. As indicated above, First Nations people are regularly the subject of discrimination on the grounds of their religious beliefs and often this involves a failure to recognise their beliefs as equivalent to other major religions. To avoid any doubts, we would support such a specific legislative provision or note in the RDB to expressly confirm that First Nations' spiritual beliefs are religious beliefs, rather than just referring to it in the Explanatory Memorandum.

Religious body exceptions – ss7 to 9 and 11

General approach to these exceptions

19. We note that the Australian Law Reform Commission is not to report on exceptions for religious bodies under other various other Commonwealth Discrimination legislation until 12 months after the RDB has come into force. This is most unfortunate and would seem to be doing things back to front. The ALRC report would give a good indication as to the type of exceptions that should be included in the RDB as well and the appropriate style of framing them. It is a good reason why the RDB should not be passed before the ALRC reports and that the ALRC be asked to examine religious body exceptions for the RDB as well.
20. The style of religious body exceptions in the *Sex Discrimination Act (Cth)* is preferable in some respects and should be adopted for the scheme of exceptions in the RDB. For example, rather than just have the wide exceptions for religious bodies in s7(2) of the RDB, which have to be shown to be conducted in accordance with doctrines, tenets, beliefs or teachings of the religion, there could be a separate exception for religious bodies to be able to base "internal matters" like selection of ministers, training for ministry and appointment for participation in religious observances or practices and admission to membership on religious criteria. This is the scheme of s37(1)(a) to (c) of the *Sex Discrimination Act 1984 (Cth)*, though we would recommend that this be extended to add membership or initiation criteria. We do not believe such an approach would be controversial.

This would enable disputes about such internal matters to be handled within the religious community on the basis of their religious criteria without the need for courts or tribunals to be involved in assessing whether such matters come within doctrines or tenets. This will in turn enable the narrowing of the more general religious body exceptions when dealing with the wider society.

21. We also prefer the definition of religious bodies to be those "established for religious purposes", the term used in the *Sex Discrimination Act 1984 (Cth)* s37 and the *Age Discrimination Act 2004 (Cth)* s35. Another good alternative is the definition in s81 of the Victorian *Equal Opportunity Act, (2010)* namely:

(a) a body established for a religious purpose; or

(b) an entity that establishes, or directs, controls or administers, an educational or other charitable entity that is intended to be, and is, conducted in accordance with religious doctrines, beliefs or principles.

Such definitions would then exclude bodies or persons who simply want to carry on their own private businesses in accordance with doctrines, tenets, beliefs or teachings of their religion, but are not in themselves bodies established for religious purposes. It would also look to the religious *purpose* of the organisation and enable the removal of the exclusion for bodies engaging solely or primarily in commercial activities which in turn would obviate the need to work out whether a body established for religious purposes engages primarily or only secondarily in commercial activities, such as op shops or gift shops owned by churches, temples, mosques or the like.

It will be necessary to clarify though that bodies established for religious purposes is a much wider concept than those listed as a Basic Religious Charity under Charities legislation and should include educational institutions, welfare bodies and the like that are established for religious purposes even if they are registered under a different head of charity.

22. There is also potentially some confusion and inconsistency between the specific s8 religious bodies ie hospitals, aged-care providers, accommodation providers and disability services in that there may be similar bodies that provide services to the public but are not listed in those exceptions. Presumably those will come within the general s7 religious body exceptions, but there will be no logic to the distinctions. There may also be bodies that perform some services covered by s8 but some other services that will be governed by s7 and it will be unclear what their situation is. We would recommend that these categories be reconsidered carefully. This is another point on which an ALRC detailed study would be of benefit.

23. In addition to those outlined above, we set out our comments below on some more specific matters which we believe are appropriate approaches to the exceptions. Apart from the situation of preferences, which we support, we urge that other exceptions should be narrowed for the reasons set out below.

