27 January 2022

Committee Secretary
Parliamentary Joint Committee on Human Rights
PO Box 6100,
Parliament House
Canberra ACT 2600

By e-mail to: human.rights@aph.gov.au

Dear Committee Secretary

Answers to questions on notice

Please find below the responses from the members of the Tasmania panel to the questions on notice from the Committee hearing on Friday, 14 January 2022. We hope that we have accurately identified the questions taken on notice.

Senator PRATT: Lastly, I wanted to ask you as a group what else you want to put on the record.

We note reference to journal articles and reports in the submission of the Australian Catholic Bishops Conference (submission 185 to this Inquiry) and urge the Committee to review the materials in full particularly those listed at footnotes 4 and 6. In respect of the *Longitudinal Study of Australia Children*, we note in particular the key findings on page 2 and the discussion on page 5 which indicate that teenage children with identified attributes such as disability, racial minority status, and who are gay or lesbian experience higher levels of discrimination.

The important findings of these materials is that children and others are subject to discrimination and vilification on the basis of their religious belief, particular members of minority religions. This both supports the need for effective protection against discrimination and vilification on the ground of religion, but also does not justify discriminatory speech against people of religion in the name of other religion.

We are also very concerned about the proposed alternative drafting of clause 12 presented by Professor Aroney as it would extend the override section 18C of the Racial Discrimination Act 1975 and other racial incitement prohibitions in clear breach of article 20(2) of the ICCPR and of protections against sexual harassment, victimisation, advertising discrimination. The limits in clause 12(3) remain complex and potentially insufficient to save these important protections.

Senator PRATT: I also want to know what your sense is of the difference between protecting an attribute and licensing, for example, not just religious belief but the time and place in which religious statements, be they supportive or negative, are made.

The first of these is an appropriate protection to find in an anti-discrimination law, while the latter, the "licensing" of particular types of speech should be considered to be a matter of freedom of thought confidence and belief, and freedom of expression as articulated in at international human rights treaties. As such it should be found in a comprehensive human rights law that ensures the appropriate mechanisms for ensuring that individual rights and freedoms are not exercised in ways that unjustifiably interfere with the rights and freedoms of others.

Senator PRATT: I guess this is more directed to Ms Banks: if you can't be discriminated against for holding a religious belief, be that statement good or bad, to what extent might you need to be contained and discriminated against just because the time and place in which you express that belief is not useful to everyone else around you?

As has been indicated by many who have made submissions opposing the retention of clause 12, the protection from being discriminated against for holding a religious belief is quite different from being required to consider the impact of you manifesting that belief with there being a clear obligation under international human rights law (for example, article 18(3) of the *International Covenant on Civil And Political Rights* (ICCPR)) to not exercise your freedom to manifest your beliefs in ways that undermine or interfere with the 'fundamental human rights and freedoms of others'. Article 19 of the ICCPR sets out the right to freedom of opinion (art 19(1)) and expression (art 19(2)). The right to freedom of expression is clearly constrained by article 19(3) which notes that the exercise of the right in article 19(1) 'carries with it special duties and responsibilities' and as such can be 'subject to certain restrictions' necessary to ensure that it is not exercised in ways that interfere with the rights of others.

As indicated in response to the previous question, the mechanism for ensuring that the exercise of these freedoms do not interfere with other human rights and freedoms is best done in a comprehensive human rights framework sit out in an Australian domestic law.

Mr PERRETT: Thank you. My final question is to everyone again. I might start with Mr Croome. Can you tell me about the consultation process between the Commonwealth government and Equality Tasmania on the religious discrimination legislation.

Mr CROOME: [response given on behalf of Equality Tasmania] … We've heard a bit about the impact on people with disability but not nearly enough. I think Disability Voices Tasmania is the only disability organisation that has been invited to present evidence. Is that right?

CHAIR: There's one more.

From **DISABILITY VOICES TASMANIA**: Note that we are the only disability organisation invited to give evidence to this Committee inquiry.

Mr PERRETT: Thanks, Mr Croome. Thanks, Chair. I'm hoping I can take Mr Croome's comments about consultation as being indicative of the group's consultation.

From **DISABILITY VOICES TASMANIA**: One concern detailed in our submission is the lack of targeted or effective consultation with people with disability on the impact of these bills on our fundamental right to equality and non-discrimination. This failure is inconsistent with Australia's obligations under the Convention on the Rights of Persons with Disabilities.

