

3. Question from Senator O'Neill

Mr Spencer: As far as we're aware at this stage, the situation remains the same as indicated to the previous committee. We certainly were aware of the public comments by the Attorney-General on the FamilyVoice podcast or webinar that has been referred to by other witnesses, and, if I recall correctly, we had confirmed by the Attorney-General's office, in relation to questions we put to the Attorney-General's office, that there were no amendments proposed to the legislative package that had been tabled before the parliament.

Senator O'NEILL: If you could take on notice who, in the Attorney-General's office, conveyed that information to you, so we don't name anybody publicly, that would be very helpful for me as a member of this committee. Do you have any concerns that there is a deal about 38(3)?

Following the media coverage on 2 December regarding an alleged 'deal' being made to remove section 38(3) of the *Sex Discrimination Act 1984* (CTH) as part of the legislative package for the bills being considered by the Committee, we circulated the attached media release and emailed the Attorney-General and Shadow Attorney-General in the following terms:

'Further to our Media Release, and to be abundantly clear, if the legislative package is amended to include provisions that repeal section 38(3) of the Sex Discrimination Act we will publicly withdraw our support for the proposals.

Simply repealing section 38(3) has the effect of impacting what we teach and how we operate our schools, it is too simplistic a response as made clear in 2019. That is why the ALRC was charged with undertaking its review – it needs careful scrutiny.'

After those emails we have spoken to the Attorney-General, her staff and other faith-based groups with concerns about this proposed deal. At some point through those conversations, we have formed a view

that no amendment will be introduced as part of this legislative package. With apologies to the Committee, we cannot recall the precise details of when that view was reached.

4. Question from Senator O'Neill

Senator O'NEILL: Thank you. You've indicated, in general, an agreement, which is furiously agreed, that this discrimination legislation is significant and it should advance, but there is a serious contest about sections 11 and 12. I'm not sure if you heard this morning the debate about constitutionality with regard to the submission of Professor Twomey and also concerns and debate and discussion between lawyers representing the Australian Human Rights Commission and the Law Council of Australia—very august bodies who are doing this work every day with very good practical knowledge on the ground—and a number of professors, who cite international law, about whether this is going to be an easy thing to implement or not. There are lots of concerns—not about other parts of the bill so much, although there are minor concerns about elements of it—and particularly about 11 and 12. My question to you is: given it's been so long in getting to this point, do you have a view about, for example, Professor Aroney's amendments to section 12? What needs to change, if we're going to do this bill in the coming weeks, to make sure that what is being promised in the bill actually delivers the degree of protection from discrimination that's appropriate for religious people to expect, in a way that is accessible and affordable and doesn't discriminate against other protected attributes? Do you have a view on that complex area, Mr Spencer and Mr Jensen?

Mr Spencer: I haven't seen Professor Aroney's proposed amendments, so—

Senator O'NEILL: You might provide that on notice.

Mr Spencer: Yes, I'll take that on notice and then I'm happy to come back to you. Our position is that on the face of it the bill seems clear with its intent. Over the years we've had a range of perspectives put to us around other legislation in the human rights area. It's been put to us, for example, that the recent amendments to the Victorian equal opportunity law may have a section 109 issue in relation to the broader exemptions currently in the Sex discrimination Act. It has been put to us that the Victorian law is likely to be invalid on that basis—although that remains unclear, because it's an exemption rather than a positive right. We've had put to us that the definition of gender identity in the Sex Discrimination Act is also so legally imprecise as to be unworkable and impossible to actually litigate on. There are many issues in the human rights area where lawyers will raise concerns of academic or other interest. We think the bill is clear enough, on its face, to go forward and provide the certainty that we need. If there are concerns, if there are legitimate objections to it, they will be run through the courts. That's the process we have—for better or for worse.

Senator O'NEILL: I know have you taken that on notice with regard to Professor Aroney. Could you also read that in the context of submission 47 to the PJCHR by Professor Twomey? I think it will be very interesting to get your view on where those two intersect. Mr Jensen, could you provide an answer?

As requested, we have reviewed the submissions referred to by Senator O'Neill from Professors Twomey and Aroney.