Preferences and special needs

24. Subject to the matters set out below, we support the principle of enabling religious bodies to give preferences to people of their own or similar religions. Most religions will not want to discriminate *against* people but wish to be able to employ their members of their own religion in order to maintain the ethos and mission of the religion, the religious character of the body or to facilitate ministry to people of the same faith, rather than out of any desire to discriminate *against* others. For most religious institutions, the whole enterprise is part of their mission. Similarly, religious bodies should be free to give preferences or benefits to members of their own or similar religions in the use of their own facilities or in the provision of scholarships and the like.

25. If the RDB is amended to provide in a separate section that it is not discrimination under the Act to provide such preferences to people of the same religion, untied from s7(2) and similar provisions, then the remaining wider religious body exceptions currently in s7(2) can be limited in the manner set out in the sections below. As some of our following comments seek to limit the terms of the exceptions for religious bodies, we do not support the current drafting of the preference provisions where they appear only as an instance of a wider religious body exceptions. We would support modified preference provisions within a scheme which encapsulates the concerns set out below.
26. We also support s10 of the RDB which enables conduct to meet needs arising out of a religious belief or activity. We assume that this caters for provision of services or accommodation for people of their own faith, who are usually not able to have their religious needs catered for as well elsewhere. We note this applies in religious aged-care facilities and hospitals which cater for food, pastoral care and worship appropriate for people of that religion. It may also be used to provide places and scholarships for students to attend schools which provide for education, food and timing of sports and lessons suitable for people of that faith.

Other exceptions should only apply where necessary under doctrines, tenets, beliefs or teachings

27. Apart from the situation of preferences and special needs outlined above, in order to achieve a better balance and reduce other forms of discrimination, we suggest that rather than conduct simply being “in accordance with” doctrines, tenets, beliefs or teachings but be “*required under or in order to conform with*” doctrines, tenets, beliefs or teachings. There may be a wide scope for what is merely considered desirable to suit doctrines, tenets, beliefs or teachings, but harm to others could be restricted by only allowing exceptions for behaviour that is required by the doctrines, tenets, beliefs or teachings, not conduct that is entirely optional. For example, people serving in a gift shop of a religious institution may prefer not to sell wedding goods for a same-sex marriage, but there may be no doctrines, tenets, beliefs or teachings which require them to deny such services.

28. These comments apply wherever these terms appear, in ss7 to 9 and s40(2).

Determining doctrines, tenets, beliefs and teachings: Need more than just another person from the same religion

29. We note that the RDB changes the usual test used for religious body exceptions for determining whether something is in accordance with the doctrines, tenets, beliefs or teachings of the religion. Instead of a more objective test of whether a belief “may reasonably be regarded as being” in accordance with the doctrines, tenets, belief or teachings of the religion, the test in the RDB is whether “*a person of the same religion as the first person/religious body could reasonably consider to be*” in accordance with the doctrines, tenets, beliefs or teachings of that religion – see for example, s7(2) and s9(3)(c), s40(2) (c) of the RDB.

30. While we recognise the difficulties of an outsider like a court determining doctrines of a religion, this is common in legislation and the exercise has been undertaken in courts and tribunals, usually with a great degree of deference to leaders of the religion on what the doctrines are. We acknowledge that in religious freedom cases, the emphasis is on the individual's freedom to believe, which is necessarily subjective. This subjective view of religious belief and activity is appropriately maintained in the RDB in relation to whether a person is discriminated against on the grounds of their religious belief or activity. However, in the context of what is allowed as an *automatic exception* to religious bodies from the discrimination provisions and where there is potential for resulting harm to others, this needs to be narrower. We believe the test requires more than just the views of *any* person of the same religion, no matter how uninformed or peculiar those views may be. We note that person has to "reasonably" consider the matters to be within the doctrines, tenets, beliefs or teachings of the religion. However, this RDB test is only what is reasonable from the perspective of a potentially uninformed individual, which does not assist in narrowing the exception to any great extent.
31. We therefore recommend that the usual objective formulation is retained or, alternatively, that the test should at least be whether the conduct or belief is such that a substantial number of persons in senior positions or leadership roles or with authority to determine such matters in that same religion could reasonably consider it to be in accordance with the doctrines, tenets, beliefs or teachings of the religion. This would not require unanimity or even a majority view but to ensure that it is not just a bizarre misinterpretation of doctrine by a very small minority, possibly of two persons, within the religion.

