Parliamentary Joint Committee on Human Rights

RELIGIOUS DISCRIMINATION BILL AND OTHER RELATED BILLS

Attorney-General's Department

Hearing date: 14 January 2022
Hansard page: 63
Question type: **Spoken**
Question number: 22002

Dr Anne Webster MP asked the following question:

CHAIR: Thank you. Can you please outline to the committee how the bill will interact with other antidiscrimination bills?
Mr Walter: As we've said in our opening statement, which, of course, I didn't read but which was tabled, I think it's very important that the committee is aware that it will operate concurrently with the other antidiscrimination laws, which protect a range of attributes, including age, disability, sex, sexual orientation, gender and so forth. What that means, significantly, is that, in a particular circumstance, it may be that a claim of discrimination could be grounded in a number of those acts. In some circumstances, it may be that the circumstances do not give rise to a claim of discrimination under this bill but do give rise to a claim of discrimination under, for example, the Sex Discrimination Act. With the exception of clause 12, the bill leaves those other acts as they are and they continue to operate as they currently operate, so they will all operate concurrently The Human Rights Commission has procedures available to it to handle circumstances where complaints are made under multiple discrimination laws at the same time.
CHAIR: On notice, can the department respond to examples of particular accounts given by witnesses throughout the committee process? We've had a number of examples that've been raised with us and I would like you to respond as the department on the basis of the actual legislation.
Mr Walter: Perhaps we liaise with the secretariat to identify which matters you're concerned with?
CHAIR: Yes.

The response to the Member's question is as follows:

The Secretariat to the Committee has been unable to provide further guidance on the examples the Committee wished the department to provide further advice on. In the absence of that guidance, the department reviewed Hansard and identified that a number of witnesses before the Committee proposed scenarios that they considered demonstrated discrimination that would be permitted by Clause 12, or examples of impacts Clause 15 could have on professions and professional bodies. The department stands ready to respond to other examples if we have missed something of significance to the Committee.

Clause 12

Clause 12 provides that simply stating one's religious belief does not, of itself, constitute discrimination under any Australian anti-discrimination law and does not contravene subsection 17(1) of the *Anti-Discrimination Act 1998 (Tas)*. The provision is not a positive right to freedom of expression. Rather, it provides an answer to a discrimination complaint, or complaint under subsection 17(1) of the Tasmanian Anti-Discrimination Act, where that complaint is in relation to a statement of religious belief made in good faith that the person making the statement genuinely considers to be in accordance with the doctrines, tenets, beliefs or teachings of their religion. Clause 12 does not apply to a statement of belief that is malicious, or that a reasonable person would consider would threaten, intimidate, harass or vilify a person or group, or that a reasonable person would consider counsels, promotes, encourages or urges conduct that would constitute a serious offence.

To determine whether any scenarios could be considered statements of belief under Clause 12 it is necessary to consider a series of questions, the answers to which turn on the facts of any particular case:

- Does the scenario relate only to a statement or other communication (other than physical conduct) and not also concern associated conduct?
- Is the statement of a religious belief held by a person OR of a belief held by a person who does not hold a religious belief?
- Is the statement made in good faith? (For further information on the meaning of 'good faith' please see the department's response to Question 22011)
- Is the statement of a belief that the person genuinely considers to be in accordance with the doctrines, tenets, beliefs or teachings of a religion OR of a belief that the person genuinely considers to relate to the fact of not holding a religious belief?
- Has the complaint been made under a discrimination provision in Australian anti-discrimination law or under subsection 17(1) of the Tasmanian Anti-Discrimination Act (and not under another provision under those laws such as sexual harassment)?
- Is the statement malicious?
- Would a reasonable person consider that the statement would threaten, intimidate, harass or vilify another person or group of people?
- Would a reasonable person, having regard to all the circumstances, conclude that the statement counsels, promotes, encourages or urges conduct that would constitute a serious offence?

It is difficult to respond to the substance of hypothetical examples when, as has been noted, the application of anti-discrimination law can be dependent on the circumstances, context of the interaction or relationship of the parties. In addition, repeated or insistent statements may amount to a course of conduct or may constitute harassment or, depending on the context, may be considered threatening by a person.

With that caveat in mind, the department considers that it would be difficult for a respondent to satisfy a court that a statement such as "disability is the work of the devil", made by a disability support worker in the context of a disability care relationship, was made in good faith and is not malicious. Further information on the meaning of 'good faith' is set out in response to Question 22011.

Clause 15

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 or any harm to people accessing the services of that profession if the rule were not in place.

Parliamentary Joint Committee on Human Rights

RELIGIOUS DISCRIMINATION BILL AND OTHER RELATED BILLS

Attorney-General's Department

Hearing date: 14 January 2022
Hansard page: 71
Question type: Spoken
Question number: 22011

Senator Deborah O'Neill asked the following question:

Senator O'NEILL: I have a couple on notice. Thank you for your response to questions earlier, where you described fidelity, conscientiousness and genuine consideration. I was trying to follow what you were saying, and I just wonder if you could review that evidence that you gave and perhaps fill it out in a written form so that it's more understandable to me, in a more considered way. I would appreciate that.
Mr Walter: Certainly.

The response to the Senator's question is as follows:

Clause 12 only applies to statements of belief that are made in 'good faith'. The department's view is that a broad interpretation of the good faith requirement applies, 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 harm that may be caused by their speech given the overall purpose of the Bill). This broader approach was discussed by a court in *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105, which considered that 'good faith' required "honest action and fidelity" that may extend beyond mere compliance with "the black letter of the law" (at 131 [93]). The court considered that a person seeking to rely on the 'good faith' defence under section 18D of the *Racial Discrimination Act 1975* must demonstrate that they are "subjectively honest, and objectively viewed, [have] taken a conscientious approach… in a way that is designed to minimise the offence or insult, humiliation or intimidation suffered by people affected by it" (at 133 [102]).

The department considers that the definition of a statement of belief in clause 5 of the 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'. The Department has provided more information on this provision on page 12 of the Department's submission to the Committee.

In accordance with general principles of anti-discrimination law, the department considers that the legal and evidential burden of proof for establishing all the elements in clause 12 (including showing that the exceptions in subclause 12(2) do not apply) rests with the respondent to a discrimination claim, as the party seeking to rely upon this defence.