Since the first release of a draft of this proposed Bill many people with disability have been excluded from an authentic consultation process. We note as one example the difficulty people with disability would have responding to the survey as detailed in submission 146 to the Parliamentary Joint Committee on Human Rights.

None of the drafts have been in plain English or in Easy Read and the timelines to respond, particularly with this parliamentary process, have been impossibly short and come at a time of year where many people are only just returning from the vacation period.

Australia has committed to obligations to protect, promote and fulfill all of the human rights and freedoms set out in the Convention of the Rights of Persons with Disability (CRPD). In relation to the process of this Bill being presented, Australia has not met the following of its obligations under the CRPD:

- article 21: 'providing information intended for the general public to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities in a timely manner and without additional cost'; and
- article 29: to 'ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others'.

To date the consultation process has not reflected this even though the (then) Attorney General the Hon Christian Porter said the parliamentary process when the Bill was tabled would ensure our obligations were met.

The Bill if passed as it currently exists will have a profound effect on the rights of people with disability and far more time and thought should have been put into looking for ways people with a range of disability could both understand the content, assess its potential effect and respond.

****

Included in submissions made to the Attorneys General who have had carriage of the religious discrimination legislative package have been concerns about the inadequacy of the consultation process. From the outset the consultation process has failed to ensure accessibility for people with disability (approximate 4.5 million Australians),[1] people with low literacy (approximately 9 million), people whose language at home is not English (5.25 million), despite the impact of the equality rights of these groups. Others whose rights are affected by the package may have had more capacity to engage with the materials, but have still had limited windows of opportunity to provide input. It appears that those in support of the Bills have, by contrast, been closely engaged with the development process since 2019, when the first exposure draft was made public, or even before.

The current consultation process for the Parliamentary Joint Committee on Human Rights allowed 25 days for submissions on what improbably the most complex discrimination law in Australian legislative history.

One aspect of the process has been an online survey that has been roundly criticised as seriously flawed by Barlow et al of the University of Queensland (submission 146). They state 'this survey contains multiple fatal flaws. The magnitude of the flaws are such that, regardless of the survey's outcome, it should be disregarded.' One aspect of their criticism identifies the sheer size and complexity of the package.

There have been 195 submissions in total published (publication has been limited to submissions from academics and organisations).[2] Set out below is a brief analysis of the 192 unique submissions that take a position on the package,[3] and those invited

---

1 See, for example, Submission 68 from Disability Voices Tasmania, which identifies the obligations of Australia under international human rights law to ensure accessibility to and accessibility of government processes.

2 The submissions are numbered 1 to 199, however there is no submission 57, 117 or 121.

3 Submission114 is identified as being from the Islamic Council of Australia is a duplicate of Submission 114 of the Islamic Council of Victoria. The Barlow et al submission is also not included in this analysis as it takes no position on the package. There are too other submissions excluded, one because deals with one small aspect of the package only and indicates no position more broadly, and the second being the submission of the Federal

to give evidence to the hearings. What is very clear from this analysis is that despite overwhelming opposition to the package being passed in their current form particularly because of the overriding of existing equality rights, the Committee is hearing from a disproportionately large percentage of supporters of the Bills.

Of these 192 submissions only 36 (19%) support the package in its entirety and/or seek to have the legislation go further in privileging religious freedoms. The remaining 156 (81%) oppose those provisions of the bill that are unorthodox in discrimination law terms.

The vast majority of submissions support federal protections against religious discrimination, with only a tiny number that actually oppose such protection. That is, the vast majority specifically express their support for law reform to happen, but not in the form of the current package of bills.

While the number of witnesses for and against the package being acted was relatively balanced, this in no way represents the proportion of submissions for and against the package. The Committee has invited a significantly disproportionate number of the authors of supporting submissions to give evidence, including notably among religious groups. Of those that oppose, 24 (13%) are faith or religious organisations (or coalitions of religious groups). That is, there are 24 submissions from faith groups opposed to the current package of bills on the basis of the overreach . This compares to 26 (14%) faith organisations (including religious schools) that support the bill. Of those faith organisations opposed to the bills, only four (17% of the 24) have been invited to give evidence. Of the 26 faith organisations that support the package of bills, 13 (50% pf the 26) have been invited to give evidence. This preferencing of evidence from supporting submission writers extends to the broader submission, with 19 of those in support invited to give evidence (53% of those on support) compared to 22 of those opposed (14% of those opposed).