Avoiding injury to religious susceptibilities – recommend removal of this test

32. We note that the RDB adds another limb in s7(4) to provide that it is not discrimination under the Act to engage in good faith in conduct "*to avoid injury to the religious susceptibilities of adherents of the religion*". While this is a common term in religious body exemptions in anti-discrimination legislation, it seems inappropriate that differential conduct which is not required by doctrines, tenets, beliefs or teachings of a religion should be exempt from discrimination laws because of some particular religious susceptibilities of adherents or a minority of them. We therefore believe that this limb should be removed wherever it appears in the RDB.
33. If it is to remain, contrary to our submissions, then it should be restricted to conduct *necessary* to avoid injury to the religious susceptibilities of adherents of the religion.

Publicly available policies need to be applied consistently

34. We support the requirements for publicly available policies for religious institutions intending to rely on the exceptions to the RDB, such as those outlined in sections such as s7(6), s9(3), s9(5), s40(2)(d) etc. This is important for purposes of transparency. However, we believe that this is not sufficient and that additional requirements need to be imposed to ensure that the policies are also applied consistently. For example, if the policy says that a person is to positively ascribe to certain doctrinal beliefs, one

could not use that policy against Muslims but not against agnostics. If there is a policy requiring employees not to engage in sex outside marriage, the exception should not apply if the policy is not used equally in relation to same-sex couples as to heterosexual couples.

In addition, for reasons outlined above in relation to liability under other anti-discrimination legislation, if there is differential application of policies based on sex or sexuality, for instance, then that should be able to be used as evidence of sex discrimination and give rise to consideration under sex discrimination legislation.

35. Further, if the exception is not restricted to conduct *necessary* under the doctrines, beliefs etc as outlined above, there may need to be a further requirement that such policies be reasonable and proportionate for the purposes of complying with the doctrines, beliefs etc of the religious body. If not, there could be a string of unnecessary policies created just to enable religious discrimination.

When must the policy be available?

36. The exceptions relating to publicly available policies speak about the conduct being in accordance with such policies. Such conduct can include dismissal or failure to promote a person or subject them to detriment – see s19(2). This may mean that the exceptions apply where there is a policy at the time of the relevant conduct, such as at or just prior to the dismissal or other penalty, but there is no requirement that the policy was in place and public at the time when the person was first employed. This means a person could be dismissed on the basis of a policy brought in after they had been working at an organisation for some time, and possibly after they have taken on financial and other commitments in reliance on that employment.
37. We urge that it be made clear that in order for the exception to apply, the publicly available policy must be one that was provided to the person at the time of their initial employment. In non-employment situations, such as accommodation and facilities in s40, the policy needs to be in place when the accommodation and facilities are offered, in any event prior to the relevant request is made for use of the accommodation or facilities.

Removing any exception allowing expulsion or punishment of students or dismissal or penalisation of teachers in educational institutions or of other staff in s8 RDB institutions on grounds of belief

38. The PAC has supported the removal of exceptions to the *Sex Discrimination Act* (Cth) in order to prevent expulsion, suspension or penalisation of students or staff of religious schools on the grounds of sex, sexuality and the like. We believe these exceptions should also be removed or narrowed for students and staff of religious educational institutions as well as the s8 RDB organisations such as hospitals, aged-care providers, accommodation providers and disability services under the RDB.
39. Religious beliefs can and do change from time to time and cannot be imposed by schools or employers under the threat of penalty. Security of schooling and

employment are essential for well-being and once a person is enrolled or engaged, their forced removal or subjection to penalties are actions too severe and a breach of a person's freedom of religion in circumstances when they can still operate according to the ethos of the school or other religious body. The exception may be where their position is one which involves religious teaching or performance of services, which might be covered by the s39(2) inherent requirement exceptions.

