Anglican Church of Australia
Public Affairs Commission

Submission of the Public Affairs Commission of the Anglican Church of Australia on the exposure drafts of the Religious Discrimination Bill 2019 and associated bills

1. We thank you for the opportunity to make submissions on the following exposure drafts of the following bills:
   - Religious Discrimination Bill 2019;
   - Religious Discrimination (Consequential Amendments) Bill 2019
   - Human Rights Legislation Amendment (Freedom of Religion) Bill 2019

2. 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.

Support for legislation against religious discrimination

3. The PAC has previously called for and supports the enactment of legislation to prevent direct and indirect discrimination on the grounds of religion. 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 clothing may not comply with the standard requirements designed for the majority. We therefore support the aims of the Bills.

4. 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 draft bills will require regard to the indivisibility and universality of all human rights and to the principle that every person is free and equal in dignity and rights (in s3(2) of the draft Religious Discrimination Bill and to be inserted by the draft Human Rights Legislation Amendment Bill into the other Commonwealth Anti-Discrimination legislation).

5. The PAC has previously commented 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. However, given the piecemeal nature of

anti-discrimination laws, it is essential that the laws protecting against religious discrimination are designed in in a way that is consistent with the operation of other anti-discrimination statutes and do not derogate in any way from those protections. We are pleased that the Attorney-General has recognised in media releases that laws prohibiting religious discrimination should act as a shield from discrimination, not a "sword" to facilitate discrimination against others.

6. We have no issues with the drafts of the Religious Discrimination (Consequential Amendments) Bill or the Human Rights Legislation Amendment (Freedom of Religion) Bill. However, we have some real concerns that the Religious Discrimination Bill as currently drafted may be interpreted or used in ways that undermine the other anti-discrimination statutes. These and other recommended changes are set out below.

Religious Discrimination Bill 2019

7. For the reasons set out above, we support the many aspects of the Bill that reflect the style and approach of other anti-discrimination statutes. We only highlight below the provisions that are of concern.

<u>ss8(3) – Deemed unreasonableness of employer conduct rules restricting statements of belief</u>

Preference for removal of ss8(3) and (4)

8. ss8 (1) and (2) provides for the usual form of indirect discrimination provisions whereby it is indirectly discriminatory to impose conditions or requirements which disadvantage people who have or engage in particular religious beliefs or activities and where such conditions or requirements are not unreasonable. It is then a case of looking at all the circumstances to work out whether such conditions are reasonable or not.

9. The problem, however, arises in ss8(3) where there is an instance of "deemed unreasonableness" singled out, that is, where an employer conduct rule (namely, one applying to businesses with revenues over $50 million) would restrict an employee from making a statement of belief when not performing work duties and where the employer cannot establish that it is necessary to avoid unjustifiable financial hardship. It is acknowledged that ss8(4) excludes from the operation of ss8(3) statements of belief that are malicious or would be likely to harass, vilify or incite hatred or violence or promote a serious offence.

10. This is a very unusual provision which seems to be aimed at Israel Folau-type situations, but perhaps does not extend that far. It does so by singling out one small aspect of religious activity (namely the making of a statement of belief), one type of employer (namely a non-government/statutory body employer with revenue of over $50 million) and one type of hardship (namely unjustifiable financial hardship). The arbitrary nature of the matters covered by ss8(3) is odd.

11. If ss8(3) is aimed at curbing the power of large corporations to stifle dissent or control of employees' lives outside work, then this is a matter with which we have some

sympathies. For example, it could be positive if large carbon-emitting corporations could not prevent all its employees from criticising and protesting about climate change out of their religious beliefs about care for God's earth, or if employees could safely, out of religious beliefs for caring for the vulnerable, criticise their employer's failures to eradicate modern slavery from their supply chains. It would, however, be odd to privilege such statements arising from religious belief but not similar statements arising from non-religious humanitarian principles. In this regard, we note that the definition of statements of belief for atheists in s5 are restricted to statements specifically "about religion". It would seem more sensible for these matters to be dealt with in the context of human rights legislation which covers freedom of speech and expression rather than limit it to religiously-motivated speech.

