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Ms Merrin Thompson
A/Director
Standing Committee on Law and Justice
Parliament House
Macquarie Street
Sydney NSW 2000

Dear Ms Thompson

INQUIRY INTO ADOPTION BY SAME SEX COUPLES

As requested in your letter of 26 February, 2009 we provide herewith responses to the questions raised during the submission and also to the additional question from The Hon Greg Donnelly MLC.

1. *Are there any circumstances where, in your view, adoption by same sex couples is more desirable than in other circumstances, for example where the couple are related to the child or have fostered the child over a lengthy period of time, and/or where the child wishes to be adopted by that couple?*

Adoption by same sex couples is outside ANGLICARE's definition of *optimal care* and as such we would argue that a specific case or example should not be the basis for legislative changes.

The legislation - if changed to meet individual situations - would permit a whole new regime of adoption practices and have far wider implications than the case specific scenarios you may be presented with in the course of your inquiry.

To make far reaching changes to the Adoption Act based on the need to solve individual case dilemmas is not a sound foundation for new legislation.

- **It is important to examine the legislative provisions that already exist to resolve some of these case issues**

Example 1: Couple are related to the child

The related couple could obtain parental responsibility as the legal guardian through the family court or the children's court. There is already provision for this in current legislation.

Example 2: If they have fostered the child over a lengthy period of time

ANGLICARE supports the principle of permanence for children in care, whereby stable relationships between children and their caregivers are maintained rather than disrupted wherever possible.

Additional provision for placement permanency and stability can be achieved through *Sole Parental Responsibility Orders* - provided in Children & Young Persons Care & Protection Act 2000 - S 149.

This allows for permanency placements to continue for the fostered child with additional parental responsibility being transferred from the Minister to the carers.

Example 3: If the child wishes to be adopted by that couple

This raises the issue of a child's participation in decisions. There is a role for children to participate in significant decisions that affect them. In ANGLICARE's experience, the input from a child and weight given to the child's views is considered with a mix of other factors in the decision making process. In effect, a child's views are sought and considered, but will not be the only factor determining the outcome of a situation.

What needs to be considered is that, if the legislation were to be changed, there would be many situations **where the child does not have a voice** in decisions that are made about their choice of adoptive parents.

ANGLICARE's view is that a conservative, cautious approach is required where a decision is irreversible - such as adoption by a same sex couple – as it would be putting children in rare and uncertain family configurations where the adoption placement decision could be made prior to the child being of a developmental age where the implications of the decision are fully understood.

What would be the implications if a child says later states they did not want to be adopted by a same sex couple - but this decision had been made on their behalf at an earlier time?

ANGLICARE would like the Committee to consider a real case example of a child's participation -

JM - a girl placed in permanent foster care at age 8. When aged 8 she was placed in foster care with a same sex couple - intended as a permanent long term arrangement.

12 months later the child asked to be moved as 'she wanted a mother'. The day to day care giving was adequate, but her emotional need for a mother were voiced by this articulate child and heard by her DOCS caseworker. JM was moved into an ANGLICARE foster family where she settled well, and a few years later requested and consented to her adoption by this family.

It is important to note that in this instance she **had not been adopted** by the same sex couple so there was an alternative arrangement that could be made for that child. However if this was a child at a younger age, less aware of her emotional needs or unable to express them clearly, a child in a similar situation could have been adopted by her same sex caregivers but thereby precluded from the opportunity to receive care from both a mother and father figure.

The predictive element in adoption requires that permanent, irreversible decisions are being made by practitioners where their practice has been grounded in and around what has been shown to work. There is inadequate research into the long term outcomes for adoption of children by same sex couples.

2. **“Some inquiry participants have argued that the current law is discriminatory against gay and lesbian couples. Do you wish to comment on the suggestion?”**

As we said in our oral evidence given on 24 February 2009, adoption is about the rights of the relinquished child for the provision of optimal care. To elaborate on this point, it is very important to understand this is not about the rights of same sex couples to adopt.

