

## **Additional comments from Australian Labor members**

### **Introduction**

1.1 Consistent with Labor's long-standing support for the International Covenant on Civil and Political Rights – including the protection and promotion of the right to freedom of thought, conscience and religion – Labor Members of this committee have been guided by three principles in considering the Religious Discrimination Bill:

- First, as the International Covenant on Civil and Political Rights makes clear, religious organisations and people of faith have the right to act in accordance with the doctrines, beliefs or teachings of their traditions and faith.
- Second, we support the extension of the federal antidiscrimination framework to ensure Australians are not discriminated against because of their religious beliefs or activities.
- And, third, consistent with the international covenant, the extension of the federal antidiscrimination framework in this way should not remove protections that already exist in the law to protect Australians from other forms of discrimination.

1.2 A Commonwealth Religious Discrimination Act would not exist in a vacuum.

1.3 Most Australian state and territory jurisdictions have already legislated to provide protection for their citizens from discrimination on the basis of religious beliefs and practice. Overwhelmingly, those protections have been put in place by Labor Governments – in Queensland, Western Australia, the Australian Capital Territory, Victoria, South Australia and Tasmania.

1.4 The freedom to have or adopt a religion or belief is absolute and cannot be limited. As the Ruddock Review noted, these rights 'cannot be departed from even in times of national emergency'. Labor acknowledges this in our 2021 Platform:

Labor recognises that the freedom to have or adopt a religion or belief, to change a religion or belief, or not to have or adopt a religion or belief, is absolute. Moreover, Labor believes in and supports the right of all Australians to have and to manifest their religion or beliefs, and the right of religious organisations to act in accordance with the doctrines, tenets, beliefs or teachings of their faith. Such rights should be protected by law and, in accordance with Article 18 of the International Covenant on Civil and Political Rights, subject only to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

1.5 The Labor members of the Human Rights Committee believe it is totally appropriate – and should not be at all controversial – for a modern Australian Parliament to legislate to protect people of faith from discrimination. The committee

heard almost unanimous support for legislative protection for people of faith. However, many people questioned whether the Bill that Prime Minister Morrison personally introduced to parliament will be workable and provide the necessary protection for people of faith that he promised and whether the Bill appropriately balances freedom of religion with other rights and freedoms.

### **Inquiry Process**

1.6 In December 2018, in his formal response to the Ruddock Review, the Prime Minister promised to 'work with the Opposition, crossbench and stakeholders in a spirit of bipartisanship, and ... introduce legislation into the Parliament that enjoys broad cross-party support'. That did not happen.

1.7 For reasons that only he can explain, the Prime Minister spent almost three years ignoring calls for a bipartisan approach to this legislation –thus breaching his election commitment – only to introduce complex legislation into the Parliament on the eve of a federal election.

1.8 The Attorney-General allowed this committee only 71 days to conduct this inquiry and report to both Houses of Parliament. There were at least twelve religious celebrations during that period including Christmas and Hanukkah. Almost the entire 71 days fell during the school holidays. As the majority report confirms, many submitters raised concerns regarding the short timeframe for the inquiry. In fact, even the Attorney General's own Department was unable to comply with the completely unrealistic timetable imposed by the Attorney General. Witnesses during the public hearings, including organisations relying on volunteers to prepare their submissions, also commented on the timing of the inquiry. The first public hearing was held four days before Christmas Day and the second and third took place early in January when many stakeholder organisations had not yet returned to work from holidays.

1.9 This bill is important to Australians of faith and no faith alike. All fair-minded people in our pluralist democracy reject discrimination in all its forms. It is therefore disappointing that this bill has suffered in its design from the Government's failure to work across the Parliament – and, indeed, across the Federation – to ensure it is fit for purpose and provides the legislative protection promised. Many of the concerns raised by stakeholders have arisen because some aspects of the proposed protections are not well thought through. This rushed process after so much inaction since 2018 is a failure of governance, and all Australians deserve better.

### **Key areas of controversy**

The two most contentious aspects of the Government's Religious Discrimination Bill are clauses 11 and 12.

#### **Clause 11**

1.10 Submitters to this inquiry raised a range of concerns about clause 11, which provides that conduct relating to employment engaged by religious educational institutions does not contravene a prescribed state or territory law if the institution

gives preference, in good faith, to persons who hold or engage in a particular religious belief or activity; and the conduct is in accordance with a publicly available written policy.

1.11 Labor members of the Committee support the right of a religious educational institution to preference staff in employment with a view to ensuring that the institution is able to reasonably conduct itself in a way that is consistent with its religious ethos.

1.12 The need to preserve that right is the legitimate concern underlying clause 11. But a number of concerns have been raised about how clause 11 would operate in practice.