12. There are several problems with the width of ss8(3), such as:

12.1 There may be many different beliefs, including religious beliefs that are not considered reasonable or acceptable in Australian society. For instance, there may be beliefs in racial supremacy. Simply making such an honestly but irrationally held statement of belief about racial supremacy, say, in a personal but public social media post, may not be sufficient to qualify as harassment or vilification or incitement to violence or hatred, but would nevertheless be likely to cause disharmony or upset in a multicultural workforce and likely to cause customers to choose to take their business elsewhere. It may be hard for the employer to positively prove unjustifiable financial hardship arising from such a post, but it would seem eminently reasonable for an employer to have a social media policy that seeks to restrict employees from making racist comments.

12.2 We discussed above the issues of criticising or protesting against aspects of an employer's business stemming from religious belief. There may be differences of degrees involved as to when such protection should be available as a matter of policy, but ss8(3) does not leave space for such differences. For example, it might be fine for a relatively unknown employee to make such statements of belief critical of an employer's business practices, but not a prominent member of senior management. Also issues of context and tone become relevant because it may be unreasonable to prevent statements simply stating one's belief, but quite reasonable for an employer to seek to prevent statements that are inflammatory or denigrate or ridicule people, including customers and colleagues, which may be likely to damage the reputation of the business. There may also be distinctions between making statements privately or making them in public where they are likely to spread more widely. The trouble is that ss8(3) and (4) deem all attempts to restrict statements of belief to be unreasonable unless they come within fairly narrow exceptions, even if the restrictions sought are what would otherwise be considered to be inherent requirements of employment. ss8(3) as drafted prevents a consideration of all the circumstances necessary to assess reasonableness.

12.3 The definition of a statement of belief only refers to statements that may reasonably be regarded as being in accordance with doctrines, tenets, beliefs or teachings of a religion. This protects statements of belief that are not *required* by the religion to be made and which the religious or atheist employee could avoid making without impinging on the exercise of their faith

or lack thereof. Again, the problem is that ss8(3) does not permit a consideration of proportionality or a weighing up of relative harm.

12.4 ss8(3) is not necessary. Employer conditions that are not reasonable are still likely to amount to indirect discrimination in all the circumstances of the case under ss8(1) and (2). The onus is on the employer to establish the reasonableness of the condition (see ss8(7)). This is regarded as sufficient for most other anti-discrimination statutes and should be for a religious discrimination statute as well. It is particularly important in a religious discrimination statute to allow any decision-making body to consider all the circumstances because of the vast range of unforeseen religious beliefs and activities that could emerge. By deeming unreasonableness in certain factual situations, ss8(3) prevents the consideration of all the countervailing facts and could lead to many unintended consequences.

13. While we can see benefits in trying to avoid unnecessary litigation by clarifying legislative intent in relation to what is or is not unreasonable, we are concerned for the reasons set out above that the proposed ss8(3) and (4) are too wide. We therefore submit that ss8(3) and (4) should be removed.

Alternative of amending ss8(3) and (4)

14. Alternatively, if the government is unwilling to remove ss8(3), then we would urge at least the following changes to the draft bill:

14.1 That the last clause of ss8(3) should read "*is not reasonable unless compliance with the rule by employees is an inherent requirement of the employment or necessary to avoid unjustifiable financial hardship to the employer, damage to the reputation of the employer or to ensure compliance with anti-discrimination laws".* The changes are to expand situations of potential reasonableness beyond merely unjustifiable financial hardship. We suggest that anti-discrimination laws will may need to be defined, for example as in the proposed s41.

14.2 It will also be necessary to remove the note under ss8(3) and ss31(6) which provide that such an employer conduct rule that is unreasonable under this subsection is not an inherent requirement of employment.

14.3 To expand the exception in ss8(4)(b) so that s8(3) will not apply to a statement of belief *"that would, or is likely to, harass, denigrate, humiliate, vilify or incite hatred, prejudice or violence against another person or group of persons"*, namely to add "denigrate", "humiliate" and "incite prejudice".

These changes would enable employers who seek to maintain inclusive and harmonious community or workplace relations to prevent discriminatory statements. It would also enable them to prevent prominent employees from publicly denigrating or humiliating their colleagues or customers. This would be consistent with a key aspect of the internationally-recognised limitations on freedom to manifest religious beliefs, namely to protect the fundamental rights and freedoms of others. If matters do not come within the "deemed unreasonableness" section, they can still be adjudged to be unreasonable in all the circumstances under ss8(1) and (2).

