Law Council
OF AUSTRALIA

Office of the President

20 January 2022

Senator Sarah Henderson
Chair
Senate Legal and Constitutional Affairs Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

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

Dear Senator Henderson

Religious Discrimination Bill 2021 and related bills – Questions on Notice

1. The Law Council of Australia (**Law Council**) thanks the Senate Legal and Constitutional Affairs Legislation Committee (**the Committee**) for the opportunity to respond to its inquiry into the *Religious Discrimination Bill 2021* (Cth) (**the Bill**) and related bills, including in its recent appearance before the Committee on Thursday 20 January 2021.

2. During this appearance, the Law Council received a question on notice. This is set out below, along with the Law Council's response.

With respect to clauses 11 and 12, does the Law Council agree with Professor Anne Twomey's assessment that 'it is confounding to contemplate why these clauses would be drafted in such a provocative manner?' How would they be addressed?

3. Professor Twomey's submission explains that the Commonwealth has the power to enact a valid Commonwealth law, section 109 of the Australian Constitution (**the Constitution**) provides that the Commonwealth law will prevail over any inconsistent State law, to the extent of the inconsistency. Section 109 does not, however, confer upon the Commonwealth Parliament a power to repeal or alter State laws, to affect the interpretation of State laws, or prohibit the State from enacting certain laws. It cannot 'directly control the content of a State law'.[1]

4. Professor Twomey goes onto explain that it would be possible for the Commonwealth to enact a law which creates a direct inconsistency, so that section 109 of the Constitution prevailed and the State law was inoperative to the extent of any inconsistency. Clauses 11 and 12 of the Bill do not do this. Instead, they alter the effect of the application of the State law. For example, subclause 11(1) states that 'a religious body that is an educational institution does not contravene a prescribed State or Territory law if' certain circumstances are met. Meanwhile, subclause 12(1) states that 'a statement of belief does not constitute discrimination for the purposes of' listed State anti-discrimination laws. As Commonwealth law cannot dictate the interpretation of State law in this manner, Professor Twomey notes that these drafting problems open the Bill to a future constitutional challenge. As such, she recommends

[1] *Western Australia v Commonwealth* (1995) 183 CLR 373, 464.

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that the Commonwealth redraft clauses 11 and 12 to ensure that they clearly establish an inconsistency, so that section 109 of the Constitution renders the State laws inoperative to the extent of any inconsistency.

5. The Law Council agrees with Professor Twomey's assessment and is grateful to her for raising these important issues. However, rather than redrafting clauses 11 and 12, the Law Council has a strong preference that these should be removed from the Bill altogether, for the reasons raised in its submission.

6. In summary, clause 12 is highly divisive, privileges the manifestation of religious belief over other human rights, undermines protections gradually attained for Australians against discrimination over many years, and conflicts with international human rights law. It is unlikely to promote a tolerant, diverse and safe environment in a range of public arenas – sporting, education, health, workplace and goods and services. The Bill is able to protect against religious discrimination without the need for such a clause.

7. Clause 11 has only been recently introduced and was not included in either of the exposure drafts of the Bill. As such, it has been subject to little consultation. It enables laws – including laws which are yet to be prescribed – passed by democratically elected State and Territory Parliaments to be overridden. This does not accord with the standard approach of Commonwealth, State and Territory anti-discrimination laws operating concurrently. The matters dealt with by clause 11 fall well within the Terms of Reference of the Australian Law Reform Commission's inquiry into religious exemptions in Australian laws and would be best dealt with in this context. This approach would be more likely to foster constructive Commonwealth, State and Territory relations, and build consensus towards a consistent approach which balances competing rights. Again, the Bill is able to protect against religious discrimination without the need for such a clause.

8. The Law Council hopes that the above responses are useful to the Committee. Should you wish to discuss, please contact Ms Leonie Campbell, Deputy Director of Policy, on 02 6246 3711 or 0402 225 282 in the first instance.

Yours sincerely

Mr Tass Liveris
President