1.13 Clause 11 is explicitly designed to override State and Territory anti-discrimination law – specifically, recent changes to the law in Victoria. As the Law Council of Australia said in their submission: -

It departs from orthodox Commonwealth anti-discrimination law, which is generally designed not to exclude or limit the operation of State or Territory law that is capable of operating concurrently with it.

1.14 Other submitters have also described the clause as 'novel'.

1.15 Clause 11 was the subject of much dispute among submitters and in the limited number of days allowed for public hearings, widely varying views about the likely and unlikely effects of the clause took a significant portion of the Committee's time. Given the significant uncertainty about the practical impact of this clause in its interaction with State and Territory laws, it was disappointing to learn from the Attorney-General's Department that:

The department did not have meetings with any state or territory government to discuss any part of the Religious Discrimination legislative package between the conclusion of the second exposure draft consultation process and the introduction of the Religious Discrimination legislative package.

1.16 It was also somewhat alarming to learn that the Government had given little – if any – detailed consideration to whether clause 11 would actually achieve its objective.

1.17 For example, when the Attorney-General's Department was asked whether a state parliament could simply circumvent clause 11 by enacting a standalone law that prevented religious schools from giving preference to persons who hold or engage in a particular religious belief or activity in an employment context, the Department said that it was not able to provide the Committee with 'technical legal advice on hypothetical examples'.

1.18 With respect, this 'hypothetical example' goes to the heart of whether clause 11 would actually achieve its apparent purpose. The fact that the Department does not appear to have even considered whether a state parliament could easily

circumvent clause 11 raises serious questions about whether the Government has properly considered any of the range of other concerns that have been raised about the provision, including in relation to its constitutionality.

1.19 Labor members also note that the Attorney-General's Department has refused to provide the Committee with basic information about the drafting process for clause 11, including how long the Government spent developing the provision and who was consulted in the drafting process.

1.20 This is a far cry from the Morrison Government's election commitment to 'work with the Opposition, crossbench and stakeholders in a spirit of bipartisanship, ... to introduce legislation into the Parliament that enjoys broad cross-party support.'

1.21 Labor members urge the Government to work across the Parliament – if not across the Federation – to address the serious concerns that have been raised about clause 11 and consider whether there are better approaches to addressing the legitimate concern that clause 11 is intended to address (i.e. the need to ensure that religious schools can reasonably conduct themselves in a way that is consistent with their religious ethos).

#### ***Clause 12: Statements of Belief***

1.22 Australia rightly prides itself on being a dynamic and successful pluralist nation.

1.23 Unfortunately, the Human Rights committee heard evidence that many people of faith do not currently feel free to share their religious beliefs. The Ruddock Review heard 'troubling examples of social hostility' directed towards people of faith. The National Catholic Education Commission expressed concern about the rise in threats to that pluralism regarding religion.

1.24 A number of serious concerns were raised by stakeholders in relation to clause 12, including but not limited to:

- concerns that, in its current form, it elevates religious speech above other human rights while also undermining existing protections against discrimination;
- relatedly, the fact that it overrides existing federal, State and Territory anti-discrimination laws;
- that the provision is unconstitutional;
- that it provides a Minister with the power to prescribe other laws to be overridden; and
- that discrimination complaints relating, in whole or in part, to a 'statement of belief' under state anti-discrimination laws will face a much more complicated and expensive process as a result of this provision.

1.25 These are genuine concerns that should have been worked through in a proper, public and bipartisan consultation process well before this bill was introduced into Parliament.

1.26 Labor members believe that the national parliament has a role to play in reassuring people of faith that the mere expression of what the Bill describes as 'moderately expressed religious view' do not contravene any Australian law. However, we also believe that this can and should be done in a way that does not remove—protections that already exist in the law to protect Australians from other forms of discrimination, or lead to the perception that they have been removed. We also think it can and should be done in a way that is not constitutionally uncertain, and which does not make it more difficult and expensive to make – or defend – legitimate anti-discrimination complaints under state and territory anti-discrimination laws.

1.27 As with clause 11, Labor members urge the Government to work across the Parliament – if not across the Federation – to address the serious concerns that have been raised about clause 12 and consider whether there are better approaches to addressing the legitimate concern that clause 12 is intended to address.

#### ***Clause 15: Qualifying Body Conduct Rules***

1.28 Clause 15 provides that a qualifying body engages in discrimination if it imposes a 'conduct rule' relating to standards of behaviour that is likely to restrict or prevent persons seeking or holding a qualification from making a statement of belief, other than in the course of the person practising the relevant profession, carrying on the relevant trade or engaging in the relevant occupation. The committee heard from healthcare professionals their concerns that clause 15 would impact the care received by patients. Other evidence to the committee said that clause 15 was unnecessary because conduct would already be caught under the indirect discrimination provisions.

