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6 January 2022

Committee Secretary
Parliamentary Joint Committee on Human Rights
PO Box 6100
Parliament House
Canberra ACT 2600

Email: religionbills@aph.gov.au;

Dear Committee Secretary

**Re: Inquiry into Religious Discrimination Bill 2021, Religious
Discrimination (Consequential Amendments) Bill 2021 and Human Rights
Legislation Amendment Bill 2021 – Answer to question on notice**

I refer to my appearance before the Committee on 21 December 2021 and to the question on notice that was put to me by Senator Deborah O'Neill in the following terms:

'In the submission that has just arrived today from Equality Australia, I notice at point 3 in their submission they indicate:

"While religious belief and activity shares some similarities with other protected attributes such as race, sex, disability or age, they also differ from other protected attributes. Legislation prohibiting discrimination on the grounds of religious belief or activity needs to contend with these key policy considerations."

You are one of the few people today who's mentioned the Siracusa principles and the way in which these fundamental rights might intersect. On notice, could you critique the claims that are made about the differences between protected attributes and the fundamental nature of religious identity or not and a few other claims that are made in the document? 'Some religions are dominant while others are not.' You are a minority religion according to this. It doesn't seem that way from your evidence, I have to say, Mr Wertheim, but I am interested in your response to the claims that are made there.'

Response

1. Religious belief and activity compared to other attributes protected by law

Religious beliefs, and the activities based on them, differ from attributes such as race, sex, disability or age in at least three fundamental ways.

Firstly, by their very nature convictions and beliefs are intangible, emanating from the heart and the mind, unlike attributes such as race, sex, disability or age which emanate from a person's ethnic background, biological make-up or physical state. Convictions and beliefs, unlike these other attributes, can be debated. The significance of this distinction is that freedom of religion, including the right not to be discriminated against on the basis of one's religion, is inherently dependent on the right to hold opinions without interference, and the right to freedom of expression.

A second difference, which follows from the first, is that for many people of faith religious belief and action motivated by it are a more fundamental part of their identity than any aspects of their physical existence. Many believers are convinced that their relationship with G-d affects not only their identity, character and behaviour but also their fate and fulfilment of purpose in this life and after physical death. Hence they will sacrifice pleasures, wealth and convenience, devote themselves to acts of altruism and even endure suffering and death if necessary in order to remain true to their faith, because they believe their life and relationship with G-d go far deeper and are of far more lasting significance than their present bodily condition and earthly existence.

A third difference is that religion is not solely an attribute of an individual person. Religion is expressed and practised as much in community with others as in the personal life of an individual believer. Therefore, in contradistinction to the protection of other attributes, the protection of religious belief and activity will not be effective if it is limited only to believers as individuals, and does not also extend to the groups, including organisations, through which they live out their beliefs collectively.

In terms of the policy that should underpin legislation to prohibit religious discrimination, these are critical distinctions in our view, and we discuss their significance in more detail in sections 2 and 3 below.

Equality Australia (in [submission 31](#)), has noted other differences between religion and attributes such as race, sex, disability or age:

- The beliefs of adherents of different religions, or those who have no religion, may collide with one another in areas of public life.
- Not all such beliefs, given their diversity, can be accommodated via rules against indirect discrimination without imposing self-contradictory obligations on those who are bound by such rules.
- Religious beliefs evolve over time.

None of these considerations has operated as an impediment to the formulation of internationally-recognised principles in support of religious freedom and the prohibition of religious discrimination. For the reasons set out in our submission, and elaborated upon in sections 2 and 3 below, we believe the Bills represent a cautious, good faith attempt to deal with all of these matters in accordance with international standards to which Australia has subscribed. If the Bills are enacted, their success or otherwise in this regard will be tested in real cases. This is another reason why the legislation, like all significant new legislation, would need to be subject to periodic review. We note that clause 76 of the Bill requires the Religious Discrimination Commissioner to conduct a review of the Bills within two years after they are enacted and provide the Minister with

a report of the review. The Bill also requires the Minister to table the report in each House of the Federal parliament. We support these provisions. We believe that further reviews should be conducted at regular intervals.

