

Parliamentary Joint Committee on Human Rights
RELIGIOUS DISCRIMINATION BILL AND OTHER RELATED BILLS
Attorney-General's Department

Hearing date: 14 January 2022
Hansard page: 66
Question type: Spoken
Question number: 22003

Ms Celia Hammond MP asked the following question:

Ms HAMMOND: My understanding of the sort of scenario where it might be applicable is that, if you've got two employees and one makes a comment to the other employee, saying something like, 'I believe X. You're living contrary to that, and therefore you're a sinner'—let's just say it's that—management may come in and tell that employee not to do that anymore, as a reasonable management action to make sure there's not hostility. That person can then say, 'Look, I'm allowed to make this statement because of the bill,' but bosses and managers want to have the ability to make sure that their workplace is harmonious. Sometimes we all need to shut our mouths, whether it's got to do with religion or not; I might say something which really annoys someone else, and in a workplace it would better not to say it. I think that's what they were getting at.

Mr Walter: I understand that, and we can give you a bit more on that. I have a couple of responses. One is that, if somebody is constantly distracting, harassing or annoying another person, it really doesn't matter whether it's because of what the content is, as you've just said. That's just a workplace issue. It just happens to be that they're annoying or harassing a person with their religious views. It could be about anything—it could be about their views on the person's football club—but it's still a management issue that can be dealt with.

You mentioned that what they have to say may be protected by the bill. Clause 12 only protects mere statements of belief; it's not a defence against harassment or against courses of conduct or actual actions that discriminate. So that kind of ongoing, irritating behaviour—

Ms HAMMOND: But it doesn't necessarily need to be ongoing. I think the point that's been highlighted by a number of witnesses throughout our hearings is that there is a threshold for harassment. But, often, in workplaces, or in any environment, you actually want to stop behaviour that could end up in harassment. You want to create a tone for the environment: 'You have those views. We totally respect that you have those views, but we've got people with different views here. Perhaps in the interests of us all working towards our shared purpose of increasing our profit'—or whatever it may be—'let us deal with this in some other way.'

I'll let you take that whole defence issue on notice. Again, it might not be necessary, but, if you could take that on notice, that would be great.

Mr Walter: Understood.

The response to the Member's question is as follows:

The prohibition of discrimination in the Bill would not prevent an employer from taking appropriate action to manage their workplaces, including disciplinary action, provided that all employees are treated equally regardless of their religious beliefs or activities, and the action taken is reasonable.

In particular, while clause 12 would protect a person from a claim that the person has discriminated under Commonwealth, state or territory anti-discrimination legislation in certain circumstances, it would not protect an employee from reasonable disciplinary action taken by their employer.

The Bill would also not override work health and safety laws. If the Bill is passed, employers would continue to have a duty to ensure, so far as is reasonably practicable, the health and safety of workers and others in the workplace under the model laws. This includes managing risks to psychological health, such as harassment. It is intended that action taken by employers that is necessary to comply with their duties under work health and safety law would not be unlawful under the Religious Discrimination Bill, in accordance with subclauses 37(1) and (3) of the Bill.

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Hearing date: 14 January 2022
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Question type: Spoken
Question number: 22004

Dr Anne Webster MP asked the following question:

CHAIR: Could you answer the question regarding the change in the role of the commissioner from the second exposure draft to the current draft.

Mr Walter: I'm actually trying to think of what changes we made. We made a change to the name of the commissioner, which is consistent with the other acts. In the second exposure draft, which I'm playing with as we speak, they were called the Freedom of Religion Commissioner. In terms of the functions that are conferred on the commissioner, I will take it on notice and just see if there were any substantial changes. I cannot recall any substantial changes.

CHAIR: Thank you.

The response to the Member's question is as follows:

There have been two changes that relate to the role of the Commissioner between the second exposure draft and the Religious Discrimination Bill:

- The Bill provides that the Commissioner will be known as the Religious Discrimination Commissioner – the second exposure draft referred to the Freedom of Religion Commissioner. The title of Religious Discrimination Commissioner will ensure consistency with the naming convention for the commissioners established under the other four federal anti-discrimination Acts.
- The Bill now includes a requirement for the Religious Discrimination Commissioner to undertake a review of the operation of the Religious Discrimination Act (clause 76). This review must be completed and a report provided to Government within two years of the commencement of the Act.

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Hearing date: 14 January 2022
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Question type: Spoken
Question number: 22005

Senator Janet Rice asked the following question:

Senator RICE: I want to go to the process between the second exposure draft and now. Submissions on the second exposure draft closed in January 2020. Is that right?

Mr Walter: Correct.

Senator RICE: That's almost two years ago and certainly almost two years—22 months or something—before we saw the third draft. You received over 290 substantive submissions and thousands of campaign submissions. There's no detail on your website about the campaign submissions. Can you take that on notice, giving us some detail about how many of those were supportive and how many you received of what type?

Mr Walter: We can.

The response to the Senator's question is as follows:

Examples of the campaign submissions are available on the Attorney-General's Department website, linked here for the [first exposure draft](#) and [second exposure draft](#).