Populations particularly concerned about the impacts of the package on their already discriminated against members—people with disability, women, and the LGBTIQ+ community—are also disproportionately underrepresented in those invited to give evidence. There are 12 submissions from disability focussed organisations that oppose the bills including notably the peaks of Women with Disabilities Australia (WWDA) and People with Disabilities Australia (PWDA) and a coalition of disability organisations (26 in total). Disability Voices Tasmania is the only disability organisation that has been invited to give evidence (8% of the 12 disability organisation submissions). This, as with the data below regarding women's and LGBTIQ+ organisations, would be even lower but for the strenuous efforts of Tasmanians to have a specific Tasmanian organisations' panel before the hearings

Attorney General's Department. Also excluded from these numbers are endorsements to submissions, for example the 34 organisations that endorsed Submission 31 from Equality Australia opposing the enactment of the package in its current form.

because of the targeted override of section 17(1) of the *Anti-Discrimination Act 1998* (Tas)

There are 12 submissions (mostly organisations) that expressed concerns based on the impact of the bill on women and women's rights. It is notable that there are only two (17% of those 12) invited to present evidence to the inquiry. In terms of LGBTIQ+ submissions, there are 29 opposing the bills, but only 2 (7% of those 29) invited to give evidence.

These imbalances flow through in respect of other groups such as organisations representing lawyers,[4] medical groups and groups representing young people and older members of the Australian community.

In summary, 81% of the submissions received oppose the bill in respect of the overreach and privileging of religion over others, of which only 14% have been invited to give evidence. Only 19% support the bill, of which 53% have been invited to give evidence. This parliamentary process seems to be further privileging certain voices of religion over all others!

Senator RICE: Alright. I particularly want to note the very limited amount of time we've had in these hearings for people with disability, which I think has been a real lack. I want to ask Ms Strahan about the issues that people with disability have regarding faith based services being able to preference workers and clients from the same faith…

From **DISABILITY VOICES TASMANIA**: There are three aspects to our concerns.

Firstly, people with disability have the right to seek out support staff that specifically meet their personal needs, especially where the relationship involves personal care. Service providers need to recruit a range of people from different backgrounds and with different skills and personal traits in order to match up staff with individuals.

In many situations and locations the only service provider available is a religious-based organisation. If staff working for those organisations have to share the same belief as the organisation the chances of diversity and choice for people with disability will be reduced.

Second, despite the introduction of NDIS and the move towards people with disability having choice and control over their lives it remains true that there is a power imbalance between people with disability and people and organisations providing services. If service providers only recruit people of the same expressed

[4] There are four submissions from legal academics or legal groups thar support the package, of which three gave evidence (75%). There are 21 submissions from legal academics or legal organisations opposed to the package, of which two (10%).gave evidence.

faith as the organisation there is a greater chance that people with disability will be subject to influence, either conscious or unconscious, in support of that faith.

Third, services are scarce, and in rural areas of Tasmania there is often only one service provider often providing services for parents, youth, people with disability and aged care. This could create a pressure on people to agree to the sentiments of that faith in order to get services.

Senator RICE: … My second question, which I'm sad I have to also put on notice, is about the fact that religious schools in Tasmania haven't been able to discriminate against same-sex-attracted and gender diverse staff. There have been some comments today about how you've actually got more inclusive schools and you've got staff who feel more secure in their work, but have there been complaints or great concerns from those Tasmanian religious based schools? Has the sky fallen in over the last 25 years because of that?

From **EQUALITY TASMANIA**: Protections against discrimination exist in regard to attributes ('grounds') such as sexual orientation, gender identity, relationship status, disability and other grounds.

There is an exception in the Tasmanian Act allowing discrimination on the ground of the religious affiliation, practice and belief of the person being discriminated against. When this was enacted it was made clear by the Government of the day that it was not to be used as cover for discrimination on any other grounds.

Mr Croome has monitored the situation closely since the protections were enacted 24 years ago and in that time he has not witnessed any concern expressed publicly by faith-based school principals, teachers, parents or students, nor has he witnessed any concern from any member of the clergy or laity of any religious community.

No attempt has been made in the Tasmanian Parliament to change the current balance of protections under the Act, nor have any campaigns risen up to make that change.

In short, the current protections are a matter of settled law in Tasmania with no desire expressed by anyone to revisit them.

