AUSTRALIAN DISCRIMINATION LAW EXPERTS GROUP

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Senate Legal and Constitutional affairs legislation committee
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By email: legcon.sen@aph.gov.au

Dear Committee Secretary

Answers to questions on notice

Please find below the responses from the representatives of the Australian discrimination law expert's group to the questions on notice from the Committee hearing on Friday, 21 January 2022.

Senator O'NEILL: … I want to go to both groups, ADLEG and PIAC. In relation to section 12, the Australian Human Rights Commission has submitted that it:

> **… is not aware of any cases where genuine statements of belief have been held to be contrary to Australian anti-discrimination law.**

Are you aware of any such example?

Senator O'NEILL: Thank you. If you could take on notice with regard to the Tasmanian law in particular, Ms Banks: could you provide an example other than something under 17(1) because really that's a vilification provision on an antidiscrimination provision. That would be most helpful for the committee because I'm keen to get these questions right when we get the Human Rights Commission here before us. Thanks for your evidence.

The prohibitions found in section 17 of the *Anti-Discrimination Act 1998* (Tas) are of sexual harassment and other forms of conduct akin to harassment on identified grounds. Neither section 17(1) or 17(2) (sexual harassment) are accurately described as vilification provisions. Both are an articulation of specific forms of direct discrimination. The prohibition in section 17(1) was originally found in the *Sex Discrimination Act 1994* (Tas) in identical terms. The only change is that in 2014, section 17(1) was expanded in terms of the protected grounds.

The history of sexual harassment prohibitions is that sexual harassment was initially found to be prohibited under direct sex discrimination in the case of *O'Callaghan v Loder* (1983) 3 NSWLR 89 (21 June 1983). In that case, it was determined that 'sexual harassment … can amount to discrimination on the ground of sex'. It was subsequently articulated as a separate form of prohibited conduct in the *Sex Discrimination Act 1994* (Cth) providing greater clarity in terms of interpreting the law for those who have rights and

obligations under the law. Noting that discrimination provisions prohibit 'less favourable treatment' on the basis of identified grounds, section 17(1) sets out particular forms of conduct—for example, engaging in conduct that humiliates a person on the basis of their gender, insults a person on the basis of their race, or ridicules a person on the basis of their disability in a specified area of activity, such as employment—that are 'less favourable' on the basis of the identified grounds. As such, the expressly prohibited conduct would, without section 17(1), fall foul of the direct discrimination prohibitions in the same Act. In some circumstances, such conduct may also be characterised as indirect discrimination, by creating a hostile work or other environment that a person with a particular attribute is exposed to and required to operate in.

As such the example given of the case of *Williams v 'ThreeWiseMonkeys' and Durston* [2015] TASADT 4 (30 June 2015) (upheld by the Supreme Court of Tasmania in *Durston v Anti-Discrimination Tribunal (No 2)* [2018] TASSC 48 (4 October 2018)) is both a vilification case and a discrimination case as it dealt with alleged breaches of both section 17(1) (a form of discrimination) and the vilification provision of the Tasmanian Act, section 19. The Tribunal applies quite different tests to determining whether or not these separate breaches occurred and found that the conduct had breached both. The Tribunal also found the conduct breached section 20 of the Act in that it involved the publishing of material that expressed discrimination or prohibited conduct.

We note also the decision of the Victorian Supreme Court of Appeal, *Catch the Fire Ministries Inc v Islamic Council of Victoria Inc* [2006] VSCA 284 (14 December 2006) deals with the statements made by a person of religion and asserted to be 'engaged in reasonably and in good faith for a genuine religious purpose'. That was a religious vilification case in which the Court held that the relevant provisions of the *Racial and Religious Tolerance Act 2001* (Vic) were reasonably and appropriately adapted to serve a legitimate end'.

We further note that it is difficult to identify such examples as the idea of a statement of 'genuine religious belief' does not exist as a defence in any discrimination laws at present and as such there is no case law that has tested this concept. The Supreme Court decision above did consider the interaction of protection against discrimination (under section 17(1)) and freedom of expression and freedom of religion and found that the provision is appropriately adapted. Further, the distinction between statements and conduct is artificial and not one found in discrimination law. As such it has not been dealt with in case law. This further indicates the extraordinary nature of the clause 5 definition of 'statement of belief' and of clause 12.

Senator BRAGG: In the worst case scenario, if there were to be a statement of belief included as part of this proposed law, do you think there is any possible way it could be drafted that could address your very serious and valid concerns?

Mr ELPHICK: ...

Senator BRAGG: I'm conscious of the time. I might ask that we get that drafting from you on notice. Is that something that you can provide?

Mr ELPHICK: Around the federal versus state and territory examples?

Senator BRAGG: Yes. Noting your position that you don't support it in any form, but if there were to be any possible way of addressing your issues could you provide that on notice? I'd be very grateful.

We re-affirm the advice provided by Mr Elphick in the hearing in response to Senator Bragg.

ADLEG does not support any provision in the Religious Discrimination Bill or the related Bills that overrides and weakens other discrimination laws. As such, we do not support any variation of the 'statement of belief' provision currently found in clause 12 of the Religious Discrimination Bill. However, were this provision to become law against such advice, then steps should be taken to reduce the harm caused by the provision to those who are protected by existing discrimination laws across Australia - including women, people with disabilities, people from diverse cultural and racial backgrounds, and LGBTIQA+ people. One way in which the harm caused by the provision can be reduced, but not removed, is to only apply clause 12 to federal discrimination laws and not to state and territory laws. This could be achieved through removing clause 12(1)(a)(vi)-(xiii), clause 12(1)(b) and clause 12(1)(c). However, this will cannot 'fix' or address the many serious and valid concerns we have identified with clause 12 in our written submission to the Senate committee. Section 12 should be removed entirely.

Thank you for the opportunity to provide these responses.

Yours sincerelv

Robin Banks
on behalf of the
Australian Discrimination Law Experts Group