40. We note that under s7(2), (4) and (6), it may be possible for existing students at a religious school to be expelled or penalised for their religious beliefs (including possibly beliefs about sexuality) if such conduct is in accordance with the doctrines, tenets, beliefs or teachings of the religion. In the case of employment of teachers and other staff there is the additional requirement for a publicly available policy about it in s7(6) RDB, but there does not appear to be an equivalent for treatment of students. We believe that such harm for students, who are quite likely to change their beliefs over time, is too severe and the expulsion or penalisation of students on the grounds of their religious beliefs needs to be excluded from the exceptions for religious educational institutions.
41. For similar reasons, the ability to dismiss or penalise teachers for their religious beliefs, which also may change after they were employed, is too severe. A mere public policy allowing dismissal on the grounds of a person's personal beliefs is not sufficient protection in such circumstances, particularly where the teacher does nothing to promote those personal beliefs or says nothing to criticise the doctrines of the school and where that teacher continues to perform their duties in accordance with the ethos of the school. These should also be carved out of the exceptions, except where the religious beliefs of the employee are an inherent part of employment, for instance, chaplains or school principals or religious education teachers etc.
42. The same considerations apply to the s8 RDB organisations. The concern is that it is not discrimination under s19 of the RDB to suspend, dismiss or impose a detriment on existing employees for their religious beliefs.
43. In the cases outlined above, if carved out from the automatic exceptions, the religious educational institution or s8 bodies may still rely on the argument that any conditions, such as conditions to work within the religious ethos of the organisations and not openly question or criticise the religious values of the organisations in the course of their employment, are reasonable conditions so as not to amount to indirect discrimination under s14 RDB. This will enable all the circumstances to be considered to assess reasonableness.

Qualifying Body Conduct Rules - s15 RDB

44. We note that qualifying bodies are still not permitted to impose conditions which may restrict a person from making a statement of belief. This raises many of the similar concerns that we had in relation to s12, that is, that a person may, outside practising their profession, trade or occupation, make public statements that are racist or sexist or attack people with disabilities etc. While s15 does not prevent conduct rules when a person makes a statement in the course of practising their profession, the concern

is that they could still be using their title and profession to promote the authority of their statement. It is not that clear how the exception in s15(2) of a qualifying rule being an essential requirement of the profession, trade or occupation will be interpreted. For instance, will it enable a qualifying body to prevent, for example, a doctor making statements of belief, outside the practice of their profession, that vaccines are evil?

45. This also seems to unfairly privilege religious practitioners in that if similar statements were made by members of a profession, but for reasons not related to religious beliefs or not having such beliefs, then they could be penalised by the qualifying bodies for their statements.
46. We continue to recommend that s15 RDB be removed. This does not mean that qualifying body conduct rules will not amount to discrimination on the grounds of religion, as they could still be direct or indirect discrimination under the general provisions, but again, one can look to all the circumstances of the case to assess the reasonableness of any such rules and their application.
47. If contrary to our submission above, s15 RDB is to remain, we urge that s15(1) should not apply when a person makes a statement of belief in circumstances in which their profession, trade or occupation is identified.

Exception in s39(1) for domestic duties

48. We note that religious discrimination is allowed for engaging people to perform domestic duties on premises where a person resides. We do not see any good reason for such an exception. Many people engaged in domestic duties come from a variety of different religions and should not be deprived of the opportunity to work on the basis of their religion. If there is a special religious need giving rise to a person being excluded, rather than just prejudice, this may be able to be covered by s10 or else an exemption may be sought.

Definition of statement of belief in s5 RDB

49. If there is still a need for a definition of a statement of belief, then we recommend that the definition could be also amended in (a)(iii) to one in which is *required* to be made by the doctrines, tenets, beliefs or teachings of that religion. This will be harder for the corresponding statement of non-belief but could be one that a person who does not hold a religious belief “reasonably considers to be *required* by reason of not holding a religious belief”. We note that rules preventing statements of belief that are not required may still be unreasonable discrimination in all the circumstances, but are just not automatically deemed to be so.

As a result of the matters outlined above, we would urge that the RDB be substantially redrafted. We would be happy to be consulted further.

Yours faithfully,

Dr Carolyn Tan,
Chairperson of the Public Affairs Commission