18 campaigns were submitted during each of the exposure draft consultation processes, however a significantly higher volume of submissions within campaigns was received for the second consultation (4820 campaign submissions) than for the first consultation (1215 campaign submissions).

The first exposure draft consultation period ran from 29 August to 2 October 2019.

<i>Campaign no.</i>	<i>Number of submissions</i>	<i>Position</i>
Campaign 1	15	Oppose, doesn't go far enough, needs further protection
Campaign 2	7	Supports, amendments required
Campaign 3	78	Supports, amendments required
Campaign 4	252	Oppose, doesn't go far enough, needs further protection
Campaign 5	7	Supports, amendments required
Campaign 6	147	Oppose, doesn't go far enough, needs further protection
Campaign 7	239	Oppose, goes too far, enshrines discrimination
Campaign 8	14	Oppose, goes too far, enshrines discrimination
Campaign 9	51	Supports, amendments required
Campaign 10	15	Supports, amendments required
Campaign 11	28	Oppose, doesn't go far enough, needs further protection
Campaign 12	149	Oppose, doesn't go far enough, needs further protection

Campaign 13	21	Not clear
Campaign 14	6	Supports, amendments required
Campaign 15	26	Oppose, doesn't go far enough, needs further protection
Campaign 16	104	Supports, amendments required
Campaign 17	43	Oppose, doesn't go far enough, needs further protection
Campaign 18	13	Oppose, doesn't go far enough, needs further protection

The second exposure draft consultation period ran from 10 December 2019 to 31 January 2020.

<i>Campaign no.</i>	<i>Number of submissions</i>	<i>Position</i>
Campaign 1	21	Oppose, goes too far, LGBTIQ protection
Campaign 2	25	Oppose, goes too far, enshrines discrimination
Campaign 3	19	Oppose, goes too far, enshrines discrimination
Campaign 4	5	Oppose, general
Campaign 5	5	Oppose, unconstitutional
Campaign 6	3328	Oppose, goes too far, enshrines discrimination
Campaign 7	11	Oppose, doesn't go far enough, needs further protection
Campaign 8	143	Supports, amendments required
Campaign 9	62	Oppose, general
Campaign 10	196	Oppose, general, oppose override of Tas law
Campaign 11	79	Support, amendments required
Campaign 12	15	Oppose, goes too far
Campaign 13	619	Support, amendments required
Campaign 14	245	Oppose, doesn't go far enough, needs further protection
Campaign 15	36	Oppose, goes too far
Campaign 16	12	Oppose, goes too far, enshrines discrimination
Campaign 17	5	Oppose, goes too far, enshrines discrimination
Campaign 18	4 versions, a total of 197 signatories	Support, amendments required

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Hearing date: 14 January 2022
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Question type: Spoken
Question number: 22009

Senator Janet Rice asked the following question:

Senator RICE: Can I get you to provide copies of the draft EMs that you prepared, please?

Mr Walter: I'm not sure that they're particularly helpful, because obviously we amended the EM as the bill changed, and it's really the final, approved version that matters.

Senator RICE: We can decide whether they're helpful or not.

Mr Walter: And I'd like consult with the Attorney about whether she wants to make a claim in that regard.

The response to the Senator's question is as follows:

In addition to the Explanatory Memorandum that accompanies the Bill, there have been two sets of explanatory materials approved by the Government. These are attached.

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Hearing date: 14 January 2022
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Question type: Spoken
Question number: 22010

Senator Janet Rice asked the following question:

Senator RICE: I have another area in which I'd like you to provide more detail on notice. There was some discussion before about the interaction of this legislation with the Fair Work Act, and, in particular I want to get your assessment of how the implications of having clause 12 in this act interact with the Fair Work Act.

CHAIR: Mr Walter, I'll get you to take that on notice, if you would. I'm going to Senator O'Neill, who also has questions on notice. Thank you.

The response to the Senator's question is as follows:

Similar to existing anti-discrimination law, the Bill is intended to operate concurrently with the *Fair Work Act 2009*.

Section 351 of the Fair Work Act prohibits an employer from taking adverse action against an employee, or prospective employee, because of a number of personal attributes including the employee's religion. However, there is an exception for action that is not unlawful under an anti-discrimination law.

The Religious Discrimination (Consequential Amendments) Bill 2021 would amend section 351 to recognise the *Religious Discrimination Act 2022* as an anti-discrimination law for the purposes of the Fair Work Act. This would mean that conduct that is not unlawful under the Religious Discrimination Act would also not be unlawful under section 351 of the Fair Work Act.

For clause 12, this would clarify that a statement of belief made by an employer to an employee or prospective employee that meets the definition in section 12 of the Religious Discrimination Act would not be unlawful under section 351 of the Fair Work Act, in the absence of other conduct that caused a detriment to the employee or prospective employee.

This would provide consistency across federal anti-discrimination law by ensuring that employers whose actions are lawful under the Religious Discrimination Act could not be subject to action under section 351 of the Fair Work Act.

