

## Anglican National Public Affairs Commission

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Sunday, January 29, 2012

The Assistant Secretary,  
International Human Rights and Anti-Discrimination Branch,  
Attorney General's Department,  
Robert Garran Offices,  
3-5 National Circuit,  
BARTON ACT 2600

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Dear Assistant Secretary,

### Background

1. Thank you for the discussion paper of September 2011 on the Consolidation of Commonwealth Anti-Discrimination laws ("Consolidation Project") and for the opportunity to comment.
2. These submissions are made on behalf of the Public Affairs Commission (PAC) of the Anglican Church of Australia (ACA). The PAC is a body which advises the Primate and Standing Committee of the ACA on matters of public concern and to enable comment on public issues. 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 or the Standing Committee.
3. Various submissions have been made in recent years by the ACA and the PAC on matters relevant to the questions raised in the Consolidation Project. These include:
  - (a) The General Synod Standing Committee of ACA submission on the Human Rights Commission Discussion Paper on *Freedom of Religion and Belief in the 21<sup>st</sup> Century*;
  - (b) The General Synod Standing Committee of ACA submission to the National Human Rights Consultation; and
  - (c) The PAC comment on 29 January 2011 on the Consolidation Project in response to an invitation by the Attorney-General's Department to the Primate of the ACA.

Copies of those submissions are attached for your information.

4. We reiterate the views on the matters of principle set out in that letter. In summary, the PAC's attitude to human rights is based on the recognition that all people are made in the image of God and need to have their dignity respected. All humanity is of equal worth in God's eyes and deeply loved by God. The protection of the vulnerable in the community is a Christian imperative. As a result, the PAC affirms the importance of human rights and equal opportunity and supports anti-discrimination laws to provide protection of minority or marginalised groups. At the same time the PAC affirms the importance of freedom of religion and the application of freedom of association to religious bodies, and has urged that these freedoms be protected by way of appropriately-crafted exemptions.
5. In relation to the specific consolidation project, as outlined in our letter of 29 January 2011, the PAC supports the consolidation of anti-discrimination legislation as a means to make the discrimination law simpler and more uniform. We noted the importance of making such laws simpler to locate, understand and remember, especially as the people in greatest

need of such legislation may not have easy access to legal advice and representation. We also noted that the process of consolidation and harmonisation should not erode any of the existing statutory protections against discrimination provided for in Commonwealth legislation. Our specific responses to the questions in the discussion paper below reflect this aim.

6. As set out in our January 2011 letter, subject to adequate exemptions to protect religious freedom, the PAC also supports the extension of the categories of discrimination currently covered by the Commonwealth legislation to prohibit discrimination on such grounds as religion, political opinion, social origin, medical record, criminal record, sexual orientation, sex or gender identity, trade union activity.
7. In the light of the above statements of principle, we provide below responses to some of the points raised in the Consolidation Project discussion paper. This submission also only addresses matters of broad principle as it is more appropriate to leave the precise models and drafting of the legislation to other bodies better placed to address these.

### **Question 1: Defining Discrimination**

8. The PAC supports consistency in the tests used for the different heads of discrimination and supports definitions and tests that make establishing discrimination less complex. It is noted that the tests for direct and indirect discrimination are currently varied and somewhat complicated and confusing. A broadly-worded definition of discrimination that can encapsulate the different forms of discrimination is preferable as it may prevent people falling between the cracks of tests that are too limited or difficult to establish.
9. The PAC, however, is not in a position to comment on the precise drafting of the definitions, nor on which precise model is the best for achieving such an outcome. We just urge that any definition be wide enough to ensure complaints can be made based on the discriminatory impact of an otherwise-neutral act or requirement (something usually dealt with as indirect discrimination) and that discrimination is not limited to situations where there is a specific discriminatory intent behind the action.
10. The PAC notes that some pieces of Commonwealth discrimination legislation cover not only past but also **proposed** discrimination and we would support such coverage to enable pro-active or preventative action to be taken.

### **Question 2: Burden of proof for proving discrimination**

11. The PAC accepts that leaving the complete burden of proof of discrimination on the complainant does cause major difficulties when it comes to a complainant being required to prove a discriminatory state of mind and also that the discriminatory factor was what led to the relevant detriment (eg loss of or failure to obtain employment, services etc) suffered by the complainant. For example, it may be hard for an Aboriginal person to prove that their race was the reason why they might have been denied employment if this is not explicitly said by the prospective employer or for a pregnant women employee to positively prove that it was her pregnancy that led to her dismissal. It may be preferable for the onus of proof on such matters to shift to the respondent employer once the circumstances can lead to prima facie inferences being drawn from the circumstantial evidence that this was the reason for or the cause of the detriment.
12. In addition, a respondent arguing that an otherwise discriminatory measure is reasonable or justified, should also bear the onus of proving that point as such matters of operation necessity are also within their knowledge.
13. We note that the Human Rights Commission has recommended that a consolidated Commonwealth equality law provide for a shifting onus of proof on elements regarding causation and justification of prima facie discriminatory conduct, to confirm that the obligation to produce evidence sits with the party best placed to produce that evidence. We support that principle.

### **Question 3: Single special measure provision**

14. The PAC believes it is essential to retain provisions allowing for special measures for affirmative action and to redress disadvantage. Identical treatment does not result in substantive equality of opportunity. It would appear to be simpler and thus more convenient if this could be dealt with in a single special measure provision catering for all types of discrimination, but the PAC does not express a concluded view as to whether such a suitable single provision can be drafted for all the different types of discrimination.

### **Question 4: Should the duty to make reasonable adjustments found in disability discrimination legislation be extended to other areas of discrimination?**

15. It would appear logical for there to be a single requirement to make reasonable adjustments to apply beyond just disability discrimination to other areas of discrimination, subject to the exemptions to be discussed later. No view is expressed on whether such a general requirement to make reasonable adjustments can be drafted in a way that is suitable for all areas of discrimination.

### **Question 5: Should public sector organisations have a positive duty to eliminate discrimination and harassment?**

16. While the PAC supports the principle of public sector organisations being required to take positive steps to eliminate discrimination and harassment, there are always difficulties with how far such provisions can go and whether making such duties enforceable will place unduly onerous obligations on such bodies. The PAC would support in principle some obligations being imposed if this could be done in a manner that is not unduly onerous.

### **Question 6: Should the prohibition against harassment cover all the protected attributes and if so how should this be expressed?**

17. The PAC supports the prohibition against harassment on the grounds of the protected attributes in the specific areas of public life where unlawful discrimination is prohibited.

### **Question 7: How should sexual orientation and gender identity be defined?**

18. The PAC would support the definitions of sexual orientation which refer to sexual attraction or sexual activity with people of a particular gender rather than the alternative suggestion which would limit this definition to the 4 specific labels referred to in the discussion paper, ie "heterosexuality, homosexuality, lesbianism and bisexuality".
19. The PAC also supports an inclusive definition of gender identity as applying to persons who genuinely identify as members of a particular sex or both.

### **Question 8: How should discrimination against a person based on the attributes of an associate be protected?**

20. The PAC supports extension of protection to discrimination against someone because they are an associate of a person who has a protected attribute. It would be simpler if this could be encapsulated in a single provision for all types of discrimination.

### **Question 9: Are the current protections against discrimination on the basis of the existing attributes appropriate?**

21. The PAC in its previous comment noted that protection just on the matters covered by the existing legislation ie race, sex, disability and age would not be sufficient and urged, subject to appropriate exemptions, the inclusion of protection against discrimination on such grounds as religion, political opinion, social origin, medical record, criminal record, sexual preference, sex or gender identity, trade union activity. This is still the position of the PAC.

**Question 10: Should the consolidation bill protect against intersectional discrimination (ie discrimination based on 2 or more aspects of a person's identity)? If so how?**

22. Intersectional discrimination should be protected. It could be specifically stated that discrimination includes discrimination on the grounds of 2 or more protected attributes.

**Question 11: Should the right to equality before the law be extended to sex and/or other attributes?**

23. Yes, equality before the law should be applied across the board to all the protected attributes.

**Question 12: What is the most appropriate ways to articulate the areas of public life to which anti-discrimination law applies?**

24. The PAC supports the current areas of public life in which anti-discrimination laws apply ie terms and conditions of employment, work, education, provision of goods and services, administration of Commonwealth laws and programmes etc. No comment is made on whether there are other areas that could apply as well.