It is bewildering to us all why the Federal Government wants to override these protections. The best explanation we have is that the fact the Tasmanian law works so well and is so widely accepted sets a precedent the Federal Government does not want.

In other states, some faith leaders and politicians have declared discrimination protections for staff in faith-based schools to be an attack on faith and generally behave as if the sky will fall in if such protections are enacted.

The fact the sky has not fallen in over Tasmania terminally undermines such fear-based claims.

We also note the significant number of people employed by faith-based organisations, particularly in the community services sector and in education. We refer the Committee to the submission of the Australian Discrimination Law Experts Group (Submission 33 to this Inquiry), in particular pages 15 to 16 in which the submission sets out materials from the Catholic Church and from other independent sources that indicate that the Catholic Church through its numerous organisational arms employed, in 2017, over 220,000 people making it an organisation that provides services and educates millions of Australians every day and that is the 'largest single group of employers in Australia – bigger than Woolworths and bigger than the four biggest banks in Australia combined'. The materials from the Catholic Church also indicate that in 2017 the significant majority of those employees (77%) were women. The submission also notes that in 2020 there were a further almost 80,000 people employed in independent (non-catholic) schools in Australia, again of which a significant majority (67.6%) when women. As such the impact on employment, including in Tasmania, is potentially significant and will disproportionately affect the employment of women.

Senator O'NEILL: … Because Mr Croome has put on the record a view, particularly about section 17(1) and the Bishop Porteous matter, could I ask you to take a close look at the submission of the Australian Human Rights Commission to this committee. It talks about the particular Tasmanian legislation and it puts a view about what happened in that particular instance. It's a little different from how it was characterised by you, Mr Croome, but I would be most interested in your response to that. And perhaps, for your information as you commence reading it, note that the Australian Human Rights Commission indicated their belief that section 12 overrides were more symbolic than actually effective. They and the Law Council also raised concerns about forcing legislation to a federal jurisdiction and the costs attached. So if you could take on notice a response to that particular document from the Australian Human Rights Commission, and in particular in relation to 17(1) in Tasmania, I would be most appreciative...

We respectively disagree with the characterisation by the Australian Human Rights Commission (AHRC) of the complaint and the Tasmanian provision.

The AHRC appears to be saying that because section 17(1) of the Tasmanian *Anti-Discrimination Act* (1998) and section 12 of the Religious Discrimination Bill both have good-faith defences, there is no actual restriction of section 17(1) by the Religious Discrimination Bill.

However, this fails to comprehend the nature of defences in relation to section 17(1). For a person to defend conduct that on its face is discriminatory in breach of

section 17(1), it must be done in good faith and for a purpose in the public interest. This is the same test for a section 19 defence.

We note Justice Michael Brett's comments regarding the public-interest defence that applies to section 17(1). In his decision regarding an appeal against an Anti-Discrimination Tribunal decision in the case of Williams v 'Threewisemonkeys' & *Durston* [2015] TASADT 4 (30 June 2015), His Honour Justice Brett referred to the public interest test as an objective test, as is the reasonable-person test in section 17(1): *Durston v Anti-Discrimination Tribunal (No 2)* [2018] TASSC 48 (4 October 2018) [75]:

> It is not enough that the communication be about a matter of public interest. It must be for a purpose *in* the public interest [my emphasis]. Freedom of expression itself is not an adequate purpose. It is not the subjective purpose of the speaker that is relevant to this assessment. There must be an objective assessment of "whether the purpose is genuinely in the public interest".

The fact there is an objective test of the conduct on section 17(1) and an objective good faith and public-interest test in the defence to conduct under section 17(1) in the Tasmanian Act clearly means that complaints that could be upheld under section 17(1) as it currently stands, would not be upheld if the much lower test of the statement being in good faith and being subjectively of the person's own religious views in the Religious Discrimination Bill were to apply.

The override of the Tasmanian law by the Federal Bill is not illusory. It would have a substantive and negative impact on the capacity of Tasmanians to make complaints under section 17(1).

We endorse the concerns raised by both the AHRC and Law Council (along with others) about forcing complaints to a federal jurisdiction and the costs attached. In this regard we urge the Committee to consider our response to a question on notice from Senator Bragg in the other current Parliamentary inquiry (set out in full below):

Senator BRAGG: Please estimate an average cost an Australian would face to access a court rather than a state tribunal to hear a claim under the proposed law?