1.29 The majority report recommends 'guidelines relevant to qualifying body conduct rules in clause 15 are developed in consultation with the relevant professional bodies.' Consultation should occur before legislation is developed rather than after it becomes law. It is difficult to see how 'guidelines' could assist professional bodies who would be subject to this provision. This is another matter on which the Government should be seeking to work constructively and in a bipartisan manner across the Parliament.

#### ***Publicly Available Policy***

1.30 Clauses 7(6), 7(7) and 9(3) provide the Minister with power to determine, by legislative instrument, the requirements of the publicly available policy of a religious educational institution required to protect conduct that would otherwise be discrimination under the Act.

1.31 Many submitters were uncomfortable with the Minister having this power. The majority report of this committee has recommended that an amendment be made

to the bill to 'set out what is required to be included in a publicly available policy, namely: that the policy must outline the religious body's position in relation to particular religious beliefs or activities and explain how this position will be enforced by the religious body.' It also recommends that the clauses provide that the minister may, by legislative instrument determine any other requirements ancillary to this, which the policy must comply with.

1.32 One of the concerns of stakeholders was that the Minister's power under these provisions was too broad and may allow for interference in religious ethos. The recommendation does not address this concern.

### ***Religious Vilification***

1.33 The constrained timeframe for this inquiry resulted in many stakeholders not being able to appear at the public hearings or their time to give evidence was severely curtailed. Some important issues were not able to be ventilated as they should have been.

1.34 This bill will protect people of faith from religious discrimination but it does nothing to protect against vilification of people who are targeted because of their religious beliefs or activity.

1.35 This protection has been called for over many years. The calls have become more urgent since the shocking Christchurch attack by an Australian terrorist, and the rise in Islamophobic, Hinduphobic and Antisemitic incidents.

1.36 The current Bill presents the Parliament with an opportunity to provide people of faith – particularly those of minority faiths – with protection against vilification. The Government should work with Labor and religious stakeholders to address this shortfall in protections for people of faith.

### ***Section 38(3) of the Sex Discrimination Act 1984***

1.37 Three years ago, Scott Morrison promised he'd change the law to protect kids. There is widespread support for this change in the Parliament and there's no excuse for further delays.

### **Conclusion**

1.38 Since 1901 the House of Representatives has commenced with a prayer. In 2010, a Labor government added an Acknowledgement of Country to proceedings. Now our Commonwealth Parliament recognizes daily these two ancient traditions of wisdom.

1.39 It is not compulsory for any parliamentarian to pray or to be present in the Chamber while these exhortations are recited. Moreover, the fact that Australia is a secular nation is acknowledged in clause 116 of our Constitution: 'Commonwealth not to legislate in respect of religion'. Nevertheless, this longstanding tradition of daily prayer in the 'People's House' reflects this nation's duality: we are a secular nation that values and respects the religious life of our people.

1.40 Australia is a successful multicultural and multi-faith country. That success has been built on mutual respect. This value should not be taken for granted. Good leadership requires patient attention to detail. Good leadership is about uniting not dividing our nation.

1.41 What we have seen with Prime Minister Morrison's bill is a rushed process without proper consultation and without the care and attention to detail deserving of such important human rights protections. The Human Rights Committee now knows that the bill was introduced with at least one serious drafting error. This fact only emerged after the Attorney-General's Department provided evidence to this committee on three occasions and failed each time to point out the error. It was only when the Department later appeared before the Senate committee inquiring into this same bill, and that committee was told about the drafting error. The Department admitted, 'we picked it up pretty fast after introduction'. It is remarkable that the Department knew of this serious error and failed to make it known to the Human Rights Committee. The majority report of this committee recommends an amendment to correct this serious error which essentially reversed the onus of proof for indirect discrimination.

1.42 Labor members of this committee understand the importance of this bill to protect people of faith against discrimination. We understand that there are real fears held by people of faith about not being able to practice their faith freely. We also understand that many of the concerns repeatedly raised about this legislation have not been addressed by the Morrison Government. Labor members fear that these unresolved concerns will lead to division in the community.

1.43 There is consensus from many stakeholders, the Attorney-General's Department, other members of this committee, and even the Prime Minister that the religious discrimination legislative package requires amendments before it can be passed. The Australian Labor Party has a long history of fighting to prevent discrimination against people of faith. The legislation that Prime Minister Morrison introduced should unite our nation, not divide. Labor members urge the Government to work with Labor and the State and Territory governments to resolve the outstanding issues identified in these Additional Comments and in the majority report of this committee as a matter of urgency.

**Graham Perrett MP**  
**Deputy Chair**  
**Member for Moreton**

**Josh Burns MP**  
**Member for Macnamara**

**Senator Deborah O'Neill**  
**Senator for Queensland**

**Senator Louise Pratt**  
**Senator for Western Australia**