<u>ss8(5) and (6) – Health practitioner conduct rules and conscientious objection</u>

Preference for removal of ss8(5) and (6)

15. We support the principle that health practitioners with conscientious objections to particular procedures, such as abortion or assisted dying, should not be forced to engage in such procedures. However, we also recognise that the health of the person seeking the service should be a vital or even paramount consideration along with other important considerations as the availability of the service from other practitioners in the same health service or in the geographical area. This too points in favour of leaving questions of reasonableness to be assessed under ss8(1) and (2) rather than deeming unreasonableness in ss8(5) and (6). We would recommend that ss8(5) and (6) be removed. ss31(7) also needs to be removed as a consequence.

Alternative of amending ss8(5) and (6)

16. If the government is not willing to remove ss8(5) and (6), then we make the following submissions.

17. The draft ss8(5) provides that if a State or Territory law allows for a conscientious objection based on religious belief, then it is unreasonable to have a health practitioner conduct rule that is inconsistent with such a law. If the aim of this section is simply to preserve the application of State and Territory laws providing for conscientious objections, then the simplest way to do so would be to provide in a separate section that nothing in the Act is will affect the operation any State or Territory law which allows for a conscientious objection to the provision of a health service on the basis of religious belief or activity. There is no need to do this in a convoluted way through a deemed unreasonableness. We do not believe s8(5) in necessary.

18. What is of particular concern in relation to ss8(5) and (6) and the definition of a health practitioner conduct rule in s5 is what is meant by the "provision of a health service". The definitions of health service are very wide and include such things as optometry, midwifery, radiation, podiatry and various other types of services where we are not aware of any religious objections to those types of services. The fear is that ss8(5) may enable health practitioners to withhold ordinary services to particular people that they do not approve of for religious reasons. We would oppose any ability to discriminate against particular people who may seek services that the health practitioner might otherwise be happy to provide to others.

19. We therefore recommend that should the sub-sections remain, then the definition of health practitioner conduct rule be amended to refer not just to "conscientiously objecting to providing the health service" but to "*conscientiously objecting to providing of a type of health service (but does not include an objection to the person seeking the service)*" or something to that effect.

20. We are also concerned that the provision should not elevate the conscientious objection above the health of the person seeking the service. It is also important to ensure that the health service can still be provided, particularly in regional or remote areas where the person seeking the service has no easily accessible means of obtaining the service elsewhere. It is also important that the person or body imposing

the rule can ensure that anti-discrimination laws as defined are complied with. We suggest that ss8(6) could be amended along the following lines:

"a health practitioner conduct rule is not reasonable unless compliance with the rule is necessary to avoid an ~~unjustifiable~~ adverse impact on:

(a) the ability of the person imposing, or proposing to impose, the rule to provide the health service;
(b) the health (including physical, mental or emotional health) of any person who would otherwise be provided with the health service by the health practitioner;
(c) the ability of the person seeking the service to obtain the said health service; or
(d) the ability of the person imposing, or proposing to impose, the rule to comply with any anti-discrimination laws."

If a health practitioner conduct rule is not automatically deemed unreasonable, it still has to be established as reasonable under the ordinary indirect discrimination tests under ss8(1) and (2).

Impact on other Anti-Discrimination Statutes – s41

s41 should be removed and operation of other anti-discrimination laws preserved

21. s41 has the effect that statements of belief do not constitute discrimination under any anti-discrimination law, including in particular, ss17(1) of the Tasmanian *Anti-Discrimination Act*. ss17(1) of the Tasmanian Act prohibits people from offending, humiliating, intimidating, insulting or ridiculing others on the basis of a range of attributes such as race, disability, sex, sexual orientation and gender identity. This means that humiliating, intimidating or ridiculing others on the grounds of those protected attributes would be permissible if it the statement was motivated by a religious belief or lack thereof. This highlights the concerns we raised above about the need to protect all human rights as much as possible and that protection of religious beliefs or lack thereof should not be a vehicle to allow other forms of discrimination. The Tasmanian legislation affords the freedom to make statements of belief, as long as such statements are made without offending, humiliating, intimidating, insulting or ridiculing others.

