

**SENATE LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION
COMMITTEE**

INQUIRY INTO THE RELIGIOUS DISCRIMINATION BILLS

**RESPONSES TO QUESTIONS ON NOTICE FROM THE AUSTRALIAN
INDUSTRY GROUP**

27 January 2022

The following Question on Notice was asked by Senator O'Neill at the public hearing for the above inquiry on 21 January 2022:

Senator O'NEILL: Did you hear any of the submissions of the Australian Human Rights Commission last week?

Mr Smith: I didn't. I did listen to some of the hearings last week, but I didn't listen to that one.

Mr Barklamb: Likewise.

Senator O'NEILL: So you may need to take this one on notice. The Human Rights Commission evidence was quite interesting. Could you have a look at some of their comments around section 12, which you've indicated you want removed, and give us your view on that? In light of that, could I also ask you to have a look at the concerns that are raised in submission 47 to the Parliamentary Joint Committee on Human Rights by Professor Twomey which go to the constitutionality of the bill, as well as the corrective to that that was advanced yesterday by Professor Aroney in his submission. At appendix B, he suggests redrafting clauses 11 and 12 to overcome the uncertainty of this bill potentially being unconstitutional. The reason I ask you, even though you're not lawyers, is that any uncertainty in the context of business practice always means cost and delay, and we can ill afford that given the pressures in the economy at the moment and the pressures on businesses. I particularly think of small businesses in regional parts of the country, which I know that you represent with vigour. If you could take those on notice, that would be important.

Response from Ai Group:

At the public hearing on 14 January 2022, the Australian Human Rights Commission (AHRC) made the following submissions about section 12 of the Bill in their Opening Statement (as recorded in the Proof Hansard):

Prof. Croucher: ...The most problematic aspect of the Bill is clause 12 which would permit statements of belief to be made that would otherwise contravene anti-discrimination law. No case has been made that this clause is legally necessary to protect genuine statements of belief. While the clause may provide more confidence to people that they can speak freely about their faith, the same effect will be achieved by the introduction of prohibitions against discrimination on the basis of religious activity, including speech.

By contrast, the only legal impact of clause 12 will be to allow currently unlawful statements to be made. This has the real potential to reduce the dignity of vulnerable people who rely on the law for protection. It is also likely to result in additional time, cost and complexity if this new federal defence is raised in response to a claim under State discrimination laws.

The Commission's view is that clause 12 seeks to favour the manifestation of religious belief over protections against discrimination, and elevates the protection of religious speech over protection for other kinds of speech. It is contrary to the objects of the Bill which recognise the indivisibility and universality of human rights.

Ai Group has not identified any inaccuracies in the above submissions of the AHRC. We refer to the preferred position that we expressed in our Opening Statement at the public hearing, as follows:

Mr Smith:Our preferred position is that proposed section 12 of the bill would be removed completely, excising the statement-of-belief provisions. But, if that's not achievable, it's very important that an additional defence be included in proposed section 39 of the bill to enable employers to take reasonable management action to deal with unreasonable religious activity in the workplace. We've proposed an appropriate amendment in our submission. The words that we've proposed come from the antibullying provisions in the Fair Work Act, and they would allow employers to take reasonable management action in a reasonable manner. And under those provisions that type of reasonable action is not bullying.

Similarly, action that an employer might need to take to deal with any unreasonable activity relating to religion in the workplace should not be seen as discrimination.

With regard to the concerns raised by Professor Twomey and Professor Aroney about the Constitutionality of the Bill, we note that the Attorney-General's Department has confirmed that the Australian Government has received legal advice that the Bill is Constitutional.¹ We have no reason to believe that the Government's advice is not correct.

¹ Evidence of Mr Andrew Walter, Acting Deputy Secretary, Integrity and International Group, Attorney-General's Department, Public hearing on 27 January 2022, Proof Hansard, p.78.