Answers to Questions on Notice

Australian Catholic Bishops Conference

Inquiry into the Religious Discrimination Bill 2021 and related bills

Senate Legal and Constitutional Affairs Committee hearing, 20 January 2022

Question 1

Senator O'NEILL: …. Professor Aroney gave a number of suggestions about the way in which the constitutional concerns that are raised by Professor Twomey might be addressed to ensure that the constitutional uncertainty around section 109 of the Constitution might be remedied before we end up with a piece of legislation that brings about a lot of litigation. Can I ask you on notice to look carefully at the submission of Professor Aroney, particularly appendix B, and submission 47 to the PJCHR, from Professor Twomey, and give us your considered view on those? That is to both entities.

Answer

Australian Constitution s 109 and inconsistent State laws

s 68 (1) of the Bill provides that the bill is not meant to 'exclude or limit the operation' of a State or Territory law to the extent that it can operate 'concurrently'.

This means that State, Territory and Commonwealth anti-discrimination acts will work concurrently unless there is a direct conflict between the State/Territory provision and the Commonwealth provision e.g., if the State/Territory law 'alters, impairs or detracts from the operation of the federal law' (see Kirby J in *APLA Ltd v Legal Services Commission (NSW)* (2005) 224 CLR 312). In such a case, under s 109 of the Constitution, the State/Territory law would be rendered inoperative to the extent that it is inconsistent with the federal act. An example of such an inconsistent provision might be the proposed limitations on the religious schools exemption under the Victorian Equal Opportunity (Religious Exceptions) Amendment Bill 2021.

Section 11 addresses a situation of such a s 109 inconsistency. Rather than wait for the s 109 challenge, the Bill takes a proactive approach whereby the Commonwealth can prescribe a State or Territory law which has the effect of 'prohibiting discrimination on the ground of religious belief or activity' and of 'preventing religious bodies from preferencing' people on the basis of religion. If such a law is prescribed then there is no contravention of that law in the employment situation, so long as the educational institution has a publicly available policy (similar to that required under s 7(6)).

Ideally, this proactive provision will save people from having to run a s 109 case regarding State and Territory laws which clearly prevent religious institutions preferencing people of faith in employment and which have been prescribed by the Minister.

Section 12 also raises s 109 issues.

The Conference agrees with the Attorney-General's Department that s 12 is partly declaratory that is, it is clarifying that under existing State/Territory laws a statement of belief does not of itself constitute 'discrimination'. However, s 12 goes beyond mere declaration by also providing that statements of belief do not contravene s 7(1) of the *Anti-Discrimination Act 1998* (Tas) or other prescribed laws. As such it is dealing directly with possible s 109 inconsistencies.

Twomey/Aroney suggested amendments

In their submissions, Professors Twomey and Aroney have clearly explained the law relating to s 109 and made drafting suggestions in relation to ss 11 and 12 of the Religious Discrimination Bill to ensure that the Bill would prevail in a s 109 challenge, using language which is likely to withstand High Court scrutiny.

The Conference supports the suggested changes set out in Appendix B of Professor Aroney's submissions with the following additional comments:

a. The requirements relating to the wording or format of the publicly available policy statements should be the same in s 7(6) and s 11. This will ensure that a statement published to meet the requirements of s 7(6) will also meet the requirements of s 11.

b. The note to s 68 should refer to both s 11 and s 12.

Question 2

Senator O'NEILL: …. With regard to the variation of manifestation of religious beliefs and the employment processes across a range of Christian denominations, including the Catholic tradition, we've already discerned that there are different views about how adherent to a particular set of values or faith positions some employees might be required to be. And we've opened up the discussion about 38(3) here. Can I ask you for your response to this? The Association of Heads of Independent Schools of Australia, who also represent a number of religious schools, told the joint standing committee that, like you, while they largely supported the Religious Discrimination Bill, they'd like to see the passage of the bill delayed and considered at the same time as the proposed amendments to the Sex Discrimination Act, because of the necessary complexity of these two sections of law being intertwined in the way they affect employment processes and the management of schools. What's your view about advance, delay and further amendment to the bill?

Answer

The *Sex Discrimination Act 1984* and the Religious Discrimination Bill protect against different forms of discrimination, and we believe that it is of the utmost importance that both forms of protection are maintained. What is required to prove discrimination on the basis of religious belief or its manifestation on the one hand, and discrimination on the basis of sex on the other, are quite different.

The exemptions and limitations for each of these grounds are also quite different. In the *Sex Discrimination Act*, for example, s 38(3) allows certain limited exemptions to sex discrimination relating to enrolments in religious schools. However, at the same time, within the context of the Act it also implicitly ensures that a religious educational institution cannot discriminate against a student on the basis of breastfeeding or family responsibilities for example.

These discrimination acts have been in place for up to forty years and there is no need to abruptly change them to take account of a new Act dealing with quite a different form of discrimination.

It may, however, be appropriate to review the operation of the two Acts together after the new Act has been in place for, say, three years.

Question 3

Senator O'NEILL: On notice, can you provide the committee with any indication of whether you have had direct confirmation or representation from the Attorney-General or the Prime Minister that there is no deal and there never has been a deal with those four members of the government—Fiona Martin, Dave Sharma, Katie Allen and Angie Bell—because there was a report on 1 December that there was a deal done regarding section 38(3) and a carve-out for students. If you could provide any clarification about whether that deal existed or not, that would be very helpful to the committee. If you could provide a file note as to whether there was any correspondence to that end or any phone calls to seek clarification, that would be helpful.

Answer

The Conference read media reports about this issue and approached the Attorney General's Office for clarity. We received a verbal assurance from that office that reports of a negotiated change to the Sex Discrimination Act are inaccurate.

Question 4

Senator PRATT: They could take it on notice; that's fine. We understand this law overrides, in the Tasmanian context, the statement: 'Messing with marriage is messing with kids.' I ask your understanding of whether a statement like that would be allowed in a doctrinal context made in good faith or whether it would invoke the Commonwealth's vilification laws under this bill.

Bishop Edwards: I would like to make a comment on the title that we chose for that document—*Don't Mess With Marriage*. One thing we've learnt is that that negative title was not helpful, and we wouldn't express ourselves that way again.

Senator PRATT: But isn't the purpose of these laws so that we have a way of bringing people together to negotiate—

Bishop Edwards: We certainly wouldn't express ourselves that way again. About the actual—

Senator PRATT: But should you be allowed to?

CHAIR: Senator Pratt, I did give you a bit of grace, but we are going to need—

Senator PRATT: If you could just take on notice, whether you should be allowed to express yourself in that way and what recourse the community should have if you were to continue to do that.

Answer

People may disagree with the statements in the booklet “Don’t Mess With Marriage” or they may read the statements in a way that was not intended and find them offensive, but the statements are not vilification nor should they be illegal. Statements made in public criticism of heterosexual or traditional practices of monogamous marriage between a man and a woman have been issued which are also phrased negatively. While we disagree with those statements, they also should not be illegal. The booklet produced by the Bishops Conference was a robust defence of marriage between a woman and a man, pointing out the importance of marriage for the welfare of children.