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Via email: [diocadmin@darwin.catholic.org.au](mailto:diocadmin@darwin.catholic.org.au)

Dear Bishop Gauci

Thank you for your correspondence of 11 November 2022 regarding the Anti-Discrimination Amendment Bill 2022 (the Bill) expressing concerns in relation to a number of aspects of the Bill. I hope that my response assists in reassuring you that the reforms are not an erosion of religious freedoms but are aimed at ensuring the balance in protections afforded to all attributes in the *Anti-Discrimination Act 1992* (the Act) are reflective of contemporary needs, and that they build upon the objects of the Act, including the recognition of equality of opportunity.

As you are aware, the reforms in the Bill arose from broad public consultation in 2017-18. The exposure draft Bill released in July 2022 reflected input and feedback received through the 2017-18 consultation process, with the exposure draft Bill providing the community further opportunity to comment on proposed amendments to the Act. Thank you for participating in the face-to-face consultation session on 9 August 2022 and providing a subsequent written submission. While the legislative reform process and the timeframes for this work do not facilitate individual feedback, I can assure you that all feedback is highly valued and was considered by Government.

You have raised concern regarding the new positive duty to prevent and eliminate discrimination, sexual harassment and vilification. The duty builds upon existing objects in section 3 of the Act, being the elimination of discrimination and sexual harassment. Introducing the duty is consistent with a national trend in discrimination law to require organisations to deal with discrimination proactively, as a way of better addressing inequality in our community. The particular steps that must be taken to meet the positive duty are not set out in the Bill because the steps will vary depending on factors including the nature and size of the organisation. An organisation will only be required to take

reasonable and proportionate measures to eliminate discrimination in the context of their organisation, and the Anti-Discrimination Commissioner will be able to guide organisations as to how they might comply.

I note in particular your concern that 'what is and is not reasonably proportionate (in relation to the positive duty) will likely be the subject of expensive litigation'. I confirm that the Bill does not propose to allow individuals to make complaints to the Anti-Discrimination Commissioner about compliance with this duty, or permit such matters to proceed beyond an investigation to a hearing before a tribunal or court. Accordingly, it should not result in expensive litigation. The process is designed to be a productive and collaborative process, to better address discrimination in our community.

In regards to proposed new section 20A providing for vilification, the Bill is based on section 18C of the *Racial Discrimination Act 1975* (Cth). The language used in that provision, that is conduct that offends, insults, humiliates or intimidates, has been considered by the courts to impose a high threshold, namely that the conduct in question must have 'profound and serious effects, not be likened to mere slights'. The conduct in question must also be assessed from the perspective of a reasonable member of the relevant group that was targeted, making the test objective, rather than subjective. The provision as drafted and the processes of the Anti-Discrimination Commissioner will mean that vexatious or unmeritorious complaints do not proceed as these tests will not be met in those circumstances. Further, statements of belief expressed as part of a sermon in a worship service are unlikely to be captured by section 20A due to the operation of section 51(d) of the Act, which is designed to exempt acts done by churches and like institutions that are part of a religious practice (e.g. a church service) from the application of the Act.

Section 37A currently provides a limited exemption in the area of work, where the Act applies to prevent discrimination in employment or potential employment. The exemption applies only to religious schools and does not apply to any other employment. The repeal of the exemption in section 37A will not prevent a religious school from teaching or practicing religion in the school, or from requiring teachers as part of their job description to, for example, perform a religious duty such as leading prayer or delivering pastoral care. It will only remove the ability of a religious school to discriminate against a staff member or job applicant on the basis of the staff member or applicant's sexuality, or their religious beliefs or activities. I further note section 35 of the Act is not being repealed. That exemption allows for discrimination based on a 'genuine occupational qualification' that the applicant is required to fill. This exemption applies to all employers and is not a reform within the Bill. The exemption would allow a religious school to require, for example, a Principal, Deputy Principal, religious education teacher or chaplain to be of the same faith.

Section 40(2A) currently allows religious boarding schools to discriminate on the basis of religion in the provision of accommodation. However, during consultation, no indications were given that this provision was relied on or utilised by religious boarding schools in the NT. Stakeholders also raised concerns that the existence of the exemption has the potential to restrict access to education for students that are not of a particular religion, and this may disproportionately affect students in remote areas where schooling options are limited.

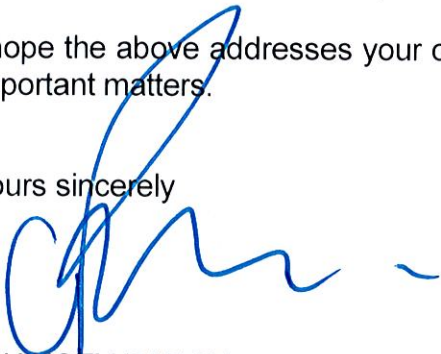
Section 40(3)(a) does not relate to religious boarding schools but to other forms of accommodation provided by religious bodies, for example, homeless shelters and other

commercial forms of accommodation. To ensure discrimination is not permitted in relation to these types of accommodation, the amendment to section 40(3)(a) will permit discrimination by religious bodies that provide accommodation only where the accommodation concerned shares the same premises as a place of worship, for example, at a religious retreat centre.

I note your letter refers to the concept of 'systemic discrimination', and I confirm this concept relates to the new representative complaints process proposed for the Act. The representative complaints process is separate from both the existing individual complaints process, and the positive duty provisions discussed earlier. It has a very specific purpose and the Bill provides a range of safeguards to guard against vexatious or unmeritorious representative complaints. This includes a requirement that the organisation establish they have relevant credentials to bring the complaint. The requirement to identify any affected individuals is not relevant in the context of a representative complaint, which is not about individual experiences but about the objective impact of a policy or procedure on a group that shares an attribute that is protected by section 19 of the Act.

I hope the above addresses your concerns and I thank you for writing to me about these important matters.

Yours sincerely



CHANSEY PAECH

Thank you for your time today,  
to talk through your concerns

