Anglican Church Diocese of Sydney

27 January 2022

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By Email: legcon.sen@aph.gov.au

Answers to Questions on Notice from the Senate Legal and Constitutional Affairs Committee Inquiry into the *Religious Discrimination Bill* 2021 and Related Bills

1. **Clause 12 is not "Procedurally unworkable"?**

   In response to a question from Senator O'Neill, I indicated that I had four points to make in response to the argument made by the Law Council of Australia (and others) that Clause 12 is "procedurally unworkable" (Submission 8, para 201). Due to the constraints of time, I was only able to address the first of my 4 point, and took the question as a whole on notice.

2. In paragraphs 201—205 of its submission, the Law Council of Australia argues that clause 12 is "procedurally unworkable" because it provides a provides a federal defence to a complaint of unlawful discrimination made under State or Territory legislation, which needs to be heard in a court or tribunal competent to exercise Federal jurisdiction. Most state-based discrimination complaints are heard in tribunals that do not have this jurisdiction, so the matter will need to be referred to a Chapter III court. This will result in court and other legal costs to both parties. The Law Council opposes clause 12 because "State and Territory tribunals currently operates on a 'no costs' basis in the area of discrimination law" and will result in a "complex route to resolving discrimination matters which should be dealt with quickly and cheaply."

3. In response, I make the following four points.

4. Firstly, the current system is never 'no costs' of those subject to a complaint. Because of the adverse implications of being found to have committed an offence or to have engaged in discrimination, respondents invariably seek legal advice. The evidence in Submission 198 is the costs of a responding to a complaint currently before the Queensland Civil and Administrative Tribunal has cost the respondent $70,000 to date. I am advised that the costs to the Catholic Church to defend the complaint against Archbishop Porteous under s17(1) of the Tasmanian Anti-Discrimination Act were of a similar order of magnitude. These expenses were incurred, notwithstanding the fact that the complaint against Archbishop Porteous was subsequently withdrawn by the complainant. To defend the current system as "no costs" is not a compelling argument.

5. Secondly, the cost implications bear equally on an *unmeritorious* complaint as they do on an *unmeritorious* use of the defence. A respondent will think twice before making a spurious claim to invoke the protection of clause 12 if it has little prospect of success. Likewise, a complainant will hesitate before pursuing an unmeritorious complaint. This goes some way to addressing the imbalance in the current system that weights very heavily on respondents, and not at all on complainants.

6. Thirdly, there are procedural mechanisms to ensure that cost implications do not prevent *meritorious* complaints from progressing. In those jurisdictions where it is not already possible to do so, the Discrimination Commissioner could be given standing to pursue the complaint in Chapter III in the name of the complainant (and thereby take responsibility for the costs of so doing).

7. Fourthly, referral to a Chapter III court will become less and less necessary once a body of law on the interpretation of clause 12 has been established. A state-based tribunal will be bound to apply the principles stated in prior Court decisions on the application of clause 12, to the extent that they are relevant to the facts under consideration. It will only be novel, untested propositions that will require a referral.

8. In conclusion, clause 12 is not "procedurally unworkable". Rather, it is just another example of the complexities inherent in our overlapping Federal and State/Territory jurisdictions, which we accept and manage in other areas of the law. The cost implications can be addressed procedurally to ensure that meritorious complaints proceed. The procedural complexities are not a valid reason to leave unaddressed the concerns to which clause 12 seeks to remedy.

The Right Reverend Dr Michael Stead
Chair, Religious Freedom Reference Group
Anglican Church Diocese of Sydney

27 January 2022