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## ACL Response to Joint Committee Questions on Notice

On behalf of the Australian Christian Lobby, I, Wendy Francis, ACL's National Director of Politics, appeared before the Joint Committee on Human Rights on 21 December 2021 in relation to the Religious Discrimination Bill 2021 (Cth) (**Bill**). I set out below our answers in response to questions on notice from Senator Deb O'Neill arising from my appearance before the Joint Committee.

### First Question on Notice:

1. "One of the concerns I have, and it's growing as the day has gone on, is the practical application of the override—that is, the intersection between the regulatory capacity that this would give the Attorney-General and the capacity of any territory or parliament to go back and say, 'The Attorney-General says this; we're going to change our legislation.' The Attorney-General reacts and they change their legislation. *Do you have a view that, as constructed, this override creates the potential for an almost permanent conflict between the Commonwealth and a number of states and territories? That would be very distressing for everybody, to have this constant uncertainty. Please take it on notice, because I think it will be a longer answer than time will allow.*"

### ACL Response:

The ACL considers that it is unlikely that the override provisions in the Bill will trigger Federal/State legislative conflict. The Bill contains two provisions which allow the Attorney General by regulation to override State and Territory law in two scenarios:

1. **Religious school protections.** Clause 11(3) of the Bill allows the Attorney General to exclude by regulation a State or Territory law that conflicts with the right of religious schools to prefer staff of the same religion set out in clause 11(1) of the Bill.
2. **Speech protections.** Clause 12(1)(c) allows the Attorney General to exclude statements of belief from being in breach of State and Territory laws that are specified in regulations.

Senator O'Neill has anticipated a situation where the Commonwealth and States engage in a cat-and-mouse game where the States continually pass new laws to evade the Commonwealth's attempts to pass regulations to exclude State laws. We think this scenario is an unlikely hypothetical that has a very low risk of eventuating.

Firstly, the religious school and speech protections in clauses 11 and 12 are consistent with Australia's international obligations under the ICCPR. The protections in the Bill are extremely narrow and highly qualified protections that set reasonable standards for religious school hiring practices and for moderate statements of faith. It will only be the most draconian of State and Territory laws that will be affected by an override. Secondly, Federal/State conflict is not uniquely set up by the provisions of this Bill. There is always a risk of a battle of back-and-forth legislation in respect of any issue where there is overlap between Federal jurisdiction and States and Territory jurisdiction. Thirdly, ACL does not anticipate that the Federal government will have the appetite to actively monitor and extend the application of the Bill to significant State and Territory legislative initiatives with a constant stream of regulations, so there is a low likelihood of conflict.

Presumably, the intention of these override provisions is so that each instance of potential Federal/State conflict can be considered on a case-by-case basis by the Federal government before an override is extended, rather than just giving simple protection to schools and speech. This is not the ACL's preferred approach to protection of religious schools and/or statements of belief. ACL considers this novel mechanism to be inefficient, requiring the Attorney-General to reactively respond to each piece of State and Territory legislation and enact particular regulations to override those laws. We consider that these provisions weaken protections for schools and speech by making that protection conditional on, and subject to, antecedent regulations enacted at the whim of the Attorney-General.

ACL prefers a simpler mechanism for school and speech protection in the Bill. It would be better for the Bill to clearly articulate the terms on which religious schools can preference staff of the same religion (clause 11) and the terms on

which reasonable statements of belief do not contravene the law (clause 12) and then for the Bill to express that these provisions “cover the field” and inherently displace any State or Territory law that is contrary to those protections. This approach would make it unnecessary to include a very novel power to displace State and Territory laws by regulation.

### **Second Question on Notice:**

2. “My final question on notice is, given your long engagement with this legislation and its multiple iterations, do you have a set of amendments that you think the parliament should consider, to make sure that this bill does provide protection from discrimination for people of faith at the same time as it doesn't override other attributes that are protected under the ICCPR?”

### **ACL Response:**

The ACL considers that the current Bill will not override other attributes protected under the ICCPR. Rather, we consider that the Bill provides religious Australians with significant protections even if it is passed in its current form.

However, there are two categories of amendments that the ACL thinks should be considered prior to passing the Bill before passage. Firstly, there are amendments that are necessary to give religious discrimination the same protections as other attributes protected by Federal discrimination legislation (the Racial Discrimination Act (**RDA**), Sex Discrimination Act (**SDA**), Disability Discrimination Act (**DDA**) and the Age Discrimination Act (**ADA**)). Secondly, there are amendments that would better reflect Australia's obligations under the ICCPR to give more effective protection against discrimination directed towards people of faith.

### ***Amendments to align with other Federal Discrimination Laws***

The Bill currently provides inferior protection to religious belief and activity as compared to the RDA, the SDA, the DDA and the ADA in 4 key areas. The following amendments would align the Bill with other Federal discrimination laws.