2. “Dominant” and “non-dominant” religions

The submission of Equality Australia draws a distinction between “dominant” (presumably Christian) and “less dominant” faiths in Australia (p.11) and contends that the Religious Discrimination Bill contains overly broad exemptions for organisations of the dominant faith given their size and sophistication and the importance of the services they provide to the public at large.

Whilst, according to the [2016 Census](#), Christianity remains the religion with the highest number of adherents in Australia (52 per cent of the population), and major public holidays in Australia (Christmas and Easter) are Christian holidays, we believe Christianity can no longer fairly be described as “dominant” in terms of social attitudes, which are shifting rapidly. In the 2016 Census “No religion” topped the list of responses to the question on religion, leading the Australian Bureau of Statistics to [conclude](#):

“The growing percentage of Australia’s population reporting no religion has been a trend for decades, and is accelerating. Those reporting no religion increased noticeably from 19 per cent in 2006 to 30 per cent in 2016. The largest change was between 2011 (22 per cent) and 2016, when an additional 2.2 million people reported having no religion”.

With this change in social attitudes, the political influence of Christian institutions and ideas in Australia, whilst still substantial, is not as powerful as it once was. By comparison, the influence of secular-humanist ideas and, to a lesser extent, of certain minority non-Christian faiths whose communities have been swelled by immigration has grown. The views of secular humanists can at times be as much at odds with the views of adherents of non-Christian religions as with traditional Christian views, as was starkly illustrated during the debate over the legalisation of same-sex civil marriages. Rather than dominating and over-bearing the will of people from minority faiths, as Equality Australia has alleged, established Christian organisations are increasingly aligned with them on critical social and political issues.

Equality Australia nonetheless points to the significant disparity in material resources between the organisations of “dominant” and non-dominant faith communities, and the dependence of many Australians on the wide range of goods and services which Christian-ethos organisations provide, sometimes with government funding assistance, or to fill a gap in government-provided goods or services.

Equality Australia does not acknowledge that the cost to government of funding these organisations, when funding is provided, is far smaller than the government would incur if it were forced to provide substitute services, either by taking over these organisations itself, or by overburdening existing government agencies. Nor does Equality Australia factor in the extent to which a sense of religious commitment makes it possible for religious charities to draw on volunteer labour and charitable giving in order to provide goods and services that the government and corporate sectors would find it financially unviable to provide.

[The Study of the Economic Impact of Religion on Society](#) conducted by Deloitte Access Economics in 2017 found that:

- “religiosity is associated with 194,320 additional volunteers in Australia each year who collectively contribute 30.5 million hours in volunteering time... The monetary value of this volunteering time is estimated at \$339 million”;
- “religiosity brings about an additional \$142 million in donations each year”;
- “the annual value to society of volunteering and giving associated with religiosity is estimated to be \$481 million”.

It follows that religious charities that provide goods and services to the public as an expression of their religious ethos should not be expected to operate on precisely the same basis as government and corporate organisations providing similar services. They should be allowed reasonable flexibility to preserve their religious ethos in order to maintain the motivation of their officers, employees and volunteers. That may mean, among other things, giving preference in employment to people who share the organisation’s religious faith and values and may participate in religious observances together to reinforce their and the organisation’s sense of mission. In our view, this is fundamentally different to discriminating *against* another specific religion or its adherents. We deal with this issue in detail in section 2 of our submission ([Submission 19](#)).

The Bill adopts a more restrictive approach to the right of a religious body to preference adherents of that religion in the delivery of goods and services. Clause 8 of the Bill expressly excludes the right of a religious hospital, aged care facility, accommodation provider or disability service provider to preference people of the same religion in the delivery of goods and services.

On the other hand, the Bill permits a religious charity to give preference to people of the same religion in conferring charitable benefits (clause 36). Religious clubs (clause 42) and voluntary organisations (clause 43) may give preference to people of the same religion in the activities they undertake and in their qualifications for membership and for holding positions on their boards of management. Religious organisations such as those which cater to particular needs for particular faith communities, such as a Christian youth club, a Muslim women's swimming club, a Jewish sports club, or a Hindu or Sikh social club, have long enriched the fabric of public life in Australia. They have not been and should not be controversial. Again, these activities are fundamentally different to discriminating *against* another specific religion or its adherents.

3. Balancing of conflicting rights - The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights ([Siracusa Principles](#))

We have dealt with the balancing of conflicting rights in some detail throughout our submission, and addressed the Siracusa Principles in section 6.

