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Answers to Questions on Notice

Parliamentary Joint Committee on Human Rights Inquiry into the Religious Discrimination Bill 2021 and Related Bills hearing on 14 January 2022

The Institute for Civil Society (ICS) is a social policy think tank. Established in August 2016, ICS seeks to:

1. Promote recognition and respect for the institutions of civil society that exist between individuals and the government. Included in this space are clubs, schools, religious organisations, charities and NGOs.
2. Uphold traditional rights and liberties, including the freedoms of association, expression, conscience and religion.
3. Promote a sensible and civil discussion about how to balance competing rights and freedoms in Australian society.

ICS provides the following answers to questions on notice taken at the hearing on 14 January 2022

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Senator O'Neill

Question: Also, to Freedom for Faith—but please feel willing to participate in this, Mr Sneddon: will you be participating in the Law Reform Commission inquiry, if given that opportunity? If so, will you be arguing that, rather than maintaining the exemptions in the Sex Discrimination Act in relation to staff, a better approach would be to amend the Fair Work Act? Can I also ask you to respond to paragraphs 55, 56 and 57 of the Australian Human Rights Commission submission, about the symbolic nature, rather than substantive nature, of section 12, and to the claims that the Australian Human Rights Commission make about the Tasmanian situation, which is much discussed. They make some very specific assertions there about how section 12 would not prevent the advance of what might be described by opponents as vexatious claims. A detailed response to those particular sections of the Australian Human Rights Commission submission would be most helpful. Thank you.

Answer:

1. Yes - when the ALRC resumes its inquiry, *Review into the Framework of Religious Exemptions in Anti-discrimination Legislation*, which is due to report not later than 12 months from the date the Religious Discrimination Bill is passed by Parliament, the Institute for Civil Society intends to make a submission to the inquiry.

2. In this inquiry we have argued that religious bodies should not be limited by anti-discrimination law in being able to choose to hire, retain and preference staff whose religious beliefs and activities conform to those of the religious body. We would support that principle being enacted in the Religious Discrimination Bill and the Fair Work Act as a national statutory right which would override inconsistent State and Territory legislation.

   The ALRC will look at the broader issue of when should religious bodies be able to preference for staff whose conduct conforms to the beliefs of the religion when that implicates anti-discrimination protected attributes other than religious belief and activity. That is a more complex issue. All religions have moral conduct rules (positive and negative) which believers are asked to comply with e.g. to care for the poor and the sick, to seek justice for all, to honour and care for their spouse and children and their parents when they are old, to avoid greed and lust and gambling, to only have sexual intercourse in man-woman marriage and abstain from sexual activity outside marriage, to be honest in business dealings and not exploit people, to be generous and a good steward of resources.

   In some cases those moral conduct standards are in tension with secular progressive values implicit in another protected attribute under anti-discrimination law e.g. a person's relationship status, or lawful sexual conduct or occupation. So the practical issue is whether a religious body employer should be able to choose to employ, retain or preference staff whose conduct does not conform in material respects to the moral conduct rules of the religion where that conduct is a protected attribute under other anti-discrimination law. In broad terms, this can be viewed as a question whether the State will require the religious body to give up applying its moral conduct rules in employment decisions and instead mandate the use of secular progressive values included in anti-discrimination law or whether religious bodies can continue to preference in employment for conformity to the religion's moral conduct rules.

For example, a religious body or religious school or college or charity employs or contracts a person to work as a pastor or teacher or employee. If the body later discovers that the person:

> (a) has a (legal) second occupation which is contrary to the moral conduct rules of the religion (e.g. payday lending to people who can't afford it, sharp business practice like aggressive debt collection, professional gambler, production or sale of legal pornography, sex work, providing services for a brothel, or for some religions, producing or selling pork for human consumption).
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> (b) is living in an unmarried de facto relationship (whether opposite sex or same sex) contrary to the moral conduct standards of the religion; or
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> (b) is engaging in any lawful sexual activity such as sexual relations outside marriage (whether opposite sex or same sex) including adultery or a serial one night stands contrary to the moral conduct standards of the religion;

can the religious body apply an employment detriment (e.g. change in duties or status or termination) to the person if the person will not change their conduct or will the religious body be penalised under anti-discrimination law for doing so?

