Freedom for Faith
Response to questions on notice from PJCHR
Due 22 Jan 2022

Questions were asked as follows:

"**Senator O'NEILL** The Freedom for Faith submission argues that the concerns around the right of religious schools to preference staff who support their religious beliefs—which is one of the more contentious aspects of the bill—are best dealt with by making amendments to the Fair Work Act….
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….

Senator RICE: Can I put another question on notice, for Freedom for Faith: can you give us the list of all your members and financial supporters, please?"

Answers

1. In our submission to the Committee, in commenting on the "over-ride" in cl 11 of the RDB designed to deal with the situation that some States and Territories have enacted, or may enact, rules limiting the right of religious organisations to apply their faith commitments in making employment decisions, we noted:

   > Our view is that this would best be achieved by amendments to the Fair Work Act, which already deals with employment by faith-based institutions, to establish a nationally consistent principle, consistent with that contained in clause 7 of this Bill, to the effect that religious faith-based organisations may prefer to select staff who adhere to its faith and mission, and may require adherence to codes of conduct consistent with that faith.

2. Yes, when the ALRC resumes its inquiry, *Review into the Framework of Religious Exemptions in Anti-discrimination Legislation*, due to report 12 months from the date the Religious Discrimination Bill is passed by Parliament, Freedom for Faith would look forward to an opportunity to make submissions to that inquiry on issues relating to religious freedom.
3. Freedom for Faith has long argued for a nationally consistent approach to the issue of employment in faith-based organisations. Logically, this is best done through the Fair Work Act, which is the main federal law on employment issues, and which already contains religious exemptions. It employs language that is somewhat dated and deficient and could do with reform. The Fair Work Act may not, however, be the best place for dealing with issues concerning volunteers. In any inquiry concerning

religious exemptions in federal law, it is important that close attention be paid to the interaction between the Fair Work Act and Commonwealth, State and Territory anti-discrimination laws. The Board of Freedom for Faith will settle on its position in response to the ALRC inquiry once it has seen the issues raised by the ALRC Discussion Paper.

4. In its submission (No 97) to the Committee the Australian Human Rights Commission recommends that cl 12 of the RDB not be enacted (see para [125] of their submission). The comments at paras [55]-[57] provide an overview of their reasons for opposing cl 12. In the context of these brief responses to committee questions it is not possible to provide a detailed response to the AHRC reasons (though, to be clear, Freedom for Faith supports cl 12 and its over-ride of s 17 of the Tasmanian *Anti-Discrimination Act* 1998). However, we offer the following brief comments in response to the committee questions.
    a. The AHRC submission in para [55] refers to the need for cl 12 as "symbolic rather than substantive". It says that it is "not aware of any cases where genuine statements of belief have been held to be contrary to Australian anti-discrimination law". This echoes the Freedom for Faith submission where we note that "it is really very rare that mere speech alone would amount to "discrimination" under most laws". The AHRC elaborates by saying at [73] that "people will continue to be permitted to make statements of belief that do not contravene anti-discrimination laws. Almost all genuine statements of belief will fall into this category."
    b. What the AHRC refers to as "symbolism", however, is a legitimate function of law. Even if a law will have no substantial major impact on decided cases, to enact a law protecting religious free speech is a useful reform in that Parliament is signalling that such speech should be protected. This may also serve to diminish the "chilling effect", where religious persons are afraid to speak about their faith because of a perhaps unjustified, but real, fear of the consequences. In short, symbolism can be a good thing.
    c. One of the problems faced in this area has been that it is possible for claims of "discrimination" to be made which are not legally justified. While of course we support the streamlining of processes for the AHRC and other similar State and Territory bodies to dispose of vexatious or unjustified complaints, as the Commission suggests at para [58], it would also be of benefit for a clear legislative preclusion of certain types of complaints, to avoid the need for the cost of dealing with such complaints at the outset. The two sets of reforms can proceed at the same time.
    d. The concern expressed in para [59] seems odd. The Commission has already accepted that few, if any, comments will amount to actual unlawful discrimination. But then concern is expressed that cl 12 will have the potential to "reduce real protections for people's dignity". With respect, comments that merely "offend" or cause someone harm to their perceived dignity, are not generally unlawful (except in the case of the Tasmanian provision noted next.) In other words, such comments are not currently unlawful, and cl 12 will not have any impact on the legal status of such comments.
5. Comment is requested on the AHRC analysis of the "Tasmanian situation", by which is presumably meant s 17 of the Tasmanian *Anti-Discrimination Act* 1998, dealt with from para [89] of the AHRC submission.
    a. The Commission does not offer its views on the litigation involving Archbishop Porteous, which is the most egregious example of the operation of

s 17 in our view. It suggests by reference to some case law that the provision is not as serious a restriction on free speech as it appears and refers to the fact that there is a defence under s 55, which protects "a public act, done in good faith, for any purpose in the public interest."

b. But, as is evident from the Porteous litigation, the fact that a superior court may possibly give a "generous reading" of a defence, did not stop a prolonged process being initiated and pursued by the Tasmanian Anti-Discrimination Commissioner. Even where the litigation was terminated by the complainant, the costs of defending the claim were borne by the alleged wrongdoer and not by the complainant. The assurances of the AHRC and others that the legislation might be read to operate in a sensible way ring hollow in light of this process.
c. While cl 12 alone would not prevent the filing of vexatious claims, a clear statement up front can at least operate to reduce the number of such claims and to provide some assurance that freedom of moderate statements of religious belief will be protected.

6. In response to Senator Rice's question, general information about Freedom for Faith and the denominations that are affiliate members is to be found on our website, https://freedomforfaith.org.au .

Associate Professor Neil Foster
For Freedom for Faith

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