SENATE LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

INQUIRY INTO RELIGIOUS DISCRIMINATION BILL 2021 AND RELATED BILLS

Australian Human Rights Commission

Examples of statements of belief being contrary to discrimination law

Senator Deborah O'Neill asked the following question on 21 January 2021:

In relation to section 12, which has occupied so much of our time, the Australian Human Rights Commission has submitted that it's not aware of any cases where genuine statements of belief have been held to be contrary to Australian antidiscrimination law. That is in paragraph 55 of your submission. I have been asking participants in this series of hearings about their view with regard to that. Over the course of this Senate inquiry, or the previous inquiry, have you been made aware of any such examples? …

Could I indicate that we received a submission from the Human Rights Law Alliance, and they refer to some cases in here. It will be very interesting to get your response to the scenarios that they describe there for our consideration, on notice.

The response to the honourable senator's question is as follows:

The document tabled by the Human Rights Law Alliance (HRLA) contains 44 case studies. It appears that some of the people described in these cases studies are clients of HRLA. Other case studies appear to have been gathered from media reports. Many of the case studies set out allegations that have not been tested in a court or tribunal.

The Commission is not in a position to comment on the accuracy of the case studies.

Most of the case studies deal with the following areas of law:

- workplace relations, including code of conduct investigations by employers
- disciplinary proceedings by qualifying bodies, including by the Medical Board of Australia
- disciplinary proceedings or other conduct engaged in by educational institutions.

Provisions of the Bill that prohibit discrimination on the basis of religious belief or activity in employment (clause 19), by qualifying bodies (clause 21) and in education (clause 24) will provide protection for people against religious discrimination in these areas (even without the unusual clause 15 dealing with 'qualifying body conduct rules' that the Commission submits should be removed from the Bill).

One of the case studies, 'Hannah', deals with an allegation of refusal of services on the basis of religious belief or activity. Clause 26 of the Bill will provide protection for people against discrimination on the basis of religious belief or activity in the provision of goods, services and facilities.

The 'statements of belief' defence (clause 12) will not be relevant to any of the kinds of cases described above because there was no allegation in those cases that there had been a breach of anti-discrimination law.

Discrimination law

It appears that 12 of the case studies in the HRLA bundle deal with discrimination law in some form. In none of these cases has a moderately expressed statement of religious belief been found to be contrary to any Australian anti-discrimination law. That is, none of the case studies put forward by HRLA suggest that clause 12 of the Bill is legally necessary.

Four of the 12 discrimination case studies deal with complaints about the making of statements. Of these, two of them deal with statements made by religious leaders in Tasmania about same sex marriage:

- The best known is the complaint made against **Archbishop Porteous** under s 17 of the *Anti-Discrimination Act 1998* (Tas) (Tas ADA). As is well-known, this complaint was withdrawn and no findings were made that the statements complained of amounted to discrimination.

- The second is the complaint made against Presbyterian preacher **Campbell Markham** and street preacher **David Gee**, also under s 17 of the Tas ADA.[1] This complaint was also withdrawn without any findings being made that the statements amounted to discrimination.[2]

If these complaints had made it to the Tasmanian Anti-Discrimination Tribunal, the respondents would have had the opportunity to argue, among other things, that the defence in s 55 of the Tas ADA applied. That section provides that s 17 does not apply to a public act done in good faith for any purpose in the public interest.

The other two case studies that involve the making of statements deal with allegations of homosexual vilification under New South Wales laws. These kinds of statements are not protected by clause 12 of the Bill which provides a defence against discrimination but not against vilification. The cases are as follows:

- **Katrina Tait:** This case reportedly involved a complaint made to the NSW Anti-Discrimination Board under s 49ZT of the *Anti-Discrimination Act 1977* (NSW) (NSW

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1 Patrick Billings, 'Anti-Discrimination Commission to hear complaint over Hobart preacher Campbell Markham's blogs' *Mercury*, 7 August 2017, at https://www.themercury.com.au/news/tasmania/antidiscrimination-commission-to-hear-complaint-over-hobart-preacher-campbell-markhams-blogs/news-story/faf220e76fb3281419182fd1892df5a1.

2 Samuel Mazur, 'Complaint Withdrawn, But The Emperor is Still Naked …' *Tasmanian Times*, 2 July 2018, at https://tasmaniantimes.com/2018/07/complaint-withdrawn-but-the-emperor-is-still-naked/.

ADA) which prohibits homosexual vilification.[3] The complaint related to comments posted by Ms Tait under an Australian Christian Lobby petition on Facebook opposing a Drag Queen Storytime Event at a Brisbane library in which she reportedly described the performers as '[h]ardly good role models with many involved in drugs and prostitution'. The complaint was withdrawn by the complainant and no findings were made.

- **Bernard Gaynor:** The HRLA refers generally to 'over 30 complaints of discrimination and vilification' filed against Mr Gaynor by 'an LGBTQ+ activist in NSW'. It appears that this is a reference to complaints filed by Mr Garry Burns. The highest profile of these cases is *Burns v Corbett* (2018) 265 CLR 304 in which the High Court held that the Civil and Administrative Tribunal of New South Wales did not have jurisdiction to determine a complaint between residents of different States. At all relevant times, Mr Burns was a resident of New South Wales and Mr Gaynor was a resident of Queensland. That case dealt with complaints of homosexual vilification under s 49ZT of the NSW ADA. At the time of the High Court proceeding, the Court noted that Mr Burns' complaint against Mr Gaynor had not been heard on the merits (at [13]).

  HRLA says that none of the complaints by Mr Burns have been successful. That is, according to HRLA there have been no findings that statements made by Mr Gaynor were contrary to Australian anti-discrimination law. Even if clause 12 were applicable to some of these claims, there is no need for a new federal defence against claims that would otherwise be unsuccessful. HRLA claims that the complaints made by Mr Burns amounted to 'vexatious harassment'. Recommendation 2 in the Commission's written submission deals with the question of termination of vexatious or otherwise unmeritorious complaints.

Four of the 12 discrimination case studies involve allegations of a refusal of service on the basis of a protected attribute such as gender identity ('Lara', 'Women's Rehab Centre', 'Jason' and 'Maria').[4] These were all complaints about conduct and not about the making of a statement of belief. Clause 12 of the Bill does not apply to discriminatory conduct.

The last four of the 12 discrimination case studies are as follows:

- **Rachel Colvin v Ballarat Christian College:** Mrs Colvin was a teacher at Ballarat Christian College for more than 10 years. She reportedly brought proceedings under *Equal Opportunity Act 2010* (Vic) alleging that she had been discriminated against by the college on the basis of her religion and political beliefs.[5] She alleged that she was forced to resign when she refused to agree and abide by a statement of faith dealing with same sex marriage that was contrary to her political and religious beliefs. According to the HRLA document, the case was settled and no findings were made that she had been discriminated against. Clause 12 of the Bill would have had no impact on this case,

[3] Australia Watch, 'Katrina', https://australiawatch.com.au/katrina-tait/.

[4] The case study about 'James' could also potentially fall into this category. It has not been included in the count of discrimination cases because it does not appear that any complaints about James' conduct were ever made.

[5] Equality Australia, 'Rachel Colvin files discrimination complaint against Ballarat Christian College', https://equalityaustralia.org.au/rachel-colvin-files-discrimination-complaint-against-ballarat-christian-college/.

because Mrs Colvin did not allege that the college had made a statement that was contrary to any Australian anti-discrimination law.

If the present Bill had been passed at the time of this complaint, Mrs Colvin may also have had a federal claim of discrimination under clause 19 (employment). However, this clause would not apply to the college, as a 'religious body', if it was able to demonstrate that it fell within the broad exceptions in clause 7(2) or (4). If clause 7 applied, there would be no prohibition in the Bill on the college dismissing Mrs Colvin on the basis of her religious belief or activity (clause 19(2)(c)), or subjecting her to any other detriment on those grounds (clause 19(2)(d)). This is one reason why the Commission says that the exemptions in clause 7 of the Bill are too broad.

- ***Christian Youth Camps Limited v Cobaw Community Health Services Ltd* (2014) 50 VR 256:** This is a discrimination case, but it is not about the making of statements of belief. The case dealt with the question of whether CYC could refuse to hire out its camping resort to the respondent organisation on the basis that the respondent intended to use it for the purposes of a weekend camp to be attended by same sex attracted young people. Clause 12 of the Bill would have had no impact on this case.

- **Christian School:** This case study involved an allegation that the school discriminated against a trans boy by requiring him to wear a female school uniform. It does not involve any allegations relating to a statement of belief. Clause 12 of the Bill would have had no impact on this case.

- **Neil:** The precise nature of the claim made in this case study is unclear. It appears that Neil may have made a claim against the journalist referred to in the case study because of the alleged impact of the article on Neil and his business. If this is the case, then clause 12 of the Bill would have had no application. It does not appear to be suggested that any formal discrimination claim was brought against Neil based on words on the t-shirt he was offering for sale. Certainly no findings have been made that selling a t-shirt with the words "Love is a Choice" amounts to discrimination under any Australian discrimination law.

The case studies in the document tabled by HLRA do not demonstrate any need for the proposed 'statement of belief' defence in clause 12 of the Bill.

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Constitutional issues

Senator Deborah O'Neill asked the following question on 21 January 2022:

Professor Twomey raises concerns about constitutionality with regard to section 109 of the Constitution. The concerns she raises are essentially that, unless there's an inconsistency, there's going to be pretty bad law made. A recommendation to amend that problem and provide some certainty has been offered by Professor Aroney. I know you don't believe there's a need for clause 12. He makes amendments for 11 and 12. I'd be interested in your considered view on that, if you could take that on notice.

The response to the honourable senator's question is as follows:

In her submission to this inquiry, Professor Anne Twomey identifies two constitutional issues with clauses 11 and 12 of the Religious Discrimination Bill.[6] Those issues are:

- the provisions may not be supported by a head of power under s 51 of the Constitution because they may be substantially inconsistent with the International Covenant on Civil and Political Rights as a whole
- the provisions may not create an inconsistency with State and Territory laws that would result in those laws being inoperative by reason of s 109 of the Constitution because the Bill purports to determine the legal effect of State laws rather than merely creating rights under Commonwealth law that are inconsistent with State laws.

In his submission to this inquiry, Professor Nicholas Aroney proposes some alternative drafting to clauses 11 and 12.[7] The alternative drafting would appear to address the second of the constitutional issues identified above, but not the first.

The drafting by Professor Aroney would not address the Commission's substantive concerns with either clause 11 or clause 12. The Commission maintains the position that, even if the provisions were drafted in the form proposed by Professor Aroney, they should not form part of the Bill.

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6 Professor Anne Twomey, *The Religious Discrimination Bill 2021*, submission to the Senate Legal and Constitutional Affairs Legislation Committee, 23 December 2021, https://www.aph.gov.au/DocumentStore.ashx?id=8a4320a6-50c4-4299-ba1d-bddf8f38ea1d&subId=719177.

7 Professor Nicholas Aroney, Religious Discrimination Bill and other related bills, submission to the Senate Legal and Constitutional Affairs Legislation Committee, Appendix B, https://www.aph.gov.au/DocumentStore.ashx?id=febd8da0-d0a1-468f-9dd6-1e8088eb44f1&subId=719361.

In the case of clause 11, the effect of the clause would be to substitute a policy position of the Commonwealth Government for a policy position of the State of Victoria in an area where Victoria has primary responsibility. This would be a highly unusual step. Education is primarily a responsibility of the States. As set out in the Commission's submission at [212]:

> If an individual State decides that prospective staff of educational institutions should be provided with greater protection against discrimination on the basis of their religious belief or activity, the Commission's view is that this choice should not overridden by the Commonwealth. The choice made by Victoria appears to be a legitimate one that permits religious educational institutions to select staff based on their religious belief or activity where this is relevant to the role. Such a position is a narrower, and proportionate, interference with freedom of religion or belief that is tightly correlated to a legitimate purpose.

In the case of clause 12, the proposed redrafting does not address the Commission's concern that the clause would result in a diminishing of protections against discrimination with adverse consequences that are unintended and unnecessary.

Significantly, the proposed redraft of clause 12 would be *more* problematic than the existing clause 12 because it would override anti-discrimination law to a greater extent. We set out below brief reasons for this conclusion.

Existing clause 12 is limited to providing that statements of belief do not amount to *discrimination* under Commonwealth, State and Territory anti-discrimination laws. However, under the proposed new drafting, clause 12(2) would provide a general right to make a statement of belief, notwithstanding *any* anti-discrimination law. This is not limited to discrimination provisions in those laws and would also extend to harassment and vilification provisions in those laws, subject to the limitations in clause 12(3).

This means that a statement of belief could provide a defence to s 18C of the *Racial Discrimination Act 1975* (Cth) (RDA). This was a result that was explicitly disavowed by the Government in the Explanatory Memorandum at [178]. The Parliamentary Joint Committee on Human Rights (PJCHR) conducted an extensive inquiry into s 18C of the RDA in 2016 and 2017. This inquiry had a high degree of public engagement, with the PJCHR receiving contributions from more than 11,000 individuals and organisations, more than 400 of which were published as submissions.[8] As a result of that inquiry, no change was made to s 18C. The Commission is concerned that the scope of s 18C should not be narrowed through a last-minute amendment to the present Bill, without members of the public who participated in that previous inquiry being given the opportunity to consider whether such a significant change is appropriate.

Clause 12(3) would not be sufficient to protect s 18C of the RDA from being overridden. Clause 12(3) of the redraft provides that a defence will not be available for a statement of belief that a reasonable person would consider would threaten, intimidate, harass or vilify a person or group.

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[8] Parliamentary Joint Committee on Human Rights, *Freedom of speech in Australia: Inquiry into the operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and related procedures under the Australian Human Rights Commission Act 1986 (Cth)*, Inquiry report, 28 February 2017, at [1.5].

The Bill provides that 'vilify' means 'incite hatred or violence towards' a person or group. This is a higher threshold than conduct captured by s 18C of the RDA, which proscribes conduct that 'is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate' another person or group of people.

The proposed amendment to clause 12 may also override protections against sexual harassment and sex based harassment under the *Sex Discrimination Act 1984* (Cth) (SDA). In assessing the degree of override, it is necessary to compare clause 12(3) of the proposed amendment to the threshold for sexual harassment and sex based harassment in the SDA. Clause 12(3) provides a statement of belief will not override the SDA if the statement is one that 'a reasonable person would consider would … harass … a person or group'. This is a higher threshold than in the SDA, where harassment can be established if 'a reasonable person, having regard to the all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated'. This difference between these two tests indicates that a statement of belief under the redrafted clause 12 is likely to be a defence to some conduct that currently amounts to sexual harassment and sex based harassment under the SDA.

The Commission's view is that it would be highly undesirable for clause 12 to be amended in a way that permits a greater degree of discrimination and harassment than is currently proposed.

There should certainly not be a reduction in protections against racial vilification or sexual harassment without a full opportunity for public debate.

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Statements of belief

Senator Deborah O'Neill asked the following question on 21 January 2021:

In your opening statement you indicated that people who were seeking the comfort of clause 12 should not seek it there, that in fact they should have confidence in other parts of the bill. Could you nominate them now and provide a full answer on notice?

The response to the honourable senator's question is as follows:

The Bill will, for the first time at the Commonwealth level, provide enforceable protections for discrimination against a person on the basis of their religious belief or religious activity.

One kind of religious activity involves communicating with others about your faith. This may involve speaking with individuals and communities about matters of religion; as well as writing, issuing and disseminating relevant publications in relation to religion.[9] In accordance with Article 18(3) of the ICCPR, these kinds of manifestation of religious belief may only be subject to limitations that are prescribed by law and necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

The Bill will ensure that people of faith may not be discriminated against in any of the areas of public life covered by the Bill, for making a statement of belief. For example, it will be unlawful to directly or indirectly discriminate against a person for making a statement of belief in the context of employment, education or the provision of goods and services.

In the employment context, it will be unlawful for an employer to treat an employee less favourably because they made a religious statement, or to require employees to adhere to a code of conduct that unreasonably restricts the ability of employees to talk about their religious beliefs.

These provisions should provide confidence to people that they are able to speak about their faith without fear of discrimination. They provide strong protection for statements of belief, in a way that does not infringe the rights of others.

[9] Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, proclaimed by General Assembly of the United Nations on 25 November 1981 and adopted by Australia, article 6.