



Law Council
OF AUSTRALIA

Office of the President

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Dr Anne Webster MP
Chair
Parliamentary Joint Committee on Human Rights
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: human.rights@aph.gov.au

Dear Dr Webster

Religious Discrimination Bill 2021 and related bills – Questions on Notice

1. The Law Council of Australia (**Law Council**) thanks the Parliamentary Joint Committee on Human Rights (**the Committee**) for the opportunity to respond to its inquiry into the above bills, including in its recent appearance before the Committee on Friday 14 January 2021.
2. Following this appearance, the Law Council received a number of questions on notice from Senator Louise Pratt. These questions are set out below, along with the Law Council's responses.

Even though the bill says you can't use these laws to harass or vilify someone – how might they make preventing sexual harassment more difficult?

3. The Law Council's response below concerns sexual harassment under Commonwealth legislation, as it has not been able to consider state and territory laws in the time available.
4. As the Committee is aware, subclause 12(1) states that a statement of belief, in and of itself, does not: (a) constitute discrimination under listed Commonwealth, state and territory anti-discrimination laws, including the *Sex Discrimination Act 1984* (Cth) (**SDA**); (b) contravene subsection 17(1) of the *Anti-Discrimination Act 1998* (Tas) (**the Tasmanian Act**); or (c) contravene a provision of a law prescribed by the regulations for such purposes.
5. Subclause 12(2) states that subclause 12(1) does not apply to a statement of belief: (a) that is malicious; or (b) that a reasonable person would consider would threaten, intimidate, harass or vilify a person or group; or (c) that is covered by paragraph 35(1)(b) of the Bill.
6. Paragraph 12(1)(a) is directed to statements of belief which constitute discrimination. Under the SDA, discrimination is defined in sections 5-7A. Paragraph 12(1)(a) is not directed towards sexual harassment, or the new prohibitions on persons harassing another person on the grounds of sex. These are defined in sections 28A and 28AA of the SDA. These provisions would need to be prescribed under paragraph 12(1)(c) for the clause 12 defence to apply.

7. This interpretation is supported by paragraph 178 of the Explanatory Memorandum to the Bill, which states that:

This clause applies solely to an action for discrimination under those Acts. This includes both direct and indirect discrimination. It does not apply to harassment, vilification or incitement provisions under these laws. For example, this provision does not affect the prohibition of offensive behaviour based on racial hatred in Part IIA of the Racial Discrimination Act or sexual harassment or sex-based harassment under the Sex Discrimination Act.

8. It is possible that the SDA's sexual harassment or sex-based harassment provisions could be prescribed for the purposes of paragraph 12(1)(c) of the Bill. However, should they be prescribed, this would be likely to result in additional complexity and confusion regarding the operation of clause 12 in circumstances where remarks give rise to a complaint of sexual harassment, or sex-based harassment, and may also constitute statements of belief. The **Appendix** sets out some of the potential difficulties which may result. Given these difficulties, it may be unlikely that these provisions would be prescribed.
9. The Law Council adds that it is unaware of any proposal to prescribe the sexual harassment provisions of the SDA for the purposes of paragraph 12(1)(c) of the Bill. However, it also emphasises that the scope of provisions which operate to override Commonwealth, state and territory law should not be left to delegated legislation.

Intrusive questions – how might this be impacted by a statement of belief? Can a statement of belief also be an intrusive question?

10. A question could amount to a statement of belief under the definition in the Bill, provided that it met the requirements of subclause 5(1): for example, if it was of a religious belief, made in good faith, by written or spoken words or other communication, and was of a belief that the person genuinely considers to be in accordance with the doctrines, etc of the religion. An example may involve a worker who asks why a colleague does not conduct his or her private life in accordance with God's word.
11. The Australian Human Rights Commission (**AHRC**) notes that intrusive questions about a person's private life or body may be considered sexual harassment under the SDA.¹ As discussed, clause 12 of the Bill would not provide a defence to 'intrusive questions' which amounted to sexual harassment under the SDA. It may do so if the sexual harassment provisions were prescribed under paragraph 12(1)(c).
12. 'Intrusive questions' may, however, constitute direct discrimination under Commonwealth, state or territory law, if they amount to a person, on the ground of a protected attribute, being treated less favourably than a person without that attribute. It is possible, although uncommon, for remarks alone to constitute discrimination.² This involves questions of fact which depend on the context and the particular circumstances in which an intrusive question was asked. For example, in goods, services and facilities, the intrusive questions may be asked by a store manager in public and in a highly confrontational manner which is profoundly humiliating for a

¹ AHRC, 'Sexual Harassment in the Workplace - The Legal Definition of Sexual Harassment', [online document](#).

² *Qantas Airways Limited v Gama* [2008] FCAFC 69, [76]-[78] (French and Jacobson JJ).

customer.³ Another example may involve a theatre manager directing a person to the toilet facilities who adopts a similar manner.

13. Under subsection 17(1) of the Tasmanian Act, 'intrusive questions' may, again depending on the circumstances, constitute conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of a protected attribute in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed.
14. In *Durston v Anti-Discrimination Tribunal (No 2)*,⁴ Brett J of the Supreme Court of Tasmania, noted of subsection 17(1) that 'read literally, the words "offends, humiliates, intimidates, insults or ridicules" are vague terms which have the potential to encompass a broad range of subjective emotions and feelings.'⁵ However, the judicial interpretation of these words by reference to the interpretation of similar, although not identical, provisions under section 18C of the *Racial Discrimination Act 1975* (Cth), has found that the operation of subsection 17(1) was 'more restricted than the literal meaning of the words would suggest.'⁶ This interpretation required the relevant conduct to have 'profound and serious effects and not to be likened to mere slights'.⁷
15. Should 'intrusive questions' meet the thresholds of subsection 17(1) of the Tasmanian Act and no exceptions apply,⁸ clause 12 of the Bill may provide a defence to such a complaint.

Can women reject sexual advances as ably in the workplace if they are accompanied by a statement of belief.

16. As discussed, the sexual harassment provisions of the SDA are not prescribed for the purposes of paragraph 12(1)(c) of the Bill. Where 'sexual advances' constitute sexual harassment under section 28A of the SDA, women would continue to have recourse to those provisions, unless they are so prescribed.
17. A worker may also apply to the Fair Work Commission for an order to prevent sexual harassment under section 789FF of the *Fair Work Act 2009* (Cth) (**FWA**), where there is a risk that this will continue. Under section 12 of the FWA, 'sexually harass' has the meaning given by section 28A of the SDA. These provisions would not be affected by the Bill, unless the relevant provisions of the FWA were also prescribed under paragraph 12(1)(c).

³ SDA, s 22(c).

⁴ [2018] TASSC 48 (*Durston*).

⁵ *Durston*, [63].

⁶ *Ibid.*

⁷ *Ibid.*, citing *Eatock v Bolt* [2011] FCA 1103, 197 FCR 261 (Bromberg J).

⁸ For example, section 55 of the Tasmanian Act provides that subsection 17(1) does not apply to conduct for public purposes, including a public act done in good faith for any purpose in the public interest. In *Durston*, Brett J considered that section 55 should be construed broadly and given a wide and flexible ambit: [70], [74]-[75].

[How would the Bill affect statements such as]“Are you having sex with your boyfriend? – what kind of sex are you having? Will you get married. I am concerned for your moral well being.”

18. Further information would be necessary to confirm that these statements constitute statements of belief by the maker according to the subclause 5(1) definition in the Bill: that is, that they are of a religious belief, made in good faith, and of a belief that the person genuinely considers to be in accordance with the doctrines etc of that religion.
19. Under the SDA and FWA provisions discussed above, such statements may be considered sexual harassment,⁹ given that they are intrusive questions about a person’s private life. If those provisions are not prescribed for the purposes of paragraph 12(1)(c), subclause 12(1) would not provide a defence to them.

Could you make suggestive statements that have a foundation of a religious belief?

20. Suggestive statements may also constitute sexual harassment under the SDA¹⁰ and therefore also under the FWA, as described above.
21. Where they have a foundation of a religious belief, such statements may also fulfil the definition of a statement of belief under subclause 5(1) of the Bill. This would depend on the relevant statement. They would need to be made in good faith, and be of a belief that the person genuinely considers to be in accordance with the doctrines, etc of that religion.
22. If the sexual harassment provisions were not prescribed for the purposes of paragraph 12(1)(c), subclause 12(1) would not provide a defence to them.

Could you advance unwanted invitations – as a statement of belief.

23. Unwanted invitations, eg to go out on dates, may also constitute sexual harassment under the SDA¹¹ and therefore also under the FWA, as described above. If those provisions are not prescribed for the purposes of paragraph 12(1)(c), subclause 12(1) would not provide a defence to them.

Could you ask intrusive questions as part of a statement of belief. God says.

24. This question is addressed under question 2 above.

Could unnecessary familiarity also be masked by statements of belief or religious statements?

25. Depending on the circumstances, unnecessary familiarity may also constitute sexual harassment under the SDA¹² and therefore also under the FWA, as described above. The responses above also apply in this context. If those provisions are not prescribed for the purposes of paragraph 12(1)(c), subclause 12(1) would not provide a defence to them.

⁹ They may also constitute harassment on the ground of sex under new ss28AA of the SDA.

¹⁰ AHRC, “Sexual Harassment in the Workplace - The Legal Definition of Sexual Harassment”, [online document](#).

¹¹ Ibid.

¹² Ibid.

Could you talk about things that aren't appropriate in a particular time and place because they are a religious belief.

26. This will depend on the relevant circumstances. 'Inappropriate' statements may cover a range of statements, from those which may be characterised as mildly annoying, to those which are deeply distressing and harmful.
27. Assuming that the inappropriate statements were statements of belief, the availability of the subclause 12(1) defence will depend on whether relevant statements would:
 - constitute discrimination for the purposes of listed discrimination laws (paragraph 12(1)(a); or
 - contravene subsection 17(1) of the Tasmanian Act; or
 - contravene a provision of a law prescribed under paragraph 12(1)(c).
28. Then the question would be whether they were excluded because of subclause 12(2) (malicious, threatening, etc). Assuming that they did not, clause 12 would provide a defence to an individual's complaint on the grounds of unlawful discrimination or under subsection 17(1) of the Tasmanian Act.
29. If the inappropriate statements fell within section 351 of the FWA, the operation of section 351 of the FWA would also be affected. Section 351 states that an employer must not take adverse action¹³ against a person who is an employee, or prospective employee, of the employer because of the person's listed attributes.¹⁴ However, under paragraph 351(2)(a) of the FWA, subsection 351(1) does not apply to conduct that is not unlawful under any anti-discrimination law listed in subsection 351(3) in force in the place where the action is taken. Statements of belief made by the employer which were not precluded by clause 12(2) of the Bill would therefore not constitute adverse action. The Fair Work Ombudsman cannot take any action with respect to discrimination where there has been no adverse action.
30. With respect to the workplace, there is, however, a term implied in law in every contract of employment requiring an employee to obey the lawful and reasonable directions of their employer.¹⁵ Such directions may, for example, enable an employer to require an employee to comply with anti-bullying or work health and safety laws. Under section 789FD of the FWA, a worker is bullied at work if another individual, or group of individuals, repeatedly behaves unreasonably towards the worker, and that behaviour creates a risk to health and safety. An employer could act to prevent an individual who is subject to the employer's direction from repeatedly making 'inappropriate statements', including statements of belief, to a worker which create such a risk. The worker who is the recipient of the statements may also seek a stop-bullying order under the FWA.
31. Outside of the workplace, there may be fewer mechanisms to prevent 'inappropriate statements' which are clearly harmful from being made. For example, in a healthcare setting, a patient whose doctor makes statements of belief which are humiliating and seriously demeaning in the course of their healthcare may wish to make a complaint

¹³ Eg, employer dismisses the employee, injures the employee in his or her employment, alters the employee's position to his or her prejudice, or discriminates between the employee and other employees: FWA, s 342.

¹⁴ Race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

¹⁵ *R v Darling Island Stevedoring & Lighterage Co Ltd; Ex parte Halliday* (1938) 60 CLR 601, 621–622.

with respect to unlawful discrimination on the basis of a protected attribute (eg, sex) with respect to the provision of services.¹⁶ However, section 12 would provide a defence to such a complaint, unless subclause 12(2) applied.

How might the protection of statements of belief be used to allow the discussion of topics at an inappropriate time and place? Eg, 'For a woman, the "normal" discharge is regular menstruation, which causes impurity for seven days from the onset of bleeding (v. 19). An "abnormal" discharge is an off-cycle flow of blood that lasts for "many days" (v. 25). Like an abnormal male discharge, this causes impurity for the duration of the condition and for an additional seven days, after which the woman must present two birds as offerings.'

32. The Law Council understands, from the Jewish Women's Archive *Shalvi/Hyman Encyclopaedia of Jewish Women*,¹⁷ that this statement emanates from Leviticus 15 in the Bible and relates to menstruation as a source of impurity. Washing with water is required after contact with the bed or vessel of a menstruating woman or a woman with abnormal bleeding. For some scholars this is linked to a requirement for the woman herself to wash.¹⁸ The above statements may be likely to meet the definition of a statement of belief in subclause 5(1) of the Bill.
33. A relevant example may involve a healthcare setting, in which a non-Jewish patient who seeks assistance for an endometriosis condition is told by her Jewish doctor that she is impure because she has not observed the requirements of Leviticus 15. The woman may be prevented from bringing a discrimination complaint on the basis of religious belief or activity due to the operation of clause 12.
34. The Law Council hopes that the above responses are useful to the Committee. Should you wish to discuss, please contact Ms Leonie Campbell, Deputy Director of Policy on 02 6246 3711 or 0402 225 282 in the first instance.

Yours sincerely



Mr Tass Liveris
President

¹⁶ Eg, under the SDA, s 22.

¹⁷ The Shalvi/Hyman Encyclopedia of Jewish Women, 'Menstruation in the Bible', by Eve Levavi Feinstein, June 23, 2021, online [article](#).

¹⁸ Ibid.

Appendix

Potential complexities should sexual harassment and sex-based harassment provisions of SDA be prescribed under paragraph 12(1)(c)

'Sexual harassment is relevantly defined under section 28A of the SDA as occurring if:

- (a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or
- (b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed;

in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

New section 28AA of the SDA, further defines harassment on the ground of sex. Under that section, a person harasses another person on the ground of sex if:

- by reason of the sex of the person harassed (or a characteristic appertaining to persons of that sex, or generally imputed to them);
- the person engages in unwelcome conduct (including making a statement to a person, whether orally or in writing) of a seriously demeaning nature in relation to the person harassed; and
the person does so in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person would be offended, humiliated or intimidated.

It is possible that the SDA's sexual harassment or sex-based harassment provisions could be prescribed for the purposes of paragraph 12(1)(c) of the Bill. However, this would be likely to result in additional complexity and confusion. For example:

- the remarks may give rise to a sexual harassment complaint, including because a reasonable person would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated. This raises the subclause 12(1) defence. This defence would not apply if (inter alia) a reasonable person would consider that the statement would threaten, intimidate, harass or vilify a person or group (paragraph 12(2)(b)). This suggests that subclause 12(1) may provide a defence to sexual harassment which may 'only' be offensive or humiliating, as opposed to intimidating.¹⁹
- with respect to statements which form the basis of a sexual harassment complaint, questions may arise as to whether subclause 12(2) excludes the statements from the subclause 12(1) defence because a reasonable person anticipated that they would be likely to 'harass'.²⁰ The meaning of 'harass' is not defined in the Bill. The Bill's Explanatory Memorandum states that it is intended to be interpreted in accordance with its ordinary meaning.²¹ The Federal Magistrates Court's review in *Sluggett v Commonwealth*²² of caselaw concerning the meaning of 'harassment' in

¹⁹ Unless another aspect of subclause 12(2) applied.

²⁰ As noted by Rees, Rice and Allen, the law on sexual harassment is of limited relevance to harassment on the basis of other attributes because the elements of sexual harassment are distinctive to the attribute of sex: Neil Rees, Simon Rice and Dominique Allen, *Australian anti-discrimination and equal opportunity law* (2018), Federation Press, 3rd edition, 673-4.

²¹ Explanatory Memorandum to the Religious Discrimination Bill 2021, 57 [185].

²² [2011] FMCA 609 (*Sluggett*).

the *Disability Discrimination Act 1992* (Cth) may be relevant. This referred to the ordinary meaning of 'harass' as 'to trouble by repeated attacks; to harry, raid and disturb persistently, torment'.²³ It further emphasised the need for harassment to be repetitious, or occurring on more than one occasion.²⁴ However, under the sexual harassment definition of the SDA, there is no requirement for the relevant unwelcome conduct to occur more than once. Therefore, for a one-off statement which constituted sexual harassment, the subclause 12(1) defence may apply, as the subclause 12(2) exclusion for conduct which 'harasses' may not assist.

- If a statement of belief constituted harassment on the ground of sex, 'harass' for the purposes of section 28AA of the SDA is not defined. It may be more likely that subclause 12(2) would preclude the subclause 12(1) defence.

Importantly, the relevant statement would need to meet the definition of a 'statement of belief' for clause 12 to provide a defence. That is, under subclause 5(1), it would need to be of a religious belief, made in good faith, by written or spoken words or other communication, and was of a belief that the person genuinely considers to be in accordance with the doctrines, etc of the religion. The 'good faith' requirement may pose a particular hurdle in the context of sexual harassment, in that it may be difficult for the maker of the statements to demonstrate an honest and conscientious endeavour to have regard to and minimise the harm inflicted²⁵ by relying upon clause 12 in such circumstances.

²³ *Sluggett*, [135] citing *McCormack v Commonwealth* [2007] FMCA 1245 [75] (Mowbray FM).

²⁴ *Sluggett*, [136].

²⁵ See eg, *Bropho v Human Rights and Equal Opportunity Commission and Anor* [2004] FCAFC 16, [93-95] (French J).