**Question 13: How should the consolidated bill protect voluntary workers from discrimination and harassment?**

25. It is noted that voluntary workers are not protected under most of the Commonwealth anti-discrimination laws because their work does not fall within the definition of "employment", although most states except NSW and WA provide protection for them in their legislation.
26. The PAC supports the protection of voluntary workers against harassment based on a protected attribute in all areas.
27. While being open in principle to extending protection against discrimination to voluntary workers, the PAC does not advocate any particular position on the inclusion of this in the consolidated legislation due to lack of information about the impact on not-for-profit organisations with a substantial voluntary workforce.

**Question 14: Should the bill protect domestic workers from discrimination and, if so, how?**

28. The PAC understands that discrimination laws apply to workers engaged in domestic duties in a private dwelling but that there are exemptions in relation to domestic workers at the point of who should be offered employment. The PAC supports the continued prohibition against harassment and against discrimination in employment or termination of employment once a domestic worker has been engaged. The PAC does not advocate any particular position on extending the application of discrimination law to the engagement of domestic workers, due to uncertainty about the potential impact of this.

**Question 15: What is the best approach to the coverage of clubs and member-based associations?**

29. The PAC supports the continuation of discrimination laws applying in the provision of goods, services and facilities by such associations, subject to exemptions discussed later.
30. In relation to the issue of whether discrimination laws should apply in relation to members and prospective members, it will be necessary to either limit the application of the discrimination laws as far as membership criteria is concerned or provide for many types of exemptions. For instance, it is necessary to allow for clubs or associations who gather for particular religious or political purposes or for purposes of support and solidarity between people of a particular race, gender or sexual identity etc. It is essential that such groups should be permitted to gather for mutual support, worship, learning, fundraising, activism etc. These will not be adequately protected by special measure provisions and will not be

protected by some of the current exemptions based on the smallness of the group. Given the breadth of exemptions required and the difficulty of predicting these in advance, it may be preferable to leave out any extension of discrimination laws to membership of associations for the time being.

**Question 16: Should the bill apply to all partnerships regardless of size? If not, what would be an appropriate minimum size requirement?**

31. There would appear to be no basis for applying different rules to partnerships as opposed to corporations or individuals engaged in an industry. There seems to be no logic in using the size of the partnership as a criterion.

**Question 17: Should discrimination in sport be separately covered? If so what is the best way to do this?**

32. It is noted that the Victorian legislation provides a model where there is a prohibition against discrimination in refusing to select a person for a sporting team or excluding them from a sporting activity but where there are broad categories of exemptions. It would be appropriate for there to be similar provisions with exemptions for discrimination based on sex and gender identity or for age categories and based on the ability, in the case of competitive sporting activity, to people who can effectively compete.

**Question 18: How should the bill prohibit discriminatory requests for information?**

33. This question raises issues of requests for information, eg medical history or other information, that may be for the purposes of discrimination, or may be legitimately for an occupational health and safety issue. This raises many complex questions and will be hard to measure or apply. Such questions may be better able to be used as evidence in relation to discrimination matters rather than prohibited in themselves.

**Question 19: Can vicarious liability provisions be clarified in the bill?**

34. Apart from noting the need to have vicarious liability provisions whereby employers and principals can be held responsible for actions of employees and agents and the need to also provide for defences, when all reasonable steps have been taken by the employer or principal to prevent discrimination or harassment, the PAC makes no comment on the best model for such liability.

**Question 20: Should the bill adopt a general limitation clause? Are there specific exceptions that would need to be retained?**

35. The PAC would support a general limitation clause of the kind found in the Canadian legislation, along the lines that conduct necessary to achieve a legitimate objective and that is a proportionate means of achieving that objective is not discriminatory.
36. However, the PAC also urges the need for exemptions for religious organisations acting in conformity with its religious doctrines, beliefs or principles. We refer to the reasons set out in the General Synod Standing Committee submissions, referred to above, to the *Discussion Paper on Freedom of Religion and Belief in the 21<sup>st</sup> Century* and also to the National Human Rights Consultation. This reasoning is applicable to the PACs submissions in relation to the Consolidation Project.
37. In those submissions it was suggested that Section 38 (4) and (5) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) provides an appropriate model of such an exemption to general human rights legislation. This was an exemption for religious organisations acting in conformity with its religious doctrines, tenets, beliefs or teachings. Such a principle could equally apply to an exemption for religious organisations under anti-discrimination law.

