

Questions on notice - Religious Discrimination Bill 2021

General human rights

Question 1.

What effect will the objects clause have on the interpretation of provisions in the bill in practice?

For example, noting that in giving effect to the objects of the bill, regard is to be had to the indivisibility and universality of human rights, and their equal status in international law, how will this impact the interpretation and application of those clauses in the bill that override existing anti-discrimination protections (e.g. clauses 11 and 12)?

Clause 3 provides a clear statement of the principles and objectives underpinning the Bill. This clause highlights that this Bill is intended to promote community understanding that people have the same fundamental rights, regardless of their religious belief or activity.

As section 15AA of the *Acts Interpretation Act 1901* (Cth) provides that statutes should be interpreted in accordance with their objects, all the other provisions of this Bill are to be read as being designed to carry out these objects as far as is possible.

Paragraphs 3(1)(a), (b) and (c) broadly reflect the existing objects clauses in other federal anti-discrimination laws. Paragraph 3(1)(d) reflects the principles underpinning clause 12 of the Bill and sets out the object of ensuring that people can, consistent with Australia's obligations with respect to freedom of religion and freedom of expression, make statements of belief. However, this objects clause itself recognises that the right to make statements of belief should be subject to specified limits set out in the Bill.

Subclause 3(2) provides that in giving effect to the objects of the Bill, regard is to be had to the indivisibility and universality of human rights, and their equal status in international law, and the principle that every person is free and equal in dignity and rights. This includes the right to freedom of religion. This implements Recommendation 3 of the Religious Freedom Review. The Religious Freedom Review found that the objects clauses of existing anti-discrimination legislation referred to the promotion of the right to equality or equality of opportunity, but made no express reference to other human rights, such as the right to freedom of religion.

As discussed below in response to question 8, the Bill has been drafted with regard to the international law principles of reasonableness, necessity and proportionality when considering the interaction between human rights and, in particular, any limitations on rights. Clause 12 has been specifically developed to balance between the rights of freedom of religion and freedom of expression with other rights, and is subject to appropriate limitations.

Question 2.

Noting the requirement under international human rights law to balance the right to freedom of religion with other human rights, where the manifestation of religion limits the rights and freedoms of others, how will this balancing exercise be undertaken in practice when applying this bill?

Religious belief or activity is an attribute which is conceptually distinct from other attributes in existing anti-discrimination law. Religious activity requires an external manifestation which may, in some circumstances, impact upon the rights and freedoms of others. The Bill has been developed with regard to the range of human rights. In the development of clauses 11, 12 and 15, the Government has been careful to strike an appropriate balance, including by ensuring that these provisions are limited in their application and subject to a variety of safeguards set out in the terms of each provision.

Conduct that is not discrimination

Question 3.

What is the practical effect of making conduct by religious bodies 'not discrimination' under Part 2 as opposed to making such conduct fall within an exception under Part 4, Division 4 of the bill?

The structure of the Bill is intended to provide 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.

Question 4.

The bill provides that some statements or activities will not constitute discrimination if it is done in 'good faith' (for example as used in clauses 7, 9 and 40). How is 'good faith' to be interpreted and applied in practice? What guidance, if any, is available in relation to interpreting when conduct engaged in by a religious body or person would be in 'good faith'?

The concept of good faith is a core requirement of a number of provisions in the Bill - see the definition of statement of belief in clause 5 and clauses 7, 9, 11, and 40. In general terms, good faith is required where a person engages in conduct or makes a statement of belief in accordance with religious beliefs or susceptibilities.

The department's view is that a court is likely to apply a broad interpretation of the good faith requirement, encompassing both subjective considerations (the person making a statement of belief considers they are behaving honestly and with a legitimate purpose) as well as objective considerations (the person has taken a conscientious approach to honouring the values asserted by the Bill, which may include considering the effect of their speech given the overall purpose of the Bill). This is an approach that was set out in *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105.

Question 5.

How will this bill operate alongside other federal anti-discrimination law?

For example, clause 7 notes that conduct that is not discrimination under this bill may constitute discrimination under other federal anti-discrimination laws. In such a case, how would both laws operate concurrently and how would the complaints process work?

This Bill will operate alongside existing Commonwealth anti-discrimination law.