22. s41 goes beyond overriding ss17(1) of the Tasmanian Act but extends to any anti-discrimination law within the meaning of the *Fair Work Act* 2009. s351 of the Fair Work Act includes most if not all anti-discrimination statutes in Australia within the definition of "anti-discrimination laws". s41 also allows regulations to extend to other anti-discrimination laws. This means that it is proposed that statements of belief can override the laws prohibiting racial, age, disability and sex discrimination. It would be totally inappropriate to allow statements arising from a religious belief or lack of such a belief to override the vital protections for other minority groups. This Bill gives an immunity to religious believers, including members of bizarre cults, to make statements that may be totally racist, sexist or which may ridicule people with disabilities and the like as long as there was a religious basis for such a belief.

23. There seems to be no equivalent to s41 in other Commonwealth anti-discrimination legislation which usually preserves the operation of state and territory and other Commonwealth anti-discrimination legislation. Preservation of these other pieces of

anti-discrimination legislation would be logical where the aim is provide as much protection against discrimination as possible and to build a respectful caring society.

24. We therefore urge that s41 be removed and replaced by an express provision to confirm that nothing in the Act shall override or affect the operation of any other anti-discrimination law.

Religious body exemptions – s10

25. We support exemptions or exceptions which enable religious bodies to give preferences to people of their own religion in employment, school enrolments or scholarships and the like. Organisations set up for religious purposes need to be able to manifest their religious beliefs and not be forced to carry out acts which their faith prohibits. They should be free to encourage an ethos in the organisation where people are working towards the same mission and to employ people to further that mission.

Exemptions should be consistent with those in other Commonwealth anti-discrimination laws

26. However, we are concerned to ensure that the "religious body exemptions" are not able to be used to circumvent the application of other anti-discrimination legislation. For example:

26.1 Each of the other pieces of Commonwealth anti-discrimination legislation has been drafted giving particular consideration to whether there needs to be religious body exemptions. There was no basis for any religious body exemptions in the *Racial Discrimination Act* or the *Disability Discrimination Act* and this Bill should not create one even if there are religious bases for such discrimination. For example, discrimination against Arabs should not be exempt by arguing that the reason for discrimination is their Muslim religion rather than their race.

26.2 The issue of religious body exemptions in the *Sex Discrimination Act* have been extensively debated. It is important that carefully drafted distinctions are not overridden by more widely drafted religious discrimination exemptions. For example, the *Sex Discrimination Act* 1984 in ss37(2) carves out from the religious exemptions the Commonwealth-funded age care services. This should not be allowed to be overridden by religious bodies engaged in Commonwealth-funded aged care arguing that they are excluding same sex couples as residents because of the religious beliefs of such couples concerning doctrines about sexuality.

26.3 This is of course relevant to the work that the Australian Law Reform Commission is carrying out in relation to exemptions for religious educational institutions in other anti-discrimination laws. It would make more sense to wait until the ALRC reports on those issues to inform the extent of exemptions under the Religious Discrimination Bill in order to ensure consistency in the reasoning and approach. For example, if the ALRC recommends that the *Sex Discrimination Act* exemptions should be removed to prevent religious schools from expelling students on the grounds of their sexuality, it would be incongruous if the schools could then dismiss those students on the grounds of their religious beliefs in relation to sexuality.

27. We therefore believe it is important that the religious discrimination legislation and any exemptions in s10 should be made expressly subject to the operation of the other Commonwealth anti-discrimination legislation. This means that if one ground of the discrimination is racial or sex discrimination in addition to religious discrimination, then the provisions and any more limited exemptions under that other anti-discrimination statute should apply.

28. In addition, for reasons set out above, the bill should for consistency reflect the style of exemptions under s37 of the *Sex Discrimination Act* which "carve out" Commonwealth-funded aged care services as it would be equally inappropriate to require aged-care residents to leave aged-care facilities if their religious views change or to exclude a partner of a resident on the basis that the partner does not share the religious belief.

29. The PAC also made a submission to the Senate Legal and Constitutional Committee inquiry into the Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018, a copy of which we attach. In that submission, we called for a removal of exemptions for religious schools as it would be considered undesirable to enable those schools to expel, exclude or penalise people on the grounds of their sexuality or gender identity or that of their parents. These considerations about the severe impacts on students would equally justify a removal of exemptions to expel students if they should lose or change or question their religious faith, something not uncommon for students. The same would apply to staff members if they have doubts or a loss of faith but are still willing to teach within the faith ethos of the school.