38. For similar reasons, in our letter to the Civil Justice and Legal Services Group in the Attorney-General's Department of 29 January 2011, we reiterated the following principles which we set out below in the following paragraphs.
39. The PAC urges that in any reforms to consolidate anti-discrimination legislation, the important human right of religious freedom must be upheld. In order to protect this right in a manner which reflects relevant international human rights instruments such as ICCPR and the Religion Declaration, it is important that any law in this area provides an appropriately generous zone of protection associated with religious belief, worship, observance, practice and teaching. It is therefore important for there to be exemptions for discrimination or for the adoption of a distinction, exclusion or preference *that is derived from the doctrines, tenets, beliefs or teachings of a particular religion or creed, providing it is made in good faith, is not arbitrary and is consistently applied.*
40. Such exemptions are tailored to protect religious freedom and are limited to situations where the religious doctrines or beliefs require it. For example, there may be instances where such religious beliefs may require discrimination in employment or appointment to certain roles or that preferences be given, but maybe those same distinctions are not required by the religious beliefs to be made in relation to people to whom services of compassion are provided. **There may of course be** other circumstances, where for missional and theological reasons, religious organisations need to be free to discriminate as to what services can be provided or who their particular services are for.
41. Such exemptions should not be limited to certain leadership or clerical positions but to all work in bodies set up for religious purposes. In such bodies, all work is often believed to be carried out best where all employees or members share the same belief system, attitudes and aims.
42. Such an exemption as suggested can be a general exemption applicable to all grounds of discrimination. There will be many grounds of discrimination where the exemption will not be necessary because religious doctrines or beliefs do not require discrimination on those grounds, but this is a matter that needs to be assessed on the relevant facts and on the doctrines of each religion. It is not appropriate to draft exemptions based only on the obvious issues that come to mind from the more well-known religions.
43. The exemptions should apply to all the forms of public life to which the discrimination laws apply. For example it should apply in employment, membership of clubs and associations, provision of goods or services, education, accommodation and provision of facilities etc.

**Question 21: How should a single inherent requirement/genuine occupational qualification exception from discrimination in the bill?**

44. As set out above in relation to Question 20, any such inherent qualification requirement should only be **additional to** a specific exemption for religious organisations acting in conformity with their religious doctrines, tenets, beliefs or teachings. It is not an adequate replacement for such an exemption for the reasons set out in the attached previous submissions. The PAC does not have any comment about the particular wording of any additional inherent requirement exception.

**Question 22: How might religious exemptions apply in relation to discrimination on the grounds of sexual orientation or gender identity?**

45. It is submitted that this can be dealt with as part of a general religious organization exemption as set out above in relation to Question 20. To restrict it to the issues of sexual orientation or gender identity presupposes that the only religious doctrinal issues are those that are highlighted in the most common debates or issues for the mainstream religions, an approach that could be discriminatory in itself.

**Question 23: Should temporary exemptions continue to be available?**

46. It would seem appropriate given the inability to foresee all the possible permutations and effects of a new consolidated anti-discrimination statute that there should be scope for temporary exemptions to be made on a case-by-case basis.
47. The PAC notes however that the Racial Discrimination Act does not provide for exemptions. The PAC has also made submissions on the Constitutional reform to advocate for a general racial discrimination prohibition to be included in the Constitution. In these circumstances there would be no basis for a temporary exemption on the grounds of race, unless it is to cover matters that might be to redress disadvantage people of a particular race but where it may not clearly amount to a special measure.

**Question 24: Are there other mechanisms that would provide greater certainty and guidance to duty holders to assist them to comply with their obligations under Commonwealth anti-discrimination law?**

48. The PAC supports the suggestions to enable the registration of action plans which set out policies to address discrimination and the suggestions to enable certification of proposals as special measures to give certainty to bodies seeking to achieve substantive equality through affirmative action, scholarships etc.

**Question 25 -28: Process questions**

49. The PAC does not make any submissions in relation to these more technical questions. In general, the PAC supports the funding and giving any necessary powers to make the Australian Human Rights Commission more effective as a body set up to assist in the protection of rights. It also supports complaints processes that are simpler and non-bureaucratic and for flexible conciliation and mediation options.

**Questions 29-30: Interactions with State and Commonwealth anti-discrimination laws**

50. The PAC reiterates its submission of 29 January 2011 that the Commonwealth anti-discrimination statute should provide that it does not override the anti-discrimination provisions of State and Territory statutes which can continue to operate compatibly with the Commonwealth statute.
51. The Commonwealth laws should also apply to State and Territory governments and instrumentalities.

Yours sincerely

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Chair