We do not consider the issue of the constitutional basis for the proposed sections 11 and 12 to be an issue where we bring particular expertise. We would generally defer to the views of those like Professor Aroney given his extensive experience and expertise.

However, as mentioned during the hearings, the intent of the legislation is clear on the face of the current drafting. Regardless of the finer academic points made by Professor Twomey, we understand that the legislation would be implemented as drafted unless litigation to challenge its constitutionality was undertaken. Accordingly, it provides a level of certainty regarding its operation.

As we also noted, similar questions regarding the constitutionality of law in this area have also been raised regarding the amendments to Victorian equal opportunity law by Associate Professor Neil Foster amongst others, Victorian proposals to further limit religious freedom rights (<https://lawandreligionaustralia.blog/2021/09/19/victorian-proposals-to-further-limit-religious-freedom-rights/>).

5. Question from Senator Rice

Senator RICE: When you saw the media coverage did you react to that? Did you contact the Attorney-General's office and say, 'Hey, what's going on?'

Mr Spencer: We wrote to the Attorney-General, to the shadow Attorney-General and put out a press release indicating our concerns around that.

Senator RICE: Did you get a response back from the Attorney-General?

Mr Spencer: I cannot recall whether we got a written response. I don't recall receiving one. That might have resulted in my previous answer to Senator O'Neill about being advised by the Attorney-General's office. That might have been the response to that. I will check and come back to you on notice.

Senator RICE: If you could take that on notice and table for the committee if you did get a response from the Attorney-General that would be most useful. You're saying that you trust the government and that there has not been a deal. That's what your evidence is. But after seeing the media reports you were obviously concerned enough to write to the Attorney-General.

As indicated above in relation to the question from Senator O'Neill, following the media coverage on 2 December regarding an alleged 'deal' being made to remove section 38(3) of the *Sex Discrimination Act 1984* (CTH) as part of the legislative package for the bills being considered by the Committee, we circulated the attached media release and emailed the Attorney-General and Shadow Attorney-General in the following terms:

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On reflection, these emails may have simply been considered to be our organisation conveying our position and not requiring a response. We have spoken to the Attorney-General, the Shadow Attorney-General and their respective staff regarding the legislation since these emails.

6. Question from Senator O'Neill

CHAIR: Senator O'Neill has a quick clarifying question, I understand.

Senator O'NEILL: I do. In light of the discussion that just ensued, I think Professor Aroney's submission with amendments would be of real interest to you. I just want to reiterate for you to have a look at that. My question, though, that I was seeking to ask as a supplementary to Senator Rice's line of questioning goes to evidence we received last week in the joint Human Rights Committee. That was in response to questioning that I asked of the Uniting Church with regard to employment processes and procedures that are fair and just around ethos as opposed to employment procedures around belief. There seem to be some language challenges about the difference between ethos and belief and how ethos is informed. Even in a church instrument like the Uniting Church, the ethos arises from the beliefs. Could you have a look at that evidence and just give your view about the sorts of questions that we're having about the right of schools to employ in line with beliefs. This is really the nub of my question: in what ways is that similar to or different from employment around ethos, in your view? I invite you, given the complexity of this bill, if you have any further submissions or particular drafting recommendations based on the evidence that emerges, it would be very helpful to hear from you.

...

Mr Spencer: Chair, just to elaborate on that briefly, for the record, we see belief as including the manifestation of a belief as it's reflected in international law. Conduct and behaviour is an intrinsic part of someone's belief, and certainly in a school context young people are very attuned to hypocrisy where actions don't mirror words. For our context, we see belief as encompassing conduct and behaviour consistent with that statement of belief.

Having read the discussion during the hearings of the Parliamentary Joint Committee on Human Rights that Senator O'Neill refers to we are not convinced that there is much to be added to our initial comments above. The 'ethos', 'nature', 'culture' or 'values' of the schools we represent, indeed the 'essence' of what they are seeking to be as a Christian learning community, is predicated upon their beliefs and manifested in their actions. Young people are very attuned to hypocrisy, merely giving 'lip service' to beliefs or values not held by the staff member is not sufficient. All educators teach out of who they are.

We trust that these additional responses will assist the Committee.

Yours faithfully

Mark Spencer
Director of ~~Public~~ Policy