The Religious Discrimination Bill is about protection from discrimination on the basis of religious belief or activity in key areas of public life. The prohibition on discrimination and the exceptions in this Bill solely relate to the attribute of religious belief or activity. This Bill does not allow a person to discriminate on the basis of other attributes protected in Commonwealth anti-discrimination law, such as age, sex, race or disability. Complaints about conduct on the basis of a protected attribute covered by another Commonwealth anti-discrimination law would continue to be determined under that Act.

There may be circumstances where the nature of the conduct a person wishes to complain about may provide the basis for claims under a number of different anti-discrimination laws. As is the case at present, a person making a complaint would need to identify what they consider are the relevant grounds for the complaint. Depending on the circumstances of the complaint and the terms of the relevant anti-discrimination laws, conduct may amount to unlawful discrimination under one law but not under another law. The AHRC's existing process of assessing claims of unlawful discrimination would be extended to the Bill once it is enacted.

Question 6.

In relation to clause 10 (which provides it is not discrimination if it is reasonable conduct intended to meet a need or reduce a disadvantage):

- a. This is stated to apply 'despite anything else in this Act'. What is the effect of this provision and why is it necessary?*
 - b. This applies to 'a person' engaging in conduct (and not a religious body). What effect will this have in practice? What situations are envisaged where an individual might rely on this provision?*
 - c. This applies where the conduct is 'reasonable in the circumstances'. How will this be assessed? If, for example, there is a limited number of aged care facilities in a region, would it be reasonable in the circumstances to provide services only to those of a minority religious group to meet their needs?*
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a.

Clause 10 provides that certain beneficial measures to meet a need or to reduce a disadvantage arising out a person's or group's religious belief or activity are not discrimination under this Bill. Subclause 10(2) states that the provision applies 'despite anything else in this Act'. The purpose of this subclause is to simply clarify the operation of clause 10. In particular, reasonable conduct that satisfies the requirements of clause 10 will not be discrimination for the purposes of clauses 13 and 14 of the Bill.

b.

Clause 10 applies to any person, in the same way that the general discrimination provisions in clauses 13 and 14 also apply to a person. Accordingly, a person may need to rely on clause 10 in relation to conduct that might otherwise be unlawful discrimination under clauses 13 or 14. The application of clause 10 will depend on the circumstances of the case.

c.

The requirement that conduct be reasonable in the circumstances is necessary because the nature of the protected attribute, religious belief or activity, cannot be precisely described (noting that it is not defined in the Bill) which means that the protected attribute is one which can affect areas of a person's life in ways that are likely to vary depending on the particular religious beliefs of the person. For example, strict dietary requirements may be necessary under one religion, but not under another. A reasonableness requirement also acts as a safeguard to ensure this provision is not used to, for example, justify measures that would unreasonably disadvantage other persons.

Clause 10 does not set out specific matters to be considered in determining whether conduct is reasonable in the circumstances. However, the department considers that determining reasonableness may include examining whether there was any disadvantage to other persons resulting from the conduct.

In relation to the example about an aged care facility, a number of considerations would be relevant. The clear policy position of the Bill is that an aged care facility would generally be prohibited from engaging in conduct that would be unlawful discrimination in an area of public life protected by the Bill – even if the aged care facility was provided by a religious body (see clause 8), subject to the exception in clause 9 in relation to employment or partnerships. The Department does not consider it likely, given

the terms of the provision, that clause 10 would support discrimination in access to aged care. Rather, clause 10 is more likely to be used to permit additional services to be provided to some persons to meet a need arising from their religious belief or activity.

Statements of belief

Question 7.

A statement of belief must be one that the person genuinely considers to be in accordance with the doctrines, tenets, beliefs or teachings of that religion. How will this be assessed in practice and what guidance, if any, is available in relation to this?

The department considers that the definition of a statement of belief in this Bill would require a court to do more than merely accept a person's claim that their statement satisfies the requirements of the definition.

A statement must be of a belief that a person 'genuinely considers to be in accordance with the doctrines, tenets, beliefs or teachings of that religion' or 'genuinely considers to relate to the fact of not holding a religious belief'. A court is likely to interpret this requirement as involving an inquiry into whether a person's beliefs are sincerely held (for example, consistent with the person's past statements or personal behaviour). A court would be particularly concerned to determine whether a person's statement was a mere artifice to, for example, claim special rights or avoid responsibility.