This issue is not simple. On the one hand liberal individualism untethered from community moral rules would maximise liberty in the choice of occupation and sexual activity. But why should a religious body representing a religious community with clear moral conduct rules be bound by such a conception of liberal individualism and not be able to discipline an employee (or member) like a pastor or teacher who turns out to be a serial adulterer, a chronic (legal) sexter, or who has a second job as a (legal) loan shark or seller of legal pornography or professional gambler?

We have not yet formulated our approach to the ALRC inquiry beyond noting the complexity of the issue as above.

3. Please comment on paragraphs 55 to 57 of the AHRC submission (Submission 97) including whether clause 12(1)(a) has mainly symbolic importance. Paragraphs 55 to 57 state:

> *54. In this context, the Commission is concerned about a provision that establishes a 'statement of belief' as a defence to any antidiscrimination law. This is so for a number of reasons.*
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> *55. First, the perceived need for this provision is symbolic rather than substantive. This issue is expanded on in section 5.2 below. The Commission is not aware of any cases where genuine statements of belief have been held to be contrary to Australian anti-discrimination law. Rather, the concern expressed is that potentially unmeritorious complaints could be made that engage the jurisdiction of an antidiscrimination Commission and that this, in turn, creates a chilling effect.*
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> *56. Secondly, the establishment of a new defence cannot prevent unmeritorious complaints from being made. If a complaint is made under anti-discrimination law it will need to be dealt with by the relevant complaint handling body by considering the substance of the complaint and all relevant and available defences. The same issues now complained of will still arise. The Commission considers that the real question is whether those bodies have sufficient powers to deal appropriately with unmeritorious complaints.*

> *57. Thirdly, there is a real danger that establishing a new defence to antidiscrimination law will have significant adverse consequences that are unintended—and unnecessary. While the drafters of clause 12 have sought to limit the kinds of statements of belief that qualify for protection, the clause will only have any legal effect at the margins— where conduct that is currently unlawful discrimination will now be lawful by virtue of clause 12 (see section 5.1 below). Those who are advocating for this change in good faith no doubt intend to make statements that are not discriminatory. However, a review of actual complaints of discrimination made to the Commission indicates that the clause will be available in a range of cases that may not have been anticipated by its proponents and which have the potential to reduce real protections for people's dignity in a range of areas of public life*
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> *(see section 5.3 below).*
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> *58. Fourthly, the provision is likely to lead to significant additional time, cost and complexity when dealing with matters under State discrimination laws, because it would mean that specialist tribunals that ordinarily hear discrimination matters would need to transfer the complaints to a court so that the federal defence could be considered (see section 5.4 below).*

Answer: The reason this provision appears in the Religious Discrimination Bill is that some other anti-discrimination and offensive conduct provisions (or overbroad interpretations of them) have been used in unmeritorious lawfare complaints to impose costs and inconvenience and threat of State sanction on religious people by who made moderate, non-vilifying statements of belief. Examples are given below. In other words, the misuse of offensive conduct and anti-discrimination provisions by some complainants opposed to some religious views and the facilitation as opposed to termination of those complaints by some anti-discrimination commissions, has amounted in practice to a form of discrimination by legal process misuse against religious people who make moderate, non-vilifying statements of belief. Such legal process misuse discrimination is not a type of discrimination which is covered by or can be complained of under other anti-discrimination laws, so a limited specific provision has been introduced in this Bill to deal with this limited specific type of discrimination. To be non-discriminatory, the Bill protects on the same basis people who make moderate, non-vilifying statements of unbelief.