30. In our submission on the Sex Discrimination Amendment Bill referred to above, we also called for transparency in that if a religion was to use doctrines or tenets to discriminate against people, this should be made transparent and be set out in policies to be provided to potential students (and their parents) and staff so they can make informed choices about the school. The same considerations apply to religious discrimination legislation.

31. The above comments will mean that s10 will need to be substantially redrafted to narrow the exemptions or to carve out matters from them. However, if, contrary to our submissions on the form of the proposed exemptions for religious bodies, we make the comments below on the current draft.

Concern about exclusion of exemptions for religious bodies engaged primarily in commercial activities

32. We urge that in the case of registered charities in ss10(2)(b), the words in the brackets "(other than a registered charity that engages solely or primarily in commercial activities)" be removed. As registered charities, they would be engaging in commercial activities on a non-profit basis. Religious institution-owned hospitals, aged-care homes, Op shops, bookstores and the like may engage primarily in activities which could be described as "commercial" but to maintain the religious ethos and mission of those organisations, it may be necessary and appropriate for them to insist that all or at least senior staff are of the same religion and there is no basis for distinguishing between them and other religious bodies conducted for the

purpose of religious mission. The commercial activity exception does not appear in the exemptions for religious bodies in the other major Commonwealth anti-discrimination legislation.

33. We recognise that for ss10(2)(c) that the same commercial activity exception remains, but it appears that "any other body that is conducted in accordance with doctrines, tenets (etc)" may include bodies or people who are not themselves religious organisations but bodies who choose to act in accordance with the doctrines, tenets etc of a religion. It would be preferable to narrow the scope of ss10(2)(c) and remove the commercial activity exception. However, if ss10(2)(c) retains its current width, then the exclusion of bodies engaged in commercial purposes may well be justified so such bodies are not automatically exempt, though, depending on the nature and aims of the body, belonging to a religion may still come within the inherent requirement of employment exemption in s31 of the Bill.

Defining religious bodes by reference to doctrines, tenets, beliefs and teachings

34. The other concern is that the criteria for a religious body in s10 is one that conducted "*in accordance with*" doctrines, tenets, beliefs and teachings of a particular religion. This can be both too wide in some aspects and too narrow in others. It is too wide in that the wording could inadvertently pick up organisations or individuals that may be totally independent from any religious institutions and be set up primarily for secular purposes, but which merely choose to conduct themselves in accordance with the doctrines of a religion. Other legislation, such as s37 of the *Sex Discrimination Act 1984* and s35 of the *Age Discrimination Act* 2004, refer to bodies "established for religious purposes" as well as requiring the relevant exempted act to be one that conforms to doctrines, tenets etc or be necessary to avoid injury to the religious susceptibilities of adherents of the religion. It would be better not to provide automatic exemption to bodies not established primarily for religious purposes. (This does not mean that belonging to a religion may not be an inherent requirement of employment or a condition of club membership under ss 31 or 34.)

35. Defining religious exemptions by whether the body is conducted "*in accordance with*" or "*conforming to*" doctrines, tenets, beliefs and teachings of a particular religion can, however, also be too narrow in that the doctrines of a religion do not usually require employing only co-religionists. Having co-religionists in leadership positions or as the majority of the workforce may, however, be necessary in order to preserve the religious ethos and mission of the organisation. It may also be that it is important for co-religionists to find places at schools or aged-care homes or hospitals where their religious beliefs and ability to worship will be catered for and nurtured. If places are limited, it would make sense for preferences to be able to be given to those co-religionists, even if the doctrines do not require that only people of that religion be enrolled or admitted. There should then be a provision that bodies established for religious purposes do not discriminate under the Act or breach the provisions of the Act by giving *preferences* to people who ascribe to the doctrines, tenets, beliefs and teachings of the body.

Further consultation

36. We wrote to the Attorney-General on 5 September 2019 asking for an extension of time to enable further consultation on and analysis of the Bills. We still urge that time be taken to do so to enable proper consideration of the legislation, especially in relation to the provisions which are unusual in anti-discrimination legislation. We would be pleased to be involved in further discussions on this topic and would be grateful if you could supply us with any further drafts of the Bill.

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