Where necessary on the facts of the case, a court would also consider whether the person's statements are in relation to a religion, consistent with the existing common law set out by the High Court in *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120 in which the Court adopted a broad, principled approach to the concept of religion and accepted that faith traditions may emerge or develop over time. The most commonly cited test was set out in the judgement of Mason ACJ and Brennan J, who said:

We would therefore hold that, for the purposes of the law, the criteria of religion are twofold: first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief, though canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion. (at p136)

The Australian Human Rights Commission provides guidance on the application and operation of Commonwealth anti-discrimination legislation.

In accordance with general principles of anti-discrimination law, the legal and evidential burden of proof for establishing the elements in this clause rests with the respondent, as the party seeking to rely upon this defence.

Question 8.

Why is it necessary for clause 12 to override all federal, state and territory anti-discrimination laws, rather than apply, on a case-by-case basis, the test under international human rights law of reasonableness, necessity and proportionality in assessing whether a statement of belief constitutes unlawful discrimination?

This clause is intended to protect the ability of individuals to explain, discuss, share and express their fundamental beliefs. Religion is a fundamental part of Australia's strong and diverse social fabric. A person's religious belief, or lack of belief, is of significance to their identity, sense of self and the manner in which they live their life. The Government is of the view that it is appropriate for this Bill to clarify the ability of people of faith to express their religious beliefs in good faith.

The application of the test of reasonableness, necessity and proportionality to potential claims of discrimination in relation to a statement of belief would not provide the certainty required to create an environment conducive to good faith discussions of religious belief. Instead, the Government considers that the provision itself satisfies the test of being reasonable, necessary and proportionate in the context of this Bill.

Question 9.

What additional laws are likely to be prescribed by the regulations for the purposes of clause 12? Is this power necessary?

Paragraph 12(1)(c) provides that a statement of belief does not contravene a provision of a law prescribed by the regulations.

The Government has not identified any laws that it considers should be prescribed for the purposes of clause 12 at this time.

This regulation making power provides flexibility and acts as a safeguard in the event that future Commonwealth, state or territory laws are identified as unreasonably limiting the ability of a person to make a statement of belief. It would be a matter for the Attorney-General whether any additional laws would be prescribed.

Regulations made pursuant to clause 77 are legislative instruments and are subject to disallowance. This will ensure Parliamentary scrutiny of any additional provisions prescribed for the purposes of this clause, including by the Parliamentary Joint Committee on Human Rights.

Question 10.

Noting that clause 12 is intended to operate as a defence to a complaint of discrimination made in relation to the statement under federal, state or territory anti-discrimination law, how would this defence operate in practice?

Subclause 12(1) provides that a statement of belief in and of itself does not contravene certain provisions of Commonwealth, state and territory anti-discrimination law. As such, this clause will not operate to exempt discriminatory conduct, or a series of conduct, merely because it has been accompanied by a statement of belief. In addition, it is not intended that this clause would affect the ability of a complainant to bring statements of belief forward as evidence in support of a discrimination complaint concerning separate conduct. For example, a statement of belief, whilst not constituting discrimination in and of itself, may provide evidence that the reason for the less favourable treatment (that is, the conduct which is the subject of the complaint) was the other person's attribute, thus proving an element of the test of direct discrimination.

This provision will operate as a federal defence to a claim of discrimination under Commonwealth, state or territory anti-discrimination law. Tribunals may therefore be unable to consider matters where a defence under this clause is raised. However, states and territories each have competent courts. If their arrangements for hearing discrimination claims provide a barrier to complainants accessing a court instead of a tribunal, it is open to states and territories to make amendments to their legislation.

Question 11.

Could employers impose a practice, rule or requirement that restricted or prevented the ability of employees to make statements of belief during the course of their employment?

The Bill does not limit the ability of employers to impose a reasonable condition, requirement or practice on staff for conduct at work, provided all employees are treated equally and not subjected to a disadvantage on the ground of their religious belief or activity.

Provisions in the Bill that protect against indirect discrimination in employment (clause 15 and clause 19) would ensure that employers cannot impose conditions upon their employees which unreasonably restrict their ability to manifest their religious beliefs, including by expressing those beliefs during the course of their employment. This is the ordinary operation of the indirect discrimination provision.

An employer does not discriminate against an employee under the Bill by disciplining that employee for conduct at work to the extent that the employer would similarly discipline another employee who did not have that religious belief or engage in that religious activity.

Question 12.