This principle is clearly set out in the Adoption Act 2000 now:

- (a) The Adoption Act sets out clear objects in s7 which include:
 - (a) *to emphasise that the best interests of the child concerned, both in childhood and later life, must be the paramount consideration in adoption law and practice,*
 - (b) *to make it clear that adoption is to be regarded as a service for the child concerned,*
- (b) s8 Adoption Act says the principles to be followed in making decisions about adoption are:
 - (a) *the best interests of the child, both in childhood and in later life, must be the paramount consideration,*
 - (b) *adoption is to be regarded as a service for the child,*
 - (c) *no adult has a right to adopt the child,*
- (c) These provisions are for guidance, and “do not create, or confer on any person, any right or entitlement enforceable at law.”(s6 Adoption Act).

These principles were not arbitrarily incorporated in the Adoption Act. The language in all such legislation in Australia and elsewhere is based on the provisions of the *UN Declaration on the Rights of the Child*:

- (a) **Article 3**
‘1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.’
- (b) **Article 20**
‘1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

2. States Parties shall in accordance with their national laws ensure alternative care for such a child.

3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.’
- (c) **Article 21**
‘States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration...’

This is why in our oral evidence we said that the only question must be: will the child's sense of personal and family identity be adversely affected by adoption into a family with same-sex parents; and given that same sex adoptive parenting is outside the norm and adopted

children already struggle with feelings of difference, will such children be adversely affected by having this additional adjustment imposed upon them.

The Adoption Act's emphasis on the priority of the rights of the child here is correct and should not be overturned.

3. ***“In light of the recent Wesley Mission case, do you believe that the exemption provision in the Anti-Discrimination Act provides guaranteed protection for ANGLICARE Sydney if the Adoption Act was amended to provide for same sex adoption?”***

The wording of the exemption in s56 *Anti-Discrimination Act NSW 1977 (ADA)* should guarantee protection for ANGLICARE Sydney in the event the *Adoption Act* is amended in this way, but this is subject to two important qualifications.

First, it should not be possible to make a complaint of unlawful discrimination in relation to adoption practices, and so there should be no application of s56 ADA. The *Adoption Act 2000* provides that the principles that must be applied in dealing with adoption are as follows:

- (a) *the best interests of the child, both in childhood and in later life, must be the paramount consideration,*
- (b) *adoption is to be regarded as a service for the child,*
- (c) *no adult has a right to adopt the child,¹*

These provisions are for guidance, and “do not create, or confer on any person, any right or entitlement enforceable at law.”²

Given that adoption is a service for the child and not applicant adoptive parents, our view is that there would have been no grounds for a complaint under the ADA s49ZP in relation to unlawful discrimination.

In our view the Wesley decision (OV and anor v QZ and anor (No.2) [2008] NSWADT 115)(**OV and OW**) is flawed and should be overturned on appeal for a number of reasons - not only because the acceptance of the complainants as foster carers was not ‘the provision of a service’ for the purposes of s49ZP, but also because the ADT was wrong to find the relevant ‘religion’ in this case for the purposes of applying the exemption in s56(d) ADA was not the beliefs of Wesley Mission, but ‘Christianity’. If this interpretation is correct s56(d) no religious group will be able to rely on it because according to the ADT all a complainant needs to do to defeat the argument is to find any adherents of a different view within the religion as a whole.

Nevertheless the ADT in OV and OW did accept that Wesley Mission was a body ‘established for the propagation of religion’. The narrow concept of ‘propagation of religion’ argued by the applicants failed to recognise the indirect approach to the propagation of religion practised, not only by Christian churches but also other religions through their charitable institutions. The ADT determined that the evidence tendered by the respondents amply demonstrated the linkage between evangelism and charitable works. The ADT was satisfied by the evidence that, on the balance of probabilities, Wesley Mission was a body established to propagate the Christian faith among other purposes.

Consequently even if OV and OW is upheld on appeal, or even stands unappealed, the decision does not mean that ANGLICARE Sydney would not be able to rely on s56 ADA in

1 Adoption Act 2000 s8.

2 Adoption Act 2000 s6.

the event of a similar complaint about action which is accepted by the Tribunal as unlawful discrimination under s49ZP ADA.

