



CATHOLIC DIOCESE OF DARWIN



18 November 2022

The Hon Chanston Paech
Attorney-General and Minister for Justice
Parliament House
State Square
Darwin NT 0800
Email: minister.paech@nt.gov.au

Dear Mr Paech

RE: *Anti-Discrimination Amendment Bill 2022*

Thank you for your discussion with me yesterday regarding the *Anti-Discrimination Amendment Bill 2022 (Bill)*, and your letter following.

I would like to thank you for the opportunity during yesterday's discussion to express my profound concerns and those shared by many thousands of Territorians across a multiplicity of religious groups in relation to the Bill.

As discussed, and previously submitted, the Church supports the *Anti-Discrimination Act 1992 (Act)* and many of the objectives of the Bill. In particular, the preservation and protection of vulnerable and minority group against discrimination. We also support the fundamental tenet of mutual respect and understanding as a pillar of our faith.

In our discussion you said that *you support religious freedoms*, and that the Bill would allow for our faith schools to have our Principals, Deputy Principals, Religious Education Coordinators, Chaplains and Priests to be of the same faith. Furthermore, you reiterated that if you are applying for a job in a faith-based school you need to understand the ethos and values of that faith and agree to support it; this was of some comfort. However, your subsequent letter does not address any of the concerns previously raised in my letter to all Parliamentarians in relation to safeguarding for this to happen.

The Commonwealth's Position

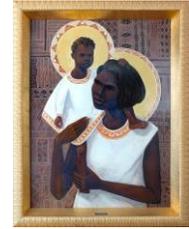
My Diocese has, as discussed, engaged lawyers who have specialist skills in Anti-Discrimination laws here and nationally to review the Bill. Your assurances about religious freedoms do not alter the black letter law enshrined in these changes, or how these laws will be applied by the courts of the Northern Territory.

This Bill must be understood in the national context, and with reference to how at odds it is with the reforms posed by the Labor Commonwealth Attorney General recently to the Australian Law Reform Commission.

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The Hon Mark Dreyfus KC said that the

*purpose of the referral is to ensure that an educational institution conducted in accordance with the **doctrines, tenets, beliefs or teachings of a particular religion or creed** ' can continue to build a community of faith **by giving preference, in good faith, to persons of the same religion as the educational institution in the selection of its staff.***

Your explanation of the effect (or limited effect) of repealing the exemption in section 37A of the Act is flawed. You say that repealing section 37A of the Act will not prevent religious education institutions from selecting teachers of the same religion and/or only those who respect our religious beliefs. You say this on the basis that a 'requirement' can be imposed upon an employee under his/her/their job description.

I am advised that any objective interpretation of the repeal of the section 37A religious freedom by the courts will be interpreted for what it is; an intended erosion of religious freedoms and that as such imposing a religious requirement on a job specification will be discriminatory.

Section 35 of the Act will not in isolation permit our **doctrines, tenets, beliefs or teachings** to be imposed upon employees as "*a genuine occupational requirement*".

If you do not want to remove the freedom and right for religious education institutions to employ teachers of the same faith and/or who respect our ethos, tenets, beliefs or teachings, then why repeal the religious freedom that is currently enshrined in section 37A of the Act which serves this very purpose?

My Letter to Members of Parliament

As discussed yesterday, the Diocese's submissions to the Department of the Attorney-General and Justice dated 12 August 2022, and my letter to the Members of Parliament of the Northern Territory Legislative Assembly dated 10 November 2022, explains in great detail the many failings of the draft Bill.

Whilst there is no utility in me traversing each of your counter contentions in yesterday's letter or repeating the detailed and legally articulated failures identified in my original letter, I would in summary say as follows:

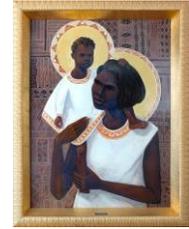
Positive Duty to Eliminate Discrimination and Commissioners Role

1. You claim that the steps required to comply and/or discharge the duty are not specified in the Bill because they will depend upon the nature and size of an organisation and what is therefore reasonable and proportionate.

That may be so and **one** indicia, however, that should not preclude you from explaining the **specific matters** that a positive duty should at a minimum address if it is to meet **your objectives**



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of **eliminating** discrimination. Some (any) effort to identify these would provide important clarity, which is currently absent.

Your suggestion that the Commissioner will publish guidelines on what you mean in this regard is respectfully, unhelpful and (worse) likely to mislead. How can the Commissioner know what the Act requires when it doesn't expressly say so? Why is the Commissioner better placed than anybody else to elucidate how one eliminates discrimination?

Further, what assistance will guidelines be for organisations that choose to follow them? Will they override the law? If not, and should the law be interpreted to require a higher standard than the Commissioner adopts, what protections will organisations who have adhered to them receive?

You say this change doesn't "*allow individuals to make complaints to the Anti-Discrimination Commissioner about compliance with this [positive] duty.*"

Section 60(a) of the Act permits "*a person aggrieved by prohibited conduct*" to make a complaint to the Commissioner, and "*prohibited conduct*" includes "*aiding a contravention*" of the Act (section 4(g) of the Act). According to the Bill a person must discharge their positive duty to eliminate discrimination, sexual harassment or victimisation to the greatest extent possible.

If a failure to respond to the new positive duty to eliminate discrimination is not a "*contravention*" of the Act, what is? How can such a contravention not permit an aggrieved person making a complaint that the positive duty has been contravened?

The meaning of the word 'Offends'

2. The proposed section 20A in the Bill is based on section 18C of the *Racial Discrimination Act 1975* (Cth) (RDA). I acknowledge that in interpreting this section of the RDA, the courts have imposed an objective interpretation with a high threshold to constitute racial discrimination.

However, the RDA doesn't have regard to (and nor should it) the circumstances of the 'offender' or the basis for the comments made which cause offense. Rather it calls for a basic objective assessment of whether the comment is likely to offend the 'reasonable person'.

In contrast, the NT laws seeks to protect a plethora of attributes. The only pointer to the offense being labelled 'discriminatory' is whether or not it is "*reasonably likely, in all the circumstances, to offend...*". This calls for an assessment not just of the person 'offended' but the person also who 'causes' the offence. It therefore cannot be an 'objective' test as it requires a circumstantial assessment of the offender and the offended. By way of example, there is every likelihood that were people of one religious group to ascribe the others as delusional/reprehensible or fundamentally flawed, and the offender responds with its own 'offensive' comments, both parties might "*in all the circumstances take offence*" and be guilty of discrimination. The same



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can be said in respect of peoples of one sexual orientation speaking of another in derogatory terms.

People will necessarily say things that do offend other people and it is a reality that plays out in our daily lives. The Bill should not attempt to regulate and/or protect individual subjective sensitivities. That isn't to say, people ought not be respectful, but legislating against people not being respectful is serious legislative overreach.

Chansey during our conversation, I believe that you believed the amendments to be sufficient and undertook our conversation in good faith, however the absence of clarity in the legislation means we still remain vulnerable in this regard and have no guarantee of protection.

You will note I am coping in the Chief Minister; this is as she had a conversation with our inter-Church Leaders on 26 October 2022 where we raised some of these concerns.

Yours respectfully

Bishop Charles
Catholic Bishop of Darwin and the Northern Territory

cc. Hon Natasha Fyles MLA, Chief Minister via email: Chief.Minister@nt.gov.au