Australia has international obligations to enact laws to prohibit any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

Subclause 12(2) provides that anti-discrimination laws will not be overridden in relation to statements of belief that are malicious; would threaten, intimidate, harass or vilify another person or group of persons; or would counsel, promote, encourage or urge conduct that constitutes a serious offence. Is this sufficient to comply with Australia's obligations, particularly its obligation to prohibit incitement to discriminate?

The Government considers that the Bill complies with all relevant international obligations.

Subclause 12(2) recognises that the law should not protect and sanction harmful statements of belief. The terms 'harass', 'threaten' and 'intimidate' are not defined in the Bill and are intended to be interpreted in accordance with their ordinary meaning.

Subclause 5(1) defines 'vilify' to mean incite hatred or violence towards a person or group of persons. This definition is consistent with the core elements of the majority of state, territory and Commonwealth vilification provisions. Behaviour that could constitute vilification includes:

- a. speaking about a person's race or religion in a way that could make other people hate or ridicule them
- b. publishing claims that a racial or religious group is involved in serious crimes without any proof
- c. repeated and serious spoken or physical abuse about the race or religion of another person
- d. encouraging violence against people who belong to a particular race or religion, or damaging their property
- e. encouraging people to hate a racial or religious group using flyers, stickers, posters, a speech or publication, or websites, email or social media.

Paragraph 12(2)(c) provides that subclause 12(1) does not apply to a statement that is covered by paragraph 35(1)(b). Paragraph 35(1)(b) relates to the expression of particular religious beliefs that a reasonable person, having regard to all the circumstances, would conclude counsel, promote, encourage or urge conduct that would constitute a serious offence. This paragraph will ensure that this clause does not protect statements of belief which advocate for the commission of serious criminal offences.

Question 13.

If a statement of belief was considered to be so offensive to persons or groups with a protected attribute such that the enjoyment or exercise of their rights and freedoms was impaired, would this result in indirect discrimination of such persons or groups?

There are limitations on the protection offered by clause 12. The department considers that if a court was asked to consider whether a statement was so offensive that it impaired the enjoyment or exercise of rights and freedoms of others then the key considerations would include whether the statement was made in good faith, was malicious, or a reasonable person would consider the statement to be threatening, intimidating, harassing or vilifying.

A statement of belief is defined in clause 5 to require, among other factors, that the statement be made in good faith. As noted in response to Question 4, the department's view is that a court is likely to apply a broad interpretation of the good faith requirement, encompassing both subjective considerations (the person making a statement of belief considers they are behaving honestly and with a legitimate purpose), as well as objective considerations (the person has taken a conscientious approach to honouring the values asserted by the Bill, which may include considering, and minimizing, the harm that may be caused by their speech given the overall purpose of the Bill) see *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105.

Clause 12(2) further requires that a statement of belief will not be protected by clause 12(1) if the statement is malicious; or if a reasonable person would consider the statement would threaten, intimidate, harass or vilify (defined in clause 5 as incitement to hatred or violence) a person or group; or if the statement would fall under clause 35(1)(b), counselling, promoting encouraging or urging conduct that would constitute a serious offence.

Question 14.

Subclause 15(2) prohibits a qualifying body imposing a rule that restricts or prevents a person from making a statement of belief in their personal capacity unless compliance with the rule is an 'essential requirement of the profession, trade or occupation'. What would be considered an 'essential requirement of the profession, trade or occupation'?

Subclause 15(2) provides that a qualifying body conduct rule which would have the effect of restricting or preventing a person from making a statement of belief other than in the course of practicing their profession, carrying on their trade or engaging in their occupation is not discrimination if compliance with the rule is an essential requirement of the profession, trade or occupation.

Whether compliance with a qualifying body conduct rule is an 'essential requirement' of the profession, trade or occupation must be determined objectively based on the evidence and the circumstances of the case. In general terms, the department considers that this will require consideration of whether compliance with the rule is an essential element of the profession, such as whether compliance is clearly necessary to carry out the particular profession, or whether the practice of that profession would be essentially the same if that rule were dispensed with. This may include considering not just the specific services provided by the profession, but the general effect of the rule on the public reputation and community standing of members of that profession, trade or occupation.

Relationship with other laws

Question 15.

Clause 37 provides that it is not discrimination on the ground of religion to engage in conduct directly in compliance with Commonwealth, state or territory laws, unless the law has been prescribed by the regulations. What laws are likely to be prescribed in the regulations and what guidance, if any, is available in relation to this?

Clause 37 provides a general exception from the prohibition on discrimination for acts done in direct compliance with certain Commonwealth, state and territory legislation. This exception is broadly consistent with the existing exemptions in section 39 of the Age Discrimination Act, section 47 of the Disability Discrimination Act and section 40 of the Sex Discrimination Act.

Subclause 37(1) relates to Commonwealth legislation. Subclause 37(1) provides that it is not unlawful for a person to discriminate against another person on the ground of religious belief or activity if the conduct constituting the discrimination is in direct compliance with a provision of a Commonwealth law, or instrument, which is not prescribed by the regulations. This provision addresses situations in which obligations that arise under this Bill may conflict with other laws or obligations.

Paragraph 37(1)(b) allows for the prescription of Commonwealth laws which would not be protected by this exception. This is a safeguard to ensure that laws under which it would not be appropriate to make decisions which may discriminate on the basis of religious belief or activity are not protected by this exception.

Subclause 37(3) relates to state and territory legislation. Subclause 37(3) provides that it is not unlawful for a person to discriminate against another person on the ground of religious belief or activity if the relevant conduct was in direct compliance with a provision of a state or territory law which is not prescribed by the regulations. This provision reflects that this Bill does not generally intend to override or interfere with state or territory legislation. Conduct in direct compliance with state and territory laws will not be unlawful under this Bill (though such conduct may be regulated through the anti-discrimination legislation of that state or territory).

This provision allows regulations to prescribe state or territory laws which would not be protected by this exception. This is a safeguard in the event that a state or territory passed a law which authorised or required discriminatory conduct. For example, if a state or territory passed a law which directly or indirectly discriminated against people of a particular religious belief or activity, the Commonwealth could prescribe this legislation in the regulations and any conduct done in direct compliance with that legislation would be excluded from this exception and would therefore be unlawful discrimination under the Bill.

It would be a matter for the Attorney-General to determine whether any additional laws would be prescribed.

Exemptions

Question 16.

The Australian Human Rights Commission is empowered under clause 44 to grant exemptions to any person or body from the anti-discrimination provisions of this bill. When is this power likely to be exercised? What guidance, if any, is available in relation to the exercise of this power? Why is appropriate that this power be able to be delegated to 'any other person or body of persons' (clause 69)? Who would the Commission likely delegate its powers to?

The Commission will be able to grant temporary exemptions for conduct that would otherwise be unlawful under this Bill.

The Commission is currently able to grant temporary exemptions under the Age Discrimination Act, Disability Discrimination Act and the Sex Discrimination Act. It is intended that the powers under this Bill will be used in the same way and circumstances as under the existing Acts. These provisions provide flexibility and recognize that in particular circumstances, conduct which would otherwise be unlawful discrimination should be permitted on a temporary basis. This may include providing exemptions on a transitional basis, such as providing protection for entities while they transition toward full compliance with this Bill, or addressing circumstances where considerable adjustments may need to be made.

Subclause 44(1) specifies that the grant of a temporary exemption must be done by notifiable instrument. This requirement ensures that the community at large is aware of temporary exemptions granted by the Commission. It is intended that such an instrument would set out the findings of the Commission, refer to the evidence on which those findings are based, and detail the reasons for making the decision. Subclause 44(2) clarifies the content of a temporary exemption. In accordance with this subclause, the exemption must specify those covered by the exemption, the provisions of this Bill to which the exemption applies and the period for which the exemption is granted. Paragraph 44(2)(c) clarifies that the exemption must not be granted for a period of more than five years. Subclause 44(3) provides that the exemption may be granted subject to terms and conditions specified in the instrument and may apply only in relation to the circumstances or activities specified in the instrument.

The Department understands that the Commission would develop guidance, as has been developed under the existing anti-discrimination Acts, once the Bill is enacted. The Commission provides information on the existing exemptions under other discrimination laws at:

<https://humanrights.gov.au/our-work/legal/exemptions>

The Commission has a broad ability to delegate its functions or powers under this Bill in clause 69. This broad power of delegation is necessary to enable the Commission to carry out the wide range of functions conferred on it by this Bill. This broad power also recognises that in certain circumstances, the Commission may consider it necessary to delegate to a person or body external to the Commission, such as a barrister, certain functions, such as in relation to the grant of exemptions or the preparation of reports, where there may be a conflict of interest with the Commission. This power is consistent with delegation powers in existing federal anti-discrimination legislation and in the AHRC Act.