The other protections provided by the Fair Work Act would continue to apply to employees. These include protections against adverse action for exercising a workplace right, and protections against unlawful termination and unfair dismissal. Workers who experience bullying in the workplace would continue to be able to make an application to the Fair Work Commission for an order to stop the bullying.

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Hearing date: 14 January 2022
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Question type: Spoken
Question number: 22013

Senator Deborah O'Neill asked the following question:

Senator O'NEILL: To be clear: once it was introduced, did you have any conversations with the Attorney-General in terms of any further changes to the bill in the course of the last week that we were sitting?

Mr Walter: Let me go back and just double-check that we didn't. I don't recall anything after the bill was introduced. Obviously, we have ongoing discussions with the Attorney's office, as, for example, there have been a range of articles this week raising issues out of these hearings, and we have ongoing discussions with the Attorney's office, but we haven't reached that point of drafting or developing any amendments. We're obviously waiting for this committee to report.

The response to the Senator's question is as follows:

Following introduction of the Religious Discrimination Bill 2021, the department prepared a technical amendment to correct a drafting error which has been approved for introduction during debate. The department also prepared options for possible amendments to the Consequential Amendments Bill.

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Hearing date: 14 January 2022
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Question type: Spoken
Question number: 22014

Senator Deborah O'Neill asked the following question:

Senator O'NEILL: I understand that you indicated to me earlier that there are four people who are working on this. Could you provide a Gantt chart to the committee about the level of activity undertaken by the Attorney-General? It sounds, from your evidence, that you've been on this journey for pretty well the whole time, Mr Walter. If you could give us a sense of fluctuations in how much attention has been paid to this bill or what sort of staffing it has received, amongst the hundreds of people who are there.

The response to the Senator's question is as follows:

The Attorney-General's Department does not use hourly time recording so it is not possible to provide an answer at the level of detail requested. The staffing resources provided to this Bill have been consistent with those that the department routinely provides for a Bill of this size and complexity. In addition, other areas of the department have contributed expertise and assistance as necessary throughout the project.

The Human Rights Branch of the Integrity and Security Division of the Attorney-General's Department has been responsible for leading this legislative project since November 2018. The average staffing levels devoted to this project have fluctuated depending on the stage of the project and the volume of work. Since the commencement of this legislative project the number of APS and EL staff dedicated to this work has varied between 3 and 6 staff, with an average of 4 staff throughout the entire project (generally comprising one EL2, two EL1s, and an APS 5 or 6). This figure does not include oversight and management from Senior Executive Service officers in the Branch and Division. This average staffing level does not include the period from April 2020 to April 2021 when the department diverted resources to the Government's response to the COVID-19 pandemic.

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Hearing date: 14 January 2022

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Question type: Spoken

Question number: 22017

Mr Graham Perrett MP asked the following question:

Mr PERRETT: Just one, Chair. Could you take this on notice, particularly in respect of part 2: why has it been drafted in a completely different manner to all other Commonwealth antidiscrimination legislation? I know you touched on other elements, in my questions, but that one in particular—part 2.

The response to the Member's question is as follows:

Please refer to the response to Question 22018.

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Hearing date: 14 January 2022
Question date: 18 January 2022
Question type: Written
Question number: 22018

Mr Graham Perrett MP asked the following question:

Could you please provide advice as to why the Bill was drafted in a different manner to all other Commonwealth anti-discrimination laws, especially in relation to the inclusion of Part 2 which sets out what is not discrimination. Was this a result of stakeholder consultation, was the Department directed to draft the Bill in that manner by the Attorney-General or was there another reason?

The response to the Member's question is as follows:

The Government has structured the Bill with the intention of providing the greatest degree of clarity to the reader, including religious bodies and people of faith. Setting out at the start of the Bill in Part 2 the provisions that do not constitute discrimination is intended to simplify the Bill and assist understanding.

The particular nature of the protected attribute of religious belief and activity, and specifically the need to consider appropriate provisions to recognize the right of persons to manifest their religious belief or activity in community with others, often in the form of religious bodies, required careful consideration of the structure of the Bill.

Part 2 of the Bill sets out that certain conduct and statements will not be discrimination on the ground of religious belief or activity. As these provisions deal with conduct or statements that are not discrimination, it was not necessary to frame them as exceptions. The practical effect of Part 2 is that it is not necessary to first consider whether the conduct is discrimination and then whether the conduct falls within the terms of an exception.

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Hearing date: 14 January 2022
Question date: 18 January 2022
Question type: **Written**
Question number: 22019

Mr Graham Perrett MP asked the following question:

Following on from a question put to the Department during the hearing on 14 January when Mr Perrett asked whether the constitutional advice received by the Department had addressed the points raised in the submission of Professor Anne Twomey, could the Department consider whether they could release the constitutional advice received by them in full or in part to assist the committee?

The response to the Member's question is as follows:

The department maintains its advice that it is not in the public interest to depart from the established position that has been maintained by successive governments not to disclose privileged legal advice. It is essential that privileged legal advice provided to the Commonwealth remains confidential. Access by Government to confidential legal advice is, in practical terms, critical to the development of sound Commonwealth policy and robust law-making.