1. Insert a new s3(1)(aa) to the Bill to mirror equivalent provisions in the SDA, DDA and the ADA:
  - (aa) to give effect to certain provisions of the International Covenant of Civil and Political Rights, the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion and Belief and to provisions of other relevant international instruments.
2. Insert a new clause 14(3) to the Bill to align with the SDA, DDA and ADA:
  - (3) For the purposes of subsection (1), the person who imposes, or proposes to impose, the condition, requirement or practice has the burden of proving that the condition, requirement or practice is reasonable.
3. Make current clause 13 of the Bill into clause 13(1) of the Bill and insert new subclauses (2) and (3) to include a reasonable adjustments clause for direct discrimination that is aligned with the equivalent provision in the DDA
  - (2) A person (the discriminator) also discriminates against another person (the aggrieved person) on the ground of the religious belief or activity of the aggrieved person if:
    - (a) the discriminator does not make, or proposes not to make, reasonable adjustments for the aggrieved person in relation to their religious belief or activity; and
    - (b) the failure to make the reasonable adjustments has, or would have, the effect that the aggrieved person is, because of their religious belief or activity (including engaging in conduct or refusing to engage in conduct on the basis of their religious belief or activity) treated less favourably than a person without the religious belief or activity would be treated in circumstances that are not materially different.
  - (3) For the purposes of this section, circumstances are not materially different because of the fact that, because of their religious belief or activity, the aggrieved person requires adjustments.
4. Insert clauses 14 (3) and (4) into the Bill to include a reasonable adjustments clause for indirect discrimination that is aligned with the equivalent provision in the DDA:
  - (3) a person (the discriminator) also discriminates against another person (the aggrieved person) on the ground of the religious belief or activity of the aggrieved person if:

- (a) the discriminator requires, or proposes to require, the aggrieved person to comply with a requirement or condition; and
  - (b) because of the religious belief or activity, the aggrieved person would comply, or would be able to comply, with the requirement or condition only if the discriminator made reasonable adjustments for the person, but the discriminator does not do so or proposes not to do so; and
  - (c) the failure to make reasonable adjustments has, or is likely to have, the effect of disadvantaging persons who hold the religious belief, or who engage in, the religious activity.
- (4) Subsection (3) does not apply if the requirement or condition is reasonable, having regard to the circumstances of the case.

***Amendments to the Bill to protect against discrimination directed towards people of faith***

5. Insert a test for determining “religious belief” that reflects international law standards by adding a new definition of “genuinely believes” in clause 5 of the Bill and a new clause 5(4) as follows:

***genuinely believes*** in relation to a person means the person’s holding of the religious belief is sincere and is not fictitious, capricious or an artifice.

5(2) For the purposes of this Act, a person holds a religious belief (inclusive of the person’s beliefs as to the actions, refusals, omissions or expressions that are motivated or required by, conflict with, accord or are consistent with, that belief):

- (a) in relation to an individual, if the person genuinely believes the belief;
- (b) in relation to a religious body, where the religious belief is consistent with the doctrines, tenets and beliefs or teachings adopted and practiced by that religious body.

6. Add a definition of religious activity to clause 5 of the Bill to give a broad and inclusive definition that reflects the capacious nature of religious belief and activity protected by Article 18 of the ICCPR:

***religious activity*** includes:

- (a) engaging in religious activity of worship, observance, practice or teaching; and
- (b) conduct, refusal, omission, expression, and association carried out in accordance with, in connection with, based upon, constitutive of, supportive of or a corollary of a religious belief; and
- (c) seeking, receiving and imparting religious beliefs either orally, in writing or in print, in the form of art or through any other media; and
- (d) , including any activity or manifestation motivated by a religious belief, whether in public or in private, and whether individually or in community with others.

7. Amend clause 14(2) of the Bill to align the test for reasonableness of interference with religious belief or activity with the requirements of Article 18 of the ICCPR:

14(2) For the purposes of subsection 14(1), a requirement or condition is not reasonable unless:

- (a) it is necessary to respond to a pressing public or social need; and
- (b) pursues a legitimate aim that is consistent with the protection of public safety, order, health or morals or the fundamental rights and freedoms of others; and
- (c) is proportionate to that aim; and
- (d) provides reasonable accommodation for a person holding religious beliefs; and
- (e) is no more restrictive than is required.

14(2) Whether a condition, requirement or practice is reasonable depends on all the relevant circumstances of the case, including the following:

- (a) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the condition, requirement or practice;
- (b) the feasibility of overcoming or mitigating the disadvantage;

- (c) whether the imposition of a condition, requirement or practice is in pursuit of a legitimate aim, and the disadvantage is proportionate to the result sought; and
  - (d) whether there was another means available to achieve the result sought with a less restrictive effect on the person holding or engaging in the religious belief or activity than the condition, requirement or practice imposed.
8. Insert protections into clause 19 (which deals with discrimination in work) for employees in relation to discrimination by employers for reasonable statements of belief:
- 19(3) If an employee conduct rule is applied by an employer to restrict or prevent a person from making, or impose a detriment on a person for making a statement of belief, that application of the rule is unlawful discrimination unless it is proven that:
- (a) the rule was necessary to achieve a reasonable result concerning the employer's business or activity and no rule with a less restrictive effect on the employee's freedom of expression would have achieved that result; and
  - (b) the application of the rule to the particular statement of belief was necessary to achieve a reasonable result concerning the employer's business or activity and there was no other means available with a less restrictive effect on the employee's freedom of expression to achieve that result.
9. Amend clause 7(6) and delete clause 7(7) of the Bill to limit the power of the Attorney-General to prescribe substance of the policies of religious bodies by legislative instrument (with equivalent amendments to clause 9(3)(d) & (e), 9(5)(d) & (e), clause 40(2)(d) & (e) and the deletion of clauses 9(7) and 40(3)):
- 7(6) If a religious body that is an educational institution engages in conduct mentioned in subsection (2) or (4) in relation to the matters described in section 19 (about employment) the conduct must be in accordance with a written policy that:
- (a) outlines the religious body's position in relation to particular religious beliefs or activities; and
  - (b) explains how the position in subparagraph (a) is or will be enforced by the religious body; and
  - (c) is publicly available, including at the time employment opportunities with the religious body become available.

In closing, it is important to note that, whilst the above amendments are desirable, the ACL considers that the Bill is necessary and remains supportive of the Bill being passed in its current form to provide protection from discrimination for people of faith without adversely affecting other attributes that are protected under the ICCPR.