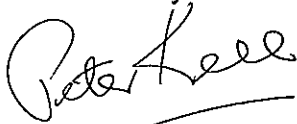
Our second qualification is that (as we have submitted to the AHRC Inquiry into Religious Freedom)³ the wording of s56(d) ADA is not ideal and would better reflect the international rights instruments it is intended to implement if it were amended such as follows (with the addition of the words underlined):

'56 Religious bodies

Nothing in this Act affects:

- (a) *the ordination or appointment of priests, ministers of religion or members of any religious order;*
- (b) *the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order;*
- (c) *the selection or appointment of persons to perform duties or functions for the purposes of or in connection with, or otherwise to participate in, any religious observance or practice; or*
- (d) *any other act or practice of a body conducted in accordance with religious values, beliefs and principles where the body considers in good faith that such act or practice is based on the body's religious values, beliefs and principles. Reference to an institution's values, beliefs and principles means the values, beliefs and principles as determined in good faith by the institution.'*

Yours faithfully



Chief Executive Officer

³ See extract of these submissions attached.

Annexure

Extract from Submission to the Australian Human Rights Commission in response to its Discussion Paper entitled 'Freedom of Religion and Belief in the 21st Century'

Submitted on behalf of the Sydney Anglican Home Mission Society Council (ANGLICARE Sydney) February 2009 paragraph 4.7 at pp25ff:

Recommendations:

- (a) That the term 'religious susceptibilities', even though it does appear in some international instruments, is not clearly understood in Australian law. It may therefore benefit from a clearer definition within legislation in force in Australia so as to make it clear that it is broader than religious 'sensibilities' and embraces the concept of religious 'beliefs' and 'values' held by individuals and organisations.
- (b) That it be acknowledged:
 - (i) that the current protections for religious freedom in Australian law which fall within 2 broad categories, namely:
 - (A) the 'inherent requirements of the job' provision in various legislation; and
 - (B) the 'religious susceptibilities' exceptionare insufficient to protect the fundamental rights cited above.
 - (ii) That the current provisions in Australia legislation (Commonwealth, State and territory) providing protection for religious freedom require redrafting in order to provide greater protection for the fundamental right to religious freedom in Australia. In this regard ANGLICARE Sydney recommends:
 - (A) That the references to freedom of religion set out in the definition of unlawful discrimination contained in section 3 of the HREOC Act which currently read:

*'discrimination, except in Part IIB, means:.....
but does not include any distinction, exclusion or preference:*

 - (c) *in respect of a particular job based on the inherent requirements of the job; or*
 - (d) *in connection with employment as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, being a distinction, exclusion or preference made in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or that creed.'*

require amendment. A suggested redraft of these provisions might be in similar terms to the following:

*'discrimination, except in Part IIB, means:.....
but does not include any distinction, exclusion or preference:*

- (c) *in respect of a particular job based on the inherent requirements of the job as determined in good faith by the institution based on the institution's values, beliefs and principles; or*
 - (d) *in connection with employment as a member of the staff of an institution that is conducted in accordance with religious values, beliefs and principles being where such distinction, exclusion or preference is made in good faith and based on the institution's religious values, beliefs and principles.*
 - (e) *reference to an institution's values, beliefs and principles means the values, beliefs and principles as determined in good faith by the institution.'...*
- (iii) That AHRC make every effort to persuade State and Territory legislatures to enact similar provisions in human right legislation across Australia. While ANGLICARE Sydney operates in NSW only and its specific concern is the legislation operating in NSW, this should not be taken to suggest that ANGLICARE Sydney would not, as a matter of public policy, support the enactment of similar provisions in other State and Territories of Australia.
- (iv) That AHRC acknowledge and accept that the references to freedom of religion set out in section 56 of the *Anti-Discrimination Act 1977 (NSW)* which currently state:

'56 Religious bodies

Nothing in this Act affects:

- (a) *the ordination or appointment of priests, ministers of religion or members of any religious order,*
- (b) *the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order,*
- (c) *the appointment of any other person in any capacity by a body established to propagate religion, or*
- (d) *any other act or practice of a body established to propagate religion that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.*

require amendment. A suggested redraft of these provisions could be in terms similar to the following:

'56 Religious bodies

Nothing in this Act affects:

- (a) *the ordination or appointment of priests, ministers of religion or members of any religious order;*
- (b) *the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order;*

- (c) *the selection or appointment of persons to perform duties or functions for the purposes of or in connection with, or otherwise to participate in, any religious observance or practice; or*
- (d) *any other act or practice of a body conducted in accordance with religious values, beliefs and principles where the body considers in good faith that such act or practice is based on the body's religious values, beliefs and principles. Reference to an institution's values, beliefs and principles means the values, beliefs and principles as determined in good faith by the institution.*