The ALRC suggests the perceived need for clause 12 is symbolic rather than substantive. That is certainly not true of clause 12(1)(b) which responds to real cases of people who made moderate, non-vilifying statements of belief and had to deal with months of compulsory conciliation under the overbroad "insult or offend" provision in section 17 of the Tasmanian Antidiscrimination Act. Nor is it true of clause 12(1)(c) which allows the prescribing of any similar overbroad "insult or offend" provisions which are contemplated in current law reform processes in Victoria, Queensland and Western Australia.

At least 4 complaints[1] have been made under section 17 of the Tasmanian Antidiscrimination Act by trans activists or atheist activists who complained that certain statements of religious beliefs *offended, humiliated, intimidated, insulted or ridiculed another person on the basis of a relevant attribute such as the sexual orientation of the person.*

[1] Complaints against Archbishop Julian Porteous concerning the Catholic Bishops booklet Don't Mess with Marriage, complaints against Rev Campbell Markham for preaching, and 2 complaints against David Gee for street preaching including one still current.

In the case of Archbishop Porteous the statements were in a Catholic Bishops Conference booklet on the Catholic view of marriage distributed to parents of students in Catholic schools. A non-Catholic trans-activist objected to the statements of traditional Catholic teaching and complained to the Tasmanian Antidiscrimination Commissioner under section 17.

The 4 complaints were accepted by the Tasmanian Antidiscrimination Commissioner which entailed months of costly and ultimately fruitless conciliation before the complainants dropped the complaints (in 3 complaints, we understand the fourth is ongoing). These complaints about moderate statements of standard religious teaching should never have been accepted. These cases show the overbreadth of section 17 and the Commonwealth is justified in overriding section 17 as it applies to moderate, non-vilifying statements of belief and unbelief.

The content of such teaching may offend or insult some people who disagree with and live differently to the teaching (there are many age-old disagreements on sexual morality and many age-old disagreements on religious truth). But if offence or insult is said to arise from the content of long-established religious (or atheist) teaching that should not be a basis for using the law to shut down such teaching. The risk of being offended or insulted by an idea or teaching is a necessary consequence of living in a pluralistic democracy and the price of freedom of expression. In most cases, the appropriate responses are to discuss the idea, rebut it or ignore it or use social sanctions, not to have the State use the force of law to silence the idea and punish its proponents.

As Professor Nicholas Aroney has suggested, the human rights issue is with section 17 of the Tasmanian Act, not clause 12 of this Bill:

> *Australia's obligations under article 18.1 and 19.2 of the ICCPR are to ensure that all Australian laws, including State and Territory laws, do not unjustifiably restrict freedom of religion and freedom of expression. Subsection 17(1) of the Tasmanian Anti-Discrimination Act 1998 is the broadest provision of its kind in Australia. ...*
> *This provision goes considerably further in constraining freedom of expression than is contemplated by article 20.2 of the ICCPR, which addresses hate speech in carefully defined terms, i.e. "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence". An Expert Workshop convened by the UN High Commissioner for Human Rights concluded in its 2013 Report that article 20.2 deliberately establishes a "high threshold" because "as a matter of fundamental principle, limitation of speech must remain an exception". Read together, articles 19.2 and 20.2 require that any restriction of hate speech must be "clearly and narrowly defined", "least intrusive", "not overly broad" and "proportionate" so as to ensure that freedom of expression is not unduly limited.[2] It is consistent with these principles for the Commonwealth to form the view that subsection 17(1) of the Tasmanian Act constitutes an unjustified restriction on freedom of expression which the Commonwealth is obliged to protect under articles 18.1 and 19.2 of the ICCPR.*

[2] *Rabat Plan of Action on National, Racial or Religious Hatred* (*Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred*, Appendix) (11 January 2013) UN Doc A/HRC/22/17/Add 4, [18], [21].

The process in these cases is the punishment. There is a real cost to the respondent to a complaint in time, distraction, anxiety, seeking advice and preparing for and attending conciliation and preparing position statements and submissions for conciliation and possible future tribunal hearings, ultimately to have the complaint withdrawn. Where the complaint is about a disagreement with the content of a moderately expressed, non-vilifying statement of belief or unbelief, it should not be accepted for conciliation and the respondent exposed to these costs.

The former Tasmanian Commissioner, Ms Banks, as quoted by the AHRC at para 96, appears to have thought she was doing the parties in the Porteous complaint a favour:

> *So, I think it did give people an opportunity to perhaps hear each other's perspectives in ways that they would not have otherwise. It creates a space for people to come together.*

Eight months (September 2015 to May 2016) of "space" to compulsorily attend, hear and respond to a non-Christian's objections to the moderate expression of 2000 year old church teaching on sexuality and marriage which the Archbishop was not at liberty to change may have seemed to the Archbishop less like a favour and more like a punishment and a deterrent to publicising such teaching again. Perhaps people could just agree to disagree about this type of religious teaching when it is expressed in a moderate non-vilifying way rather than using legal process to censor views?

The AHRC says at para 97 of its submission:

> While the Commission acknowledges the potential for cases of this nature to have a possible chilling effect on the free expression of views, particularly in the absence of a finding by a Tribunal, if a good faith statement of religious belief would not actually breach s 17(1) of the Tas ADA then the additional protection *claimed* to be provided by clause 12 of the Bill is more illusory than substantive.

That comment misses the point. Even assuming a moderate, good faith statement of religious belief would not be held to breach s 17(1) of the Tas ADA in a court case, in practice section 17 imposes costs and stress on respondents, because the Tasmanian Antidiscrimination Commissioner accepts and lets unmeritorious complaints run until the complainant drops them. So a solution is needed outside the Tasmanian Antidiscrimination Commission. Clause 12 provides that solution in the form of a federal defence which effectively requires the Commission to decide whether it is convinced enough of the merit of a complaint that it will defend a court case to establish that the statement is not a moderate, non-vilifying statement of belief.

4. **Statements as discriminatory conduct - clause 12(1)(a)**

The Commission said at paras 98-99 of its submission:

> *98 Statements may constitute discrimination if they amount to less favourable treatment on the ground of an attribute protected by discrimination law. For example, statements, regardless of whether there was any other accompanying conduct, can amount to racial discrimination39 or sex discrimination.40*
> *99. The Commission will also accept complaints based on statements in other areas including disability discrimination.*

The cases cited by the Commission in footnotes do not seem to justify the breadth of its view that one-off offensive statements can constitute discrimination. The view of the law in the Commission about statements seems to be much broader than the law laid down by court cases.

The AHRC's examples show that it accepts some offensive statements (none of the examples given are of statements of religious belief) as being sufficient to constitute discrimination. That shows that the protection in clause 12(1)(a) of moderate, non-vilifying statements of belief or unbelief from discrimination law is needed (at least in Commissions if not in court) and is of substantive effect and not purely symbolic contrary to the AHRC's opinion.

5. Need for court to assess federal defence in clause 12

Finally, it is true that based on current High Court rulings, State administrative tribunals which are not Chapter 3 courts cannot determine the application of federal statutory defences to claims in such State tribunals - those defences have to be heard in a Chapter 3 court. But the alternative to this admitted inconvenience is that the Commonwealth must never provide a federal defence to a State tribunal action. In fact the Commonwealth creates contrary or qualifying rights to State law all the time.

In practice, once one court case has established that the federal defence in clause 12 applies to override a State anti-discrimination law, in future cases complainants, respondents and the State Tribunal will be mindful of that precedent and conduct themselves accordingly. In general, complainants and State Tribunals will not spend time and resources on lawyers to re-litigate matters already settled by a court precedent. Predictions of endless court litigation over clause 12 are unrealistic.