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To: LegCon.Sen@aph.gov.au



ACL Response to Constitutional Affairs Legislation Committee Question

On behalf of the Australian Christian Lobby, I, Daniel Flynn, ACL's Deputy Director, appeared before the Senate Legal and Constitutional Affairs Legislation Committee on 20 January 2022, in relation to the Religious Discrimination Bill 2021 (Cth) (**Bill**). I set out below my answer in response to a question from Senator Andrew Bragg.

Question

Senator Andrew Bragg has provided the following question for the Australian Christian Lobby:

- **What forms of discrimination in Australia would the statement of belief provision ameliorate?**

ACL Response:

The “statement of belief provision” at Clause 12 of the Religious Discrimination Bill 2021 (“RDB”) ameliorates against claims of discrimination directed towards people of faith, or no faith for moderate statements of belief.

The right to manifest ones belief is expressed in the ICCPR, Article 18 (1) & (3). This right is of sufficient importance that it should only be restricted when it is necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

If, for example, a temperate statement of belief was made about marriage or gender, under the protection afforded by clause 12(1) (b) of the RDB, the maker of the statement would have a defence to a complaint under section 17 of the Tasmanian Anti-Discrimination Act. Section 17 of the Tasmanian Act provides for proceedings based on the low threshold of “offends, humiliates ... another person” on the basis of a protected attribute and is out of step with equivalent laws in States and Territories.

Clause 12(1)(c) of the RDB allows the Government to prescribe by regulations laws in State and Territories laws for which a religious person can raise a defence of having made a moderate statement of belief. This clause is intended to allow the Government to override perception-based offenses which ascribe liability for speech based on the perception of the hearer rather than the content of the statement. While this mechanism is unusual, it appears to give effect to the Governments obligation to ensure that the protections in the ICCPR are implemented in Australia including in the States and Territories.

For example, a Catholic publication on marriage distributed to parents in Catholic schools in Tasmania resulting in a discrimination claim that was allowed to proceed by the Tasmanian Antidiscrimination Commissioner.

We refer to this statement from the Institute for Civil Society, Submission 128, 7 January, page 9 (footnote omitted):

“Clause 12(1)(a) provides that moderate, non-vilifying statements of belief and unbelief do not constitute *discrimination* under listed anti-discrimination laws. This provision seems directed to preventing the future

use of anti-discrimination law to censor moderate, non-vilifying statements of belief and unbelief, rather than dealing with a significant existing problem (as clause 12(1)(b) re section 17 of the Tasmanian Act does). Various judges have acknowledged that, in certain work contexts, words (e.g., racially abusive or sexually abusive epithets especially when repeated and said in front of peers in a work environment) can amount to discrimination causing psychological harm, but it is not clear that a one-off statement can amount to discrimination. So, clause 12 has some work to do in protecting reasonable statements of belief or unbelief from being held to amount to discrimination in law. But given that the cited cases involved statements which were harassing or vilifying or malicious or not in good faith and clause 12 does not protect such statements, clause 12(1)(a) would not affect outcomes in the cited workplace cases. Hence clause 12(1)(a) is best viewed as heading off current and future attempts in commissions and tribunals to expand anti-discrimination law to chill the expression of moderate, non-vilifying statements of belief and unbelief by threat of lengthy complaints proceedings and punishment (my emphasis).

There is a growing list of religious people whose reasonable statements of belief, often on social media, have been used by offended third parties (often third party activists (who were not in the actual or intended audience of the statement) as the basis for complaints to the employers or accreditation bodies of the religious people or discrimination tribunals seeking to have the religious people sacked, disqualified from their trade or profession, suspended or expelled as students or otherwise sanctioned under discrimination law for the statements. There are 44 such cases documented at www.australiawatch.com.au

Many religious people were sacked or disqualified or suspended or had months of trauma and cost fighting such complaints. This is the real-world problem of discrimination against religious people who make reasonable statements of belief to which clause 12 and equivalent protections of reasonable statements of belief in clause 15 are directed.”

Protection from discrimination by universities, professional and trade registration bodies (Clause 15) and by an employer (ACL's proposed Clause 19(3)) is critical to protect people of faith from discrimination.

These clauses all ameliorate against the religious discrimination that is the suppression of the right to manifest one's belief.

The RDB deletes protections (present in earlier drafts) for religious employees against employer overreach into their personal expressions of faith outside work, colloquially known as the 'Folau clause'.

Employee protections are necessary, reasonable and proportionate and should be included in the Bill. The purpose of the Folau clause was to clearly establish that a moderate expression of faith by an employee in their own time is their own business, and that an employer cannot impose an unnecessary code of conduct that will restrict employees' personal expressions of faith. We recommend that moderate protection be included in the Bill by inserting into clause 19 of the Bill the following:

- (3) If an employee conduct rule is applied by an employer to restrict or prevent a person from making, or impose a detriment on a person for making a statement of belief, that application of the rule is unlawful discrimination unless it is proven that:
 - (a) the rule was necessary to achieve a reasonable result concerning the employer's business or activity and no rule with a less restrictive effect on the employee's freedom of expression would have achieved that result; and
 - (b) the application of the rule to the particular statement of belief was necessary to achieve a reasonable result concerning the employer's business or activity and there was no other means

available with a less restrictive effect on the employee's freedom of expression to achieve that result.

The absence of an employee statement of belief clause leads to self-censoring by employees.

As Archbishop Comensoli said in the Australian Catholic Bishops Conference submission dated 23 December 2021 at page 10:

"The clause 12 provision still does not operate to protect religious speech in other circumstances. It should be noted that the failure to place any meaningful constraint on an employer's right to discriminate on the basis of religious belief will mean that workers are still not protected for statements of belief outside the workplace. The lack of employment protections contributes to a fear among ordinary people of faith of adverse action from employers, such that they engage in self-censorship. This chilling effect on freedom of religion is in addition to reported incidents of religious discrimination in the workplace and other areas." (my emphasis).