To further elaborate, under Article 18.1 of the [International Covenant on Civil and Political Rights](#) (ICCPR):

“Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.”

Article 18.3 permits limitations on the manifestation of religious belief and activity only to the extent that it is “*necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others*” (emphases added).

In clarifying what “necessary” means in this context, the [Religious Freedom Review Report](#) in 2018 recommended that:

“Commonwealth, State and Territory governments should have regard to the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights when drafting laws that would limit the right to freedom of religion.” (Recommendation 2).

The [Siracusa Principles](#)¹ stipulate that whenever a limitation to a right, including the right to freedom of thought, conscience and religion, is required by the ICCPR to be “necessary,” the limitation must *inter alia* respond to a pressing public or social need, pursue a legitimate aim and be proportionate to that aim (Principle #10), and the limitation must “*use no more restrictive means than are required for the achievement of the purpose of the limitation*” (Principle #11).

With one qualification, this is the test that has been adopted in sub-clause 14(2) of the Bill, which deals with indirect discrimination, that is, the imposition of a condition, requirement or practice which has, or is likely to have, the effect of disadvantaging persons who hold a particular religious belief or activity.

The qualification is that sub-clause 14(2) would permit the imposition of the condition, requirement or practice if it is “reasonable” to do so, even if it is not strictly “necessary”, as required by Article 18(3) of the ICCPR and the Siracusa Principles. In section 6 of our submission, we have suggested a small amendment to sub-clause 14(2) which would bring it into alignment with the international standard, and would honour the following commitment made in Paragraph 15 of the Explanatory Memorandum to the Bill:

*“In accordance with the ICCPR and Siracusa Principles, this Bill only limits the right to freedom of religion and other rights in circumstances where it is **necessary** to do so.”* (Emphasis added).

The other question raised by Article 18.3 of the ICCPR is: which rights and freedoms are, or are not, to be regarded as “fundamental” so as to take priority over the right to freedom of religion if there is a conflict. A possible answer is provided by Article 4.2 of the ICCPR. Article 4.2 nominates seven rights from which no derogation is permitted, even “*in time of public emergency*”. These are:

- the right to life (Article 6);
- the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment and from medical or scientific experimentation (Article 7);

¹ UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 28 September 1984, E/CN.4/1985/4

- the right not be held in slavery or involuntary servitude (Article 8.1 and 8.2);
- the right not to be imprisoned merely on the ground of inability to fulfil a contractual obligation (Article 11);
- the right not to be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed (Article 15);
- the right to recognition everywhere as a person before the law (Article 16)
- the right to freedom of thought, conscience and religion (Article 18).

Principle #69 of the Siracusa Principles specifies four of the above rights, namely those protected by Articles 6, 7, 8.1 and 8.2 and 15 of the ICCPR, and prohibits any State, including States that are not parties to the ICCPR, from suspending or violating “*such fundamental rights*”, even in times of public emergency. The expression “*such*” fundamental rights implies that the Siracusa Principles acknowledge the existence of other fundamental rights, but these are not specified. However, the designation as “fundamental” of four of the rights nominated in Article 4.2 of the ICCPR, to the exclusion of the other three rights nominated in that Article, indicates that the expression “fundamental rights” in Article 18.3 of the ICCPR is intended to have a restricted meaning, and is possibly limited to rights that protect the physical life, bodily integrity and freedom from servitude or arbitrary imprisonment of the individual.

For the reasons analysed in our submission, on matters such as preferencing and the protection of statements of belief, the Bills appear to prioritise a broader range of rights over the right to freedom of religion than those which the Siracusa Principles would recognise as “fundamental rights”.² We do not contend that this is inappropriate, quite the contrary. We merely observe that any suggestion that the Bills give insufficient weight to other human rights and excessive weight to the right to freedom of religion is not borne out when measured against Article 18.3 of the ICCPR and the Siracusa Principles.

We trust that the above will be of assistance.

Yours sincerely

Peter Wertheim AM
co-CEO

² For example, clauses 12 and 15 of the Bill prioritise a person’s right to be protected from statements that are malicious or that a reasonable person would consider would threaten, intimidate, harass or vilify a person or group, over another person’s right to express a religious belief.