It is important to put the response to this question in context. Discrimination law across Australia has been designed to enable participants to deal with their claim or response without needing to engage a lawyer. This is done through an early focus on dispute resolution in the form of conciliation. A significant percentage of all complaints that proceed beyond the initial assessment are resolved by conciliation conducted by the relevant statutory authority. The more complex the questions of law in a complaint, including any possible defences, the less likely it is for a complaint to resolve through the conciliation process.

It is currently rare for a complainant to proceed to the tribunal process at the state or territory level or court process at the federal level. For example, the average number of complaints dealt with by the Anti-Discrimination Commissioner in Tasmania per annum since 2009–10 is 151. The average number referred to the Tribunal (an automatic referral) is 21, of which on average 7 are withdrawn by the complainant. On average only 6 cases per annum (of the average 151) actually go to a hearing on the substance due to withdrawal and other factors.

Even in a tribunal setting, it is relatively uncommon for individual complainants to have legal representation, particularly for those in the less populous states and territories. There is little or no access to legal aid assistance or pro bono assistance in the less populated states and territories, and low levels of the requisite legal expertise to deal with complex discrimination cases. Where a complaint does proceed to some form of hearing, respondents are at least twice as likely to be represented as complainants. For example, looking at the cases finalised by the tribunal since 2016, there have been 52 published decisions in total, in these the complainant was represented in 17 and the respondent in 38. Twenty of the cases were hearings on the substance of the alleged breach, in which 4 complainants were represented and 12 respondents. We note the important work of the Law Council of Australia on barriers to access to justice which identified many of those groups protected under discrimination law, eg, people with disability, Aboriginal people and Torres Strait Islanders, members of racial minorities, as being among those most disadvantaged in terms of access to justice: The Justice Project <https://www.lawcouncil.asn.au/justice-project/final-report>.

Some impacts of the complexity of clause 12 will be:

Firstly, the complaint is much more likely to have to proceed to a formal legal dispute resolution process before a Constitutional Chapter III Court (noting that for this to happen, all state and territory legislatures will need to amend existing provisions to enable this). The complexity of the questions that arise in a case where the respondent is relying on clause 12 as a defence to a claim means that the parties would inevitably need legal representation and there would be significant additional preparation and hearing time just to deal with this aspect of the claim. We have had advice that it is likely to include needing up to three additional days of hearing as well as an additional week of preparation by both a barrister and a legal practitioner. The estimated additional legal costs would be in the order of $50,000. In addition, for claims proceeding in the less populated states and territories there are the costs of travel and accommodation for at least the barrister for the hearing days.

Second, given the uncertainty of how clause 12 will play out, the complainant runs a much more higher risk of losing and therefore having costs awarded against them in the court proceedings. This contrasts with the situation in the state and territory anti-discrimination tribunals, where there is a presumption against costs being awarded). If cost are awarded, the additional cost to the losing party would be approximately

the same amount again, that is another $50,000. It should be noted that for a complainant legal costs are not tax deductible, while they may be deductible if the respondent seeking to rely on a clause 12 defence is an organisation.

We note that many people who make complaints under discrimination law, if not most, are either on some form of pension or benefit, such as a disability support pension, or a low-income earner. To put the amounts above in context, a maximum disability support pension for a single person is just over $25,000 per annum (for a couple the amount is just over $38,000.) This includes an energy supplement of just over $350 per annum (just over $550 per annum for a couple). It also includes a maximum pension supplement of just over $1850 per annum ($2800 per annum for a couple). The base rate pension for a single person is just under $23,000 (just under $34,700 per annum for couples).

As such the cost of dealing with a clause 12 defence would be at least twice a single pensioner's entire annual benefit, with the risk of the equivalent of an additional two years of benefit if unsuccessful in their argument. This is not a risk that is in any way feasible for a person on limited assets to face.

Unsurprisingly many people choose to pursue their claims under state and territory discrimination laws because there is a presumption against a costs order in the event of losing in the tribunal. This option becomes unviable when a legal issue, such as a federal defence in the form of clause 12, is raised as the case therefore must proceed in a Chapter III Court with the costs risks enlivened.

Thank you for the opportunity to provides these further responses.

Yours sincerely

Robin Banks
on behalf of

Disability Voices Tasmania
Equality Tasmania
Multicultural Council of Tasmania
Unions Tasmania
Women's Health Tasmania