PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

INQUIRY INTO RELIGIOUS DISCRIMINATION BILL 2021 AND RELATED BILLS

Australian Human Rights Commission

Statements constituting racial discrimination

Senator Deborah O'Neill asked the following question on 14 January 2021:

Could you provide an example of a statement that has in and of itself been found to constitute racial discrimination in the absence of accompanying conduct?

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

Statements may constitute discrimination if they amount to less favourable treatment on the ground of an attribute protected by discrimination law. For example, statements, regardless of whether there was any other accompanying conduct, can amount to racial discrimination.

In *Qantas Airways Limited v Gama* (2008) 167 FCR 537 the Full Court of the Federal Court (French, Branson and Jacobson JJ) unanimously held that the making of statements can amount to racial discrimination, including by impairing the enjoyment of a person's human right to just and favourable conditions of work. At [76]–[77] their Honours said:

> Section 9 [of the *Racial Discrimination Act 1975* (Cth) (RDA)] prohibits a class of acts defined by their attributes and their purpose or effect. To be unlawful under s 9 it is necessary that an act involve "a distinction, exclusion, restriction or preference based on race, colour, dissent or national or ethnic origin …". The making of a remark is an act. It may be that the remark involves a distinction because it is made to a particular person and not to others. The remark may convey no express or implicit reference to the person's race, colour, descent or national or ethnic origin. Nevertheless, a linkage may be drawn between the distinction effected by the remark and the person's race or other relevant characteristic by reason of the circumstances in which the remark was made or the fact that it was part of a pattern of remarks directed to that person and not to others of a different race or relevant characteristic. Where the remark, critical of one person in a group but not others, expressly or by implication links the criticism or denigration to that person's race then that linkage establishes both the distinction and its basis upon race. That was the present case.
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> The second attribute of an unlawful act under s 9(1) is that it have the purpose or effect of nullifying or impairing a person's recognition, enjoyment or exercise on an equal footing of any "human right or fundamental freedom …". The denigration of an employee on the grounds of that person's race or other relevant attribute can properly be found to have the

> effect of impairing that person's enjoyment of his or her right to work or to just and favourable conditions of work.

In that case, Mr Gama, who was born in Goa in India, complained about a number of statements made to him at work that he said amounted to racial discrimination. The Court held that statements that he was 'walking up stairs like a monkey' and references to him as a 'Bombay taxi driver' were contrary to s 9 of the RDA.

The Full Court's findings in *Gama* have been followed in subsequent cases.

In *Murugesu v Australian Postal Corporation* [2015] FCCA 2852, Burchardt J said at [245] that it was 'well established' that racial abuse of an employee can contravene the terms of s 9 of the RDA. His Honour applied *Gama* in finding that Mr Murugesu, a postal worker, was subject to racist insults by his supervisor Mr Boyle. These included calling Mr Murugesu a 'fucking black bastard', making heavy-handed remarks about 'going back to Sri Lanka' and about Mr Murugesu doing 'slave work' (at [219]). These comments were found to be contrary to s 9 of the RDA.

Recently, in *Ferguson v John A Martin & Kevin J Pendergast trading as Sharks Shire Pumping* [2021] FedCFamC2G 58, Driver J applied *Gama* in finding that Mr Ferguson, a truck driver was subject to racist insults by the owners of the business that employed him. These included calling Mr Ferguson a 'black cunt' and saying that because he was of Maori heritage he was likely to be a 'dole bludger' and a 'thief' (at [219], [235]–[238]). These comments were found to be contrary to s 9 of the RDA.

PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

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Australian Human Rights Commission

Statements constituting sex discrimination

Senator Deborah O’Neill asked the following question on 14 January 2021:

If you could also perhaps take on notice an example of a statement that has in and of itself been found to constitute discrimination on the basis of gender or sexual orientation in the absence of accompanying conduct that's of the same kind.

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

Statements may constitute discrimination if they amount to less favourable treatment on the ground of an attribute protected by discrimination law. For example, statements, regardless of whether there was any other accompanying conduct, can amount to sex discrimination.

In *Horman v Distribution Group Ltd* [2001] FMCA 52, Raphael FM found that Ms Maevida Horman was discriminated against at work, contrary to s 14(2)(d) of the *Sex Discrimination Act 1984* (Cth). The discrimination comprised the making of the following statements:

- After Ms Horman undertook a stocktake, a more senior employee shouted at her ‘You stupid fucking bitch. You have mixed show room stock with store room stock’.
- Either the same senior employee or another worker said about Ms Horman ‘She’s a dog’ and later ‘Oh look, a four legged dog. We have one of those here. Mav. Only she has two legs.’

The court held that the making of these statements to Mr Horman at work amounted to subjecting her to a detriment, and that her employer was vicariously liable for this conduct because it had not taken all reasonable steps to prevent its employees from engaging in such conduct (at [7], [30] and [57]).

In *Cooke v Plauen Holdings Pty Ltd* [2001] FMCA 91 at [31]–[33], Driver FM found that Ms Cooke was subjected to sex discrimination at work by her manager contrary to s 14 of the SDA. This conduct was largely in the form of statements, including an invitation that Ms Cooke model for him, swearing in her presence, and finding excessive fault with her work (at [31]–[33]).

In *Poniatowska v Hickinbotham* [2009] FCA 680, Mansfield J found that a work environment characterised by the use of coarse language, sometimes sexually explicit, could give rise to a claim of sex discrimination, contrary to s 14(2) of the SDA (at [303]–[306]).

PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

INQUIRY INTO RELIGIOUS DISCRIMINATION BILL 2021 AND RELATED BILLS

Australian Human Rights Commission

Increased difficulties in preventing sexual harassment

Senator Louise Pratt asked the following question in writing on 14 January 2021:

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.

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

Can women reject sexual advances as ably in the work place if they are accompanied by a statement of belief?

"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."

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

Could you advance unwanted invitations as a statement of belief?

Could you ask intrusive questions as part of a statement of belief?

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

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

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."

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

Clause 12(1)(v) of the Bill provides that a 'statement of belief', in and of itself, does not constitute discrimination for the purposes of the *Sex Discrimination Act 1984* (Cth). Other parts of clause 12 provide that a 'statement of belief' is a defence to a claim of sex discrimination under State and Territory law.

The Explanatory Memorandum provides that the clause 'provides a defence to a complaint of discrimination' (at [156]) but that it does not apply to separate 'harassment, vilification or incitement provisions' under the same laws (at [178]):

> 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.

It is well established that sexual harassment is a form of sex discrimination.[1] If a person claims to have been sexually harassed at work, they may allege both sexual harassment (s 28B of the SDA) and sex discrimination in employment (s 14 of the SDA). In some cases, sex discrimination is made out while sexual harassment is not.[2] This is one reason why it is useful to be able to plead both causes of action as alternatives.

If clause 12 is passed in its current form, it may provide a defence to a claim of sexual harassment that is pleaded as sex discrimination. The precise way that any such claim arises will be fact dependent and require a consideration of all of the circumstances. Nevertheless, it seems clear that a person could complain about a statement that they consider to amount to either sexual harassment or sex discrimination. If the person makes a complaint that the statement is in breach of both provisions, and the respondent considers that the statement falls within the definition of a 'statement of belief' in the Bill, then it would be open to the respondent to plead cause 12 of the Bill as a defence to the discrimination claim.

For claims made under the SDA, this will increase the complexity of the proceeding by requiring an assessment of whether the statement:

- is of a religious belief held by the respondent
- is of a belief that the person genuinely considers to be in accordance with the doctrines, tenets, beliefs or teachings of that religion
- is made, in good faith, by written or spoken words or other communication
- is malicious
- is of a nature that a reasonable person would consider would threaten, intimidate, harass or incite hatred or violence towards a person or group
- is of a nature that a reasonable person, having regard to all of the circumstances, would conclude that the person is counselling, promoting, encouraging or urging conduct that would constitute a serious offence.

If the claim were instead made under State or Territory law dealing with sex discrimination, there would be an additional layer of complexity. This is because, if the complaint is unable to be conciliated, it is likely that (with the exception of QCAT) the relevant State or Territory

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1 *Aldridge v Booth* (1988) 80 ALR 1 at 16–17 (Spender J); *Hall v Sheiban* (1989) 20 FCR 217 at 277 (French J); *Elliott v Nanda* (2001) 111 FCR 240 at 281 [127] (Moore J).

2 For example, *Cooke v Plauen Holdings Pty Ltd* [2001] FMCA 91.

Tribunal will not have jurisdiction to hear a claim where a federal defence is raised. Most, but not all, jurisdictions allow these claims to be transferred to a Court. As noted in the Commission's written submissions at [120]–[121]:

> If a case can be validly transferred to a court, this would involve not only the additional time and cost of multiple proceedings, but would also expose the complainant to paying the costs of the respondent in the court proceedings if they were unsuccessful. This would deprive a complainant of one of the advantages of pursuing a State claim and would have the tendency to reduce access to justice.
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> If the case cannot be validly transferred to a court, the complainant may lose the right to have their complaint heard at all. This is because, once a complaint has been made to a State or Territory antidiscrimination body, the complainant is prevented from making the same complaint to the Australian Human Rights Commission. In those cases, the result of raising the 'statement of belief' defence would be to entirely defeat what might be a legitimate discrimination claim without any consideration of the merits of the claim.

It would be open to a complainant **not** to make a claim of sex discrimination as an alternative to sexual harassment in order to try to avoid some of these procedural issues. However, as noted above, in some cases a sex discrimination claim succeeds where a sexual harassment claim fails. This means that a person who feels that they have been sexually harassed on the basis of statements made at work may decide not to press claims to relief based on sex discrimination if the statement has a religious basis to it, because of a concern that a federal defence might be raised, and may lose a legitimate and potentially successful cause of action as a result.

PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS

INQUIRY INTO RELIGIOUS DISCRIMINATION BILL 2021 AND RELATED BILLS

Australian Human Rights Commission

Codes of conduct

Senator Susan Rice asked the following question on 14 January 2021:

I have a lot of questions, some of which have been answered and others which we haven't got time for. I'll go to the key one, which is about the ability of religious organisations to give preference to people of their own faith and the conditions under which they work. We've had quite a bit of discussion with other witnesses as to how this would impact on and interact with codes of conduct. I wonder whether you have given some thought as to whether clause 7 would in fact override codes of conduct—say, for medical professionals—or whether the other provisions in workplace law and the Fair Work Act would mean that there could still be cases taken if workers were breaching their code of conduct. …

Please take on notice any further consideration of the interaction with codes of conduct.

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

Direct effect: qualifying body conduct rules

The aspect of the Bill that directly engages with codes of conduct is clause 15 which deals with codes of conduct imposed by a 'qualifying body'. A 'qualifying body' is defined as an authority or body that is empowered to confer, renew, revoke, vary or withdraw an authorisation or qualification that is needed for, or facilitates, any of the following by an individual:

(a) the practice of a profession

(b) the carrying on of a trade

(c) the engaging in of an occupation.

Clause 15 of the Bill provides that a qualifying body engages in discrimination if it:

- establishes a code of conduct (a 'qualifying body conduct rule') that relates to people seeking or holding a relevant qualification, and
- the rule is likely to have the effect of restricting or preventing the person from making a 'statement of belief' other than in the course of the person practising the relevant profession, carrying on the relevant trade or engaging the relevant occupation.

That is, codes of conduct cannot regulate the making of any 'statements of belief' when a person with a relevant qualification is not at work. There is an exception if compliance with the code of conduct is an 'essential requirement' of the profession, trade or occupation.

A similar deeming provision, commonly referred to as the Folau-clause, previously applied to employers and was dropped in the final form of the Bill. The Folau-clause was removed because the Government formed the view that the ordinary operation of the indirect discrimination provisions in the Bill was sufficient to protect employees from unreasonable codes of conduct. The Attorney-General's Department said in answers to questions on notice:

> The Bill does not limit the ability of employers to impose a reasonable condition, requirement or practice on staff for conduct at work, provided all employees are treated equally and not subjected to a disadvantage on the ground of their religious belief or activity.
>
> Provisions in the Bill that protect against indirect discrimination in employment (clause [14] and clause 19) would ensure that employers cannot impose conditions upon their employees which unreasonably restrict their ability to manifest their religious beliefs, including by expressing those beliefs during the course of their employment. This is the ordinary operation of the indirect discrimination provision.

The same rationale applies equally to the current prohibition on qualifying body conduct rules in clause 15. The clause is not necessary because the prohibition on indirect discrimination is sufficient. The indirect discrimination provisions in the Bill would permit qualifying bodies to impose reasonable conditions on those seeking or holding a relevant qualification, provided all such people are treated equally. At the same time, the indirect discrimination provisions would ensure that qualifying bodies cannot impose conditions on those seeking or holding a relevant qualification that unreasonably restrict their ability to manifest their religious beliefs.

However, clause 15 goes further than this and has the potential to prohibit a range of conditions that are reasonable in all of the circumstances. This is because, as described by both the Australian Medical Association and the Australian Nursing and Midwifery Federation, sometimes the regulation of the conduct of professionals outside of work hours is reasonable, for example, their use of social media could impact on the reputation of the profession as a whole and the confidence of the public in the ability of medical practitioners to behave ethically and in accordance with professional values.

Clause 15 does not have any counterpart in any other Commonwealth discrimination law.

The impact of clause 15 on codes of conduct was raised in the written submissions of the Australian Medical Association[3] and the Australian Nursing and Midwifery Federation.[4] They were particularly concerned about the ability of clause 15 to limit existing rules made by the Australian Health Practitioner Regulation Agency and the Medical Board of Australia. This issue was also raised by both organisations in oral evidence to the Committee. The Acting Federal Secretary of the Australian Nursing and Midwifery Federation gave the following evