Senate Legal and Constitutional Affairs Legislation Committee

Religious Discrimination Bill 2021 [Provisions]

Attorney-General's Department

Hearing date: 21 January 2022

Hansard page: 67

Deborah O'Neill asked the following question:

Senator O'NEILL: To be clear: in practical effect, there is no need for clause 12?
Mr Walter: I think there would be some very limited examples where clause 12 might have some substantive role to play. Given all those provisos that are around it in terms of the definition of religious belief, including the fact it has to be in good faith, we can't step into circumstances where the words are said maliciously or amount to harassment, discrimination and so forth. If we confine ourselves to clause 12(1), we think it is clarificatory of the law as it is.
Senator O'NEILL: Can you provide me on notice any of those very few minor examples that you just said might have some impact? I get the sense there's a whole lot more that people think it's going to do than what you've made clear today it's not going to do.
Mr Walter: I agree. I think the expectations are separate to what the law, as written, does.

The response to the question is as follows:

As outlined in the Explanatory Memorandum for the Religious Discrimination Bill, examples may include situations that could be considered under the Religious Discrimination Bill itself. The examples noted in the Explanatory Memorandum are sharing a Christmas greeting which references religious beliefs, or sharing an atheistic view of religion and prayer. The Department does not have additional examples at this time.

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Senator Paul Scarr asked the following question:

Senator SCARR: Thank you, Chair. Mr Walter, it is good to see you again. I have a number of questions for you, and the time is limited, as has been noted. An issue was raised by the Australian Muslim Advocacy Network. No doubt you're aware—the government is aware—of the increase in acts of Islamophobia and also, indeed, in acts of anti-Semitism. We had the dreadful, dreadful events in Christchurch recently. The concern raised is that there is insufficient antivilification protection where people are vilified on the basis of religion. Under the Racial Discrimination Act, people of the Jewish faith, for example, are protected because being Jewish is seen as going to ethnicity as well as religion, whereas, for someone of the Muslim faith, the same principle doesn't apply. A quite evocative example was given. We've had a recent influx—and it's a good thing—of humanitarian visa holders from Afghanistan. Someone could arrive from Afghanistan and, if they're subject to vilification, whether or not they have a remedy depends on whether the word 'Afghan' is used in the vilification, which doesn't seem to me to be an acceptable state of affairs. In your view, what is the antivilification law that applies, for example, for people of the Muslim faith or the Buddhist faith? We heard quite disturbing evidence from a number of witnesses of the Buddhist faith yesterday in relation to vilification at a federal level.

Mr Walter: Thank you for the question. I'll provide you with the provisions on notice because I think it's a very important question. However, we have general antivilification provisions in the Criminal Code, which provide substantial criminal penalties for these types of crimes, including against people on the basis of their religion. They sit in the provisions that relate to human rights atrocities and so forth. We'll get you the exact provisions. I can't remember them off the top of my head, but they're in the Criminal Code, and there's a comprehensive suite of vilification laws in the states and territories as well.

I'm deliberately using the word 'vilification' because that has a particular meaning and it's commonly conflated with what are more colloquially known as hate crime laws. Vilification is all about the audience of the statements. Vilification is about inciting someone else to hate a religious group, for example, whereas hate crimes are about hate speech directed at an individual who is of a particular religion. Vilification is comprehensive coverage; hate speech provisions are much more patchy. Section 18C of the Racial Discrimination Act is, I think, what you're probably referring to. That is the main hate speech provision in Commonwealth legislation. Your description of it is quite right: it would apply to some ethno-religious groups, such as people of Jewish faith—Sikhs are probably another good example—but it wouldn't apply, for example, to Christians. Then there are other provisions in state and territory legislation, and that's a little patchier. We've got quite a good table of all that, so we'll dig that out and make sure that it's all up to date, and we'll provide it to the committee because I think it might be of value.

The response to the question is as follows:

Please refer to attached table which contains extracts of relevant provisons from federal, state and territory legislation.

Vilification provisions

Jurisdiction	Authority	Legislation/Policy Directive
Commonwealth	*Criminal* ***Criminal Code Act 1995*** **(Cth)**	**Section 80.2A – Urging violence against groups** (1) A person (the *first person*) commits an offence if: (a) the first person intentionally urges another person, or a group, to use force or violence against a group (the *targeted group*); and (b) the first person does so intending that force or violence will occur; and (c) the targeted group is distinguished by race, religion, nationality, national or ethnic origin or political opinion; and (d) the use of the force or violence would threaten the peace, order and good government of the Commonwealth. Penalty: Imprisonment for 7 years. Note: For intention, see section 5.2. (2) A person (the first person) commits an offence if: (a) the first person intentionally urges another person, or a group, to use force or violence against a group (the targeted group); and (b) the first person does so intending that force or violence will occur; and (c) the targeted group is distinguished by race, religion, nationality, national or ethnic origin or political opinion. Penalty: Imprisonment for 5 years (3) The fault element for paragraphs (1)(c) and (2)(c) is recklessness. **Section 80.2B – Urging violence against members of groups** (1) A person (the *first person*) commits an offence if: (a) the first person intentionally urges another person, or a group, to use force or violence against a person (the *targeted person*); and (b) the first person does so intending that force or violence will occur; and (c) the first person does so because of his or her belief that the targeted person is a member of a group (the *targeted group*); and

Jurisdiction	Authority	Legislation/Policy Directive
		(d) the targeted group is distinguished by race, religion, nationality, national or ethnic origin or political opinion; and (e) the use of the force or violence would threaten the peace, order and good government of the Commonwealth. Penalty: Imprisonment for 7 years. (2) A person (the first person) commits an offence if: (a) the first person intentionally urges another person, or a group, to use force or violence against a person (the targeted person); and (b) the first person does so intending that force or violence will occur; and (c) the first person does so because of his or her belief that the targeted person is a member of a group (the targeted group); and (d) the targeted group is distinguished by race, religion, nationality, national or ethnic origin or political opinion. Penalty: Imprisonment for 5 years. (3) For the purposes of paragraphs (1)(c) and (2)(c), it is immaterial whether the targeted person actually is a member of the targeted group. (4) The fault element for paragraphs (1)(d) and (2)(d) is recklessness.
New South Wales	*Criminal* ***Crimes Act 1900* (NSW)**	**Section 93Z - Offence of publicly threatening or inciting violence on grounds of race, religion, sexual orientation, gender identity or intersex or HIV/AIDS status** (1) A person who, by a public act, intentionally or recklessly threatens or incites violence towards another person or a group of persons on any of the following grounds is guilty of an offence: (a) the race of the other person or one or more of the members of the group, (b) that the other person has, or one or more of the members of the group have, a specific religious belief or affiliation, (c) the sexual orientation of the other person or one or more of the members of the group, (d) the gender identity of the other person or one or more of the members of the group, (e) that the other person is, or one or more of the members of the group are, of intersex status, (f) that the other person has, or one or more of the members of the group have, HIV or AIDS.

Jurisdiction	Authority	Legislation/Policy Directive
		Maximum penalty: (a) in the case of an individual—100 penalty units or imprisonment for 3 years (or both), or (b) in the case of a corporation—500 penalty units. (2) In determining whether an alleged offender has committed an offence against this section, it is irrelevant whether the alleged offender's assumptions or beliefs about an attribute of another person or a member of a group of persons referred to in subsection (1) (a)–(f) were correct or incorrect at the time that the offence is alleged to have been committed. (3) In determining whether an alleged offender has committed an offence against this section of intentionally or recklessly inciting violence, it is irrelevant whether or not, in response to the alleged offender's public act, any person formed a state of mind or carried out any act of violence. (4) A prosecution for an offence against this section is not to be commenced without the approval of the Director of Public Prosecutions. (5) In this section: **gender identity** means the gender related identity, appearance or mannerisms or other gender related characteristics of a person (whether by way of medical intervention or not), with or without regard to the person's designated sex at birth. intersex status means the status of having physical, hormonal or genetic features that are: (a) neither wholly female nor wholly male, or (b) a combination of female and male, or (c) neither female nor male. **public act** includes: (a) any form of communication (including speaking, writing, displaying notices, playing of recorded material, broadcasting and communicating through social media and other electronic methods) to the public, and (b) any conduct (including actions and gestures and the wearing or display of clothing, signs, flags, emblems and insignia) observable by the public, and (c) the distribution or dissemination of any matter to the public. For the avoidance of doubt, an act may be a public act even if it occurs on private land. **race** includes colour, nationality, descent and ethnic, ethno-religious or national origin. **religious belief** or affiliation means holding or not holding a religious belief or view.

Jurisdiction	Authority	Legislation/Policy Directive
		sexual orientation means a person's sexual orientation towards: (a) persons of the same sex, or (b) persons of a different sex, or (c) persons of the same sex and persons of a different sex. **violence** includes violent conduct and violence towards a person or a group of persons includes violence towards property of the person or a member of the group, respectively.
	Civil ***Anti-Discrimination Act 1977*** **(NSW)**	**Section 20C - Racial vilification unlawful** (1) It is unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group. (2) Nothing in this section renders unlawful— (a) a fair report of a public act referred to in subsection (1), or (b) a communication or the distribution or dissemination of any matter on an occasion that would be subject to a defence of absolute privilege (whether under the *Defamation Act 2005* or otherwise) in proceedings for defamation, or (c) a public act, done reasonably and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including discussion or debate about and expositions of any act or matter.
ACT	*Civil* ***Discrimination Act 1991*** **(ACT)**	**Section 67A – Unlawful vilification** (1) It is unlawful for a person to incite hatred toward, revulsion of, serious contempt for, or severe ridicule of a person or group of people on the ground of any of the following, other than in private: (a) disability; (b) gender identity; (c) HIV/AIDS status; (d) race; (e) religious conviction; (f) sex characteristics; (g) sexuality. Examples: other than in private 1 screening recorded material at an event that is open to the public, even if privately organised

Jurisdiction	Authority	Legislation/Policy Directive
		2writing a publicly viewable post on social media 3 speaking in an interview intended to be broadcast or published 4 actions or gestures observable by the public 5 wearing or displaying clothes, signs or flags observable by the public Note: Serious vilification is an offence under the Criminal Code, s750. (2) However, it is not unlawful to (a) make a fair report about an act mentioned in subsection (1); or (b) communicate, distribute or disseminate any matter consisting of a publication that is subject to a defence of absolute privilege in a proceeding for defamation; or (c) do an act mentioned in subsection (1) reasonably and honestly, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including discussion or debate about and presentations of any matter. (3) In this section: HIV/AIDS status means status as a person who has the Human Immunodeficiency Virus or Acquired Immune Deficiency Syndrome.
	Criminal ***Criminal Code 2002*** **(ACT)**	**Section 750 – Serious vilification** (1) A person commits an offence if (a) the person intentionally carries out an act; and (b) the act is a threatening act; and (c) the person is reckless about whether the act incites hatred toward, revulsion of, serious contempt for, or severe ridicule of, a person or group of people on the ground of any of the following: (i) disability; (ii) gender identity; (iii) HIV/AIDS status; (iv) race; (v) religious conviction; (vi) sex characteristics; (vii) sexuality; and (d) the act is done other than in private; and

Jurisdiction	Authority	Legislation/Policy Directive
		(e) the person is reckless about whether the act is done other than in private. Examples: other than in private 1 screening recorded material at an event that is open to the public, even if privately organised 2writing a publicly viewable post on social media 3 speaking in an interview intended to be broadcast or published 4 actions or gestures observable by the public 5 wearing or displaying clothes, signs or flags observable by the public Maximum penalty: 50 penalty units. (2) In this section: **disability** - see the Discrimination Act 1991, section 5AA. **gender identity** - see the Discrimination Act 1991, dictionary. **HIV/AIDS** status means status as a person who has the Human Immunodeficiency Virus or Acquired Immune Deficiency Syndrome. **race** - see the Discrimination Act 1991, dictionary. **religious conviction** - see the Discrimination Act 1991, dictionary. **sex characteristics** - see the Discrimination Act 1991, dictionary. **sexuality** - see the Discrimination Act 1991, dictionary. **threatening act** means an act carried out by a person only if the person (a) by the act, intentionally threatens physical harm toward, or toward any property of, the person, or members of the group mentioned in subsection (1) (c) (i) to (vii); or (b) is reckless about whether the act incites others to threaten the harm.
Northern Territory	N/A	The Northern Territory is the only state or territory that does not have specific legislative provisions covering hate speech or racial vilification. The *Anti-Discrimination Act 1992* (NT) prohibits discrimination and harassment in activities associated with education, work, accommodation, services, clubs, and insurance or superannuation. In 2018, the NT consulted on introducing anti-vilification laws prohibiting offensive conduct on the basis of race, religious belief, disability, sexual orientation, gender identity and intersex status as part of the Modernisation of the Anti-Discrimination Act project. Public consultation on the project is now closed – however, the NT Government has not yet indicated an intention to introduce a specific provision.

Jurisdiction	Authority	Legislation/Policy Directive
Queensland	*Civil* ***Anti-Discrimination Act 1991* (Qld)**	**Section 124A – Vilification on the grounds of race, religion, sexuality or gender identity unlawful** (1) A person must not, by a public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race, religion, sexuality or gender identity of the person or members of the group. (2) Subsection (1) does not make unlawful— (a) the publication of a fair report of a public act mentioned in subsection (1); or (b) the publication of material in circumstances in which the publication would be subject to a defence of absolute privilege in proceedings for defamation; or (c) a public act, done reasonably and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including public discussion or debate about, and expositions of, any act or matter.
	Criminal ***Anti-Discrimination Act 1991* (Qld)**	**Section 131A – Serious racial and religious vilification** (1) A person must not, by a public act, knowingly or recklessly incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race, religion, sexuality or gender identity of the person or members of the group in a way that includes— (a) threatening physical harm towards, or towards any property of, the person or group of persons; or (b) inciting others to threaten physical harm towards, or towards any property of, the person or group of persons. Maximum penalty— (a) for an individual—70 penalty units or 6 months imprisonment; or (b) for a corporation—350 penalty units. (2) A Crown Law Officer's written consent must be obtained before a proceeding is started by complaint under the Justices Act 1886 in relation to an offence under subsection (1). (3) An offence under subsection (1) is not an offence for section 155(2) or 226. (4) In this section: **Crown Law Officer** means the Attorney-General or Director of Public Prosecutions.

Jurisdiction	Authority	Legislation/Policy Directive
South Australia	*Criminal* ***Racial Vilification Act 1996* (SA)**	**Section 4 — Racial vilification** A person must not, by a public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of their race by (a) threatening physical harm to the person, or members of the group, or to property of the person or members of the group; or (b) inciting others to threaten physical harm to the person, or members of the group, or to property of the person or members of the group. Maximum penalty: If the offender is a body corporate—$25 000. If the offender is a natural person—$5 000, or imprisonment for 3 years, or both.
	Civil ***Civil Liability Act 1936* (SA)**	**73—Racial victimisation** (1) In this section— **act of racial victimisation** means a public act inciting hatred, serious contempt or severe ridicule of a person or group of persons on the ground of their race but does not include: (a) publication of a fair report of the act of another person; or (b) publication of material in circumstances in which the publication would be subject to a defence of absolute privilege in proceedings for defamation; or (c) a reasonable act, done in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest (including reasonable public discussion, debate or expositions); **detriment** means (a) injury, damage or loss; or (b) distress in the nature of intimidation, harassment or humiliation; **public act** means (a) any form of communication with the public; or (b) conduct in a public place; race of a person means the nationality, country of origin, colour or ethnic origin of the person or of another person with whom the person resides or associates. (2) An act of racial victimisation that results in detriment is actionable as a tort by the person who suffers the detriment. (3) In an action for damages for racial victimisation, damages may be awarded to compensate any form of detriment.

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		(4) The total amount of the damages that may be awarded for the same act or series of acts cannot exceed $40 000. (5) In applying the limit fixed by subsection (4), the court must take into account damages awarded by a court in criminal proceedings on convicting the defendant, in respect of the same act or series of acts, of the offence or a series of offences of racial vilification1. (6) Before a court awards damages for an act of racial victimisation, the court must (a) take reasonable steps to ensure that all persons who may have been harmed by the act are given a reasonable opportunity to claim damages in the proceedings; or (b) take other action that appears reasonable and necessary in the circumstances to protect the interests of possible claimants who are not before the court. Note— 1 See section 6 of the Racial Vilification Act 1996.
Tasmania	*Civil* ***Anti-Discrimination Act 1998* (Tas)**	**Section 19 – Inciting hatred** A person, by a public act, must not incite hatred towards, serious contempt for, or severe ridicule of, a person or a group of persons on the ground of (a) the race of the person or any member of the group; or (b) any disability of the person or any member of the group; or (c) the sexual orientation or lawful sexual activity of the person or any member of the group; or (d) the religious belief or affiliation or religious activity of the person or any member of the group; or (e) the gender identity or intersex variations of sex characteristics of the person or any member of the group.
Victoria	*Civil* ***Racial and Religious Tolerance Act 2001* (Vic)**	**Section 7 - Racial vilification unlawful** (1) A person must not, on the ground of the race of another person or class of persons, engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons. (2) For the purposes of subsection (1), conduct (a) may be constituted by a single occasion or by a number of occasions over a period of time; and (b) may occur in or outside Victoria. Note: **Engage in conduct** includes use of the internet or e-mail to publish or transmit statements or other material.

Jurisdiction	Authority	Legislation/Policy Directive
		Section 8 – Religious vilification unlawful (1) A person must not, on the ground of the religious belief or activity of another person or class of persons, engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons. (2) For the purposes of subsection (1), conduct (a) may be constituted by a single occasion or by a number of occasions over a period of time; and (b) may occur in or outside Victoria. Note: Engage in conduct includes use of the internet or e-mail to publish or transmit statements or other material.
	Criminal ***Racial and Religious Tolerance Act 2001*** **(Vic)**	**Section 24 - Offence of serious racial vilification** (1) A person (the offender) must not, on the ground of the race of another person or class of persons, intentionally engage in conduct that the offender knows is likely— (a) to incite hatred against that other person or class of persons; and (b) to threaten, or incite others to threaten, physical harm towards that other person or class of persons or the property of that other person or class of persons. Note: Engage in conduct includes use of the internet or e-mail to publish or transmit statements or other material. Penalty: In the case of a body corporate, 300 penalty units; In any other case, imprisonment for 6 months or 60 penalty units or both. (2) A person (the offender) must not, on the ground of the race of another person or class of persons, intentionally engage in conduct that the offender knows is likely to incite serious contempt for, or revulsion or severe ridicule of, that other person or class of persons. Note: Engage in conduct includes use of the internet or e-mail to publish or transmit statements or other material. Penalty: In the case of a body corporate, 300 penalty units; In any other case, imprisonment for 6 months or 60 penalty units or both.

Jurisdiction	Authority	Legislation/Policy Directive
		(3) For the purposes of subsections (1) and (2), conduct— (a) may be constituted by a single occasion or by a number of occasions over a period of time; and (b) may occur in or outside Victoria. (4) A prosecution for an offence against subsection (1) or (2) must not be commenced without the written consent of the Director of Public Prosecutions. **Section 25 – Offence of serious religious vilification** (1) A person (the offender) must not, on the ground of the religious belief or activity of another person or class of persons, intentionally engage in conduct that the offender knows is likely— (a) to incite hatred against that other person or class of persons; and (b) to threaten, or incite others to threaten, physical harm towards that other person or class of persons or the property of that other person or class of persons. Penalty: In the case of a body corporate, 300 penalty units; In any other case, imprisonment for 6 months or 60 penalty units or both. (2) A person must not, on the ground of the religious belief or activity of another person or class of persons, knowingly engage in conduct with the intention of inciting serious contempt for, or revulsion or severe ridicule of, that other person or class of persons. Note: Engage in conduct includes use of the internet or e-mail to publish or transmit statements or other material. Penalty: In the case of a body corporate, 300 penalty units; In any other case, imprisonment for 6 months or 60 penalty units or both. (3) For the purposes of subsections (1) and (2), conduct— (a) may be constituted by a single occasion or by a number of occasions over a period of time; and (b) may occur in or outside Victoria. (4) A prosecution for an offence against subsection (1) or (2) must not be commenced without the written consent of the Director of Public Prosecutions.

Jurisdiction	Authority	Legislation/Policy Directive
Western Australia	*Criminal* ***Criminal Code Act Compilation Act 1913* (WA)**	**Section 77 - Conduct intended to incite racial animosity or racist harassment** Any person who engages in any conduct, otherwise than in private, by which the person intends to create, promote or increase animosity towards, or harassment of, a racial group, or a person as a member of a racial group, is guilty of a crime and is liable to imprisonment for 14 years. Alternative offence: s. 78, 80A or 80B. **Section 78 - Conduct likely to incite racial animosity or racist harassment** Any person who engages in any conduct, otherwise than in private, that is likely to create, promote or increase animosity towards, or harassment of, a racial group, or a person as a member of a racial group, is guilty of a crime and is liable to imprisonment for 5 years. Alternative offence: s. 80A or 80B. Summary conviction penalty: imprisonment for 2 years and a fine of $24 000. **Section 80A - Conduct intended to racially harass** Any person who engages in any conduct, otherwise than in private, by which the person intends to harass a racial group, or a person as a member of a racial group, is guilty of a crime and is liable to imprisonment for 5 years. Alternative offence: s. 78 or 80B. Summary conviction penalty: imprisonment for 2 years and a fine of $24 000. **Section 80B - Conduct likely to racially harass** Any person who engages in any conduct, otherwise than in private, that is likely to harass a racial group, or a person as a member of a racial group, is guilty of a crime and is liable to imprisonment for 3 years. Summary conviction penalty: imprisonment for 12 months and a fine of $12 000.

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Attorney-General's Department

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Senator Paul Scarr asked the following question:

Senator SCARR: I understand those arguments. The concern I have—my background is that I'm an ex-general counsel of a company with 4,000 employees. You could have a dispute in the lunch room where someone comes in and says: 'I had the right to say that; it's my religious faith and I'm protected under the statement of belief clause,' and someone says, 'They did haven't the right to say that because of X, Y, Z.' You can see the practical situations, which employers, from their perspective, want to make sure that there is sufficient clarification in this bill on, to make it clear what is permissible for them to say, so they can say to that employee, 'You're not entitled to make a certain statement to a customer with respect to their religious affiliation or a statement to a patient in a hospital bed in relation to why they might have a particular disease.' There's a real concern that the bill isn't clear enough around those sorts of statements and it needs to be tightened to provide clarification that the intention is not—and I understand the intention is not to permit statements or behaviour which go beyond the bounds of acceptable workplace behaviour, for any of the reasons that you outlined. Can you see that concern? Perhaps the department can take on notice whether or not there is an opportunity to accommodate what I believe are legitimate concerns to make sure that that's made clearer in the bill?
Mr Still: Yes, I think we can take that on notice.

The response to the 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. For example, it would not prevent an employer from requiring employees to treat colleagues, customers, patients and others in the workplace with respect. The protection in clause 12 also does not apply to a person who makes a statement of belief that is malicious or that a reasonable person would consider would threaten, intimidate, harass or vilify a person or group.

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 duties to ensure both the phsycial and psychological health and safety of customers and clients, for example. Action taken by employers to manage inappropriate workplace behaviour 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.

Accordingly, the department's view is that a clarifying amendment to confirm that the Bill does not preclude reasonable management action is not legally necessary. Whether an amendment should be made to make this clear on the face of the Bill is a matter for government.

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Senator Janet Rice asked the following question:

Senator RICE: You said, to be clarificatory, that there would be most limited circumstances other than the override of 17(1), which you said is more significant. Given my time, can you just take on notice why the government thinks it's important to override section 17(1) and why that's more significant, and then just reflect on the evidence that we've heard? For example, in their submission, the Discrimination Law Experts Group said:

The balance between federal discrimination laws, on the one hand, and state and territory discrimination laws, on the other hand, would be thrown into disarray by clause 12.

There will be a huge impact for something that you were describing as just being in limited circumstances and clarificatory, and the Human Rights Commission say it is unnecessary. Why it is considered necessary to do that for such a limited outcome, throwing the state-versus-federal balance of laws into disarray, as ADLEG described?

CHAIR: Thank you, Senator Rice. That question will be taken on notice. I'm now going to give the call to Senator O'Neill.

The response to the question is as follows:

Clause 12 of the Bill provides that certain statements of belief will not be discrimination for the purposes of any Australian anti-discrimination law, nor will they contravene subsection 17(1) of the Tasmanian *Anti-Discrimination Act 1998* or any provision of a law prescribed by the regulations.

The Tasmanian Act is specifically included in this provision given its broad scope and what the Government considers is its demonstrated ability to affect freedom of religious expression. Subsection 17(1) of the Tasmanian Act prohibits conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of a gender, race, age, sexual orientation, lawful sexual activity, gender identity, intersex variations of sex characteristics, disability, marital status, relationship status, breastfeeding, parental status or family responsibilities. Tasmania is the only state or territory jurisdiction with a provision that extends to conduct that offends a person. The Government considers that subsection 17(1) may unreasonably impede statements of belief.

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Senator Janet Rice asked the following question:

Senator RICE: I know we discussed this last week in the Parliamentary Joint Committee on Human Rights, but I want to get on the record for this committee what the department knew about the so-called deal with the Liberal moderates. Prior to 1 December, prior to when we saw the bill, had the government sought any briefing from the Attorney-General's Department on the changes to the SDA—section 38(3) in particular?
Mr Walter: Can I be really annoying and take this on notice?
Senator RICE: It's basically the same question we asked you last week!
Mr Walter: We have that question, and we're considering the answer to it. Let me say two things. After the bill was introduced we identified the problem with the indirect discrimination provision, which I mentioned earlier, and we got approval to develop amendments to correct that. We have also been in regular communication on a range of other possible changes to the legislation, taking into account what's been said in these committees and so forth. So we have that dialogue all the time, including with the Attorney's office. We do not have any approved amendments to this package of legislation apart from the indirect discrimination amendment I mentioned. The thing I am being cautious about—and there's a range of them potentially in play—is: if we were to go down that path that's a decision that goes into the cabinet process, and that puts me in a difficult bind because I can't talk about that.
Senator RICE: I don't want you to talk about the content. I want to know whether you were consulted on potential changes to the SDA prior to the media coverage of the deal on 1 December.
Mr Walter: Understood. As I said in the last hearing, we don't know the details of any discussions that may or may not have taken place and who they were with. I can confirm we've had discussions with the Attorney's office, but I've not spoken to the Attorney myself about it. There are a range of amendments that could possibly be made to the bill. I'd like to think about whether I can give you more detail.
Senator RICE: That's to that bill, but how about to the SDA? We're talking about the deal where moderate Liberals will pass this bill as long as there are changes to modify or remove section 38(3) of the SDA.
Mr Walter: At the risk of irritating you even more, can I put a hypothetical: if the government were to amend section 38 as part of this process, they would do it through an amendment to probably the consequential bill or the other bill—not the main bill.
Senator RICE: Can you tell me whether there have been discussions about doing that?
Mr Walter: That's what I'd like to take on notice, as to whether I can give you more detail on the types of things we have discussed.
Senator O'NEILL: On the same matter: it is a week since this question was asked. We're not asking in the general; we're asking a very specific question which has been well ventilated, certainly by me, many times in the course of this hearing. Did you draft any amendment to

section 38(3) prior to 1 December? It's a yes or no; I'm not asking for detail. Did you do that or did you not do that?
Mr Walter: I can say there are no approved amendments to section 38.
Senator O'NEILL: That's not the question.
Mr Walter: That's what I can definitely say: there are no approved amendments to section 38. Can I take the rest on notice? I need to consult with the Attorney.
CHAIR: Senator O'Neill, Mr Walter has already indicated, in response to Senator Rice's question, he is going to take that question on notice. Senator Rice, you have the call.

The response to the 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, which included consideration of amendments to the *Sex Discrimination Act 1984*. No text approval was requested by or provided to the department.

Senate Legal and Constitutional Affairs Legislation Committee

Religious Discrimination Bill 2021 [Provisions]

Attorney-General's Department

Hearing date: 21 January 2022

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Senator Deborah O'Neill asked the following question:

Senator O'NEILL: But the practical reality is that, if the Prime Minister had got his wish and rammed this bill through the House of Representatives in the final week of 2021, the House would have passed a bill which, by the government's own admission and your evidence today, contained basic drafting errors with regard to indirect discrimination.
CHAIR: Senator O'Neill, could I just interject. Mr Walter has obviously corrected the record in relation to this drafting error. Can I—
Senator O'NEILL: Yes. Can he answer the question please. Is that correct?
Mr Walter: No, I don't think that—well, I can't comment on the commentary element about ramming it through, but I can say we picked it up pretty fast after introduction, so I don't think so.
Senator O'NEILL: So it was after introduction. At what time did you pick it up? If you could take that on notice, that would be of great interest.

The response to the question is as follows:

The drafting error in clause 14 of the Religious Discrimination Bill 2021 was identified on Friday, 26 November 2021 – the day after the Bill's introduction.