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2 February 2022

Senator the Hon Sarah Henderson
Chair
Senate Standing Committee on Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600

Dear Senator,

Re: Religious Discrimination Bill 2021 Public Hearing — Opening Statement and Questions on Notice

Thank you for the opportunity for the Australian Chamber of Commerce and Industry (ACCI) to appear before the Senate Legal and Constitutional Affairs Legislation Committee on 21 January 2022 to assist the Committee's consideration of the religious discrimination bills currently before the Parliament.

We appreciate the Committee's consideration of the perspectives and practical feedback being provided by Australia's business community. As indicated in our evidence of 21 January 2022, it is critically important that the input of duty holders, the managers of contemporary workplaces seeking to avoid discrimination, and respondents to potential litigation, be taken into account.

Opening Statement: As indicated by Mr Barklamb at the commencement of the public hearing, we attach our opening statement which we request be recorded in Hansard.

Question on Notice – AHRC and academic submissions: Senator O'Neill requested ACCI respond on notice to evidence from the Australian Human Rights Commission (AHRC) on clause 12 of the Religious Discrimination Bill 2021 (Submission 32) and the submissions of Professors Nicholas Aroney (Submission 145) and Anne Twomey (Submission 31) regarding constitutional concerns.

Human Rights Commission: ACCI is particularly concerned about the circumstances described in paragraph [58] of the AHRC submission, where it is argued that clause 12 'is likely to lead to significant additional time, cost and complexity when dealing with matters under State discrimination laws'. It is employers' experience that delays in bringing matters or engaging with the evidence makes them more difficult to address and potentially more costly. If such concerns were widely shared and found to have merit, reconsideration may need to be given to the clause in whole or part. However, this may be a matter upon which there are differing views and which Government has already considered in drafting the clause.

The AHRC's central argument is that the additional cost will be a consequence of needing to refer matters brought in state and territory tribunals to Commonwealth courts due to jurisdictional limits that may prevent respondents from relying on clause 12. This supports ACCI's wider observation that there should be a single Commonwealth framework to the exclusion of state and territory tribunals and statutes. This genuine reform would avoid any such issues arising from the jurisdictional limits of state tribunals, 'an ongoing issue requiring broader legal reforms' according to Professor Nicholas Aroney (Submission 145, [11]). One single anti-discrimination framework at the federal level would allow all claims to be dealt with in federal tribunals without any requirement for referrals to or from other bodies, a process that imposes unnecessary costs and delays.

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However, we are uncertain about the extent to which the issue of referrals from state tribunals as a direct consequence of the operation clause 12 would apply to businesses. The most foreseeable anti-discrimination disputes involving clause 12 and employers appears to be circumstances in which management action is taken in response to an employee's statements of belief, which the employee then alleges is discriminatory. In such scenarios, it does not seem that the employee, as the complainant, would commence proceedings against their employer in a state tribunal if they intend to rely on the protection offered by clause 12, given its existence in federal jurisdiction. Therefore, any cost and complexity of referral to a federal court, as suggested by the AHRC, does not appear a primary or foreseeable issue for employers. Rather, the cost and complexity for employers more so lies in the inflexible, unclear and unreliable exemptions offered to them in the Religious Discrimination Bill 2019. For this reason, ACCI encourages the Committee to recommend some or all of the amendments suggested in our submission to this inquiry.

Constitutional underpinnings: In response to the submissions of Professors Aroney and Twomey, ACCI would have significant reservations at any legislation that rests on a shaky or questionable constitutional foundations, particularly where resolving constitutional uncertainty would impose significant costs and uncertainty on private sector respondents to litigation and delay or obscure the practical management of workplaces consistent with organisations' values and legal responsibilities.

Businesses require certainty in their legal obligations and in any exemptions in anti-discrimination law they may need to rely upon. The vast majority of small business owners are lay persons with no legal experience and without practical access to legal services, particularly those necessary to address any substantial constitutional matter. Few businesses can or should ever be asked to assume responsibilities to resolve the legal foundations of legislation.

However, despite potential uncertainty for reliance on the external affairs power if provisions in the Bill are held to be substantially inconsistent with the ICCPR, Professor Twomey's submission notes that other constitutional powers, such as the corporations power in s 51(xx), 'may provide constitutional support for particular provisions, such as those dealing with employment.' Therefore, it seems unlikely that the discrimination in work provisions would be found to be invalid, especially noting the extent to which they replicate provisions in the existing *Fair Work Act 2009*.

ACCI supports the Committee emphasising to the Senate the need for constitutional and legal certainty for employers, employees and all who potentially engage with such legislation. During our economic recovery, all legislation should be scrutinised through the lens of ensuring that our job creators and engines of economic growth are not further debilitated or exposed to any avoidable uncertainty or additional cost.

We apologise for any delay in this correspondence and hope our input of is of assistance to the Committee in the finalisation of its report due to be published on 4 February 2022.

Yours sincerely,

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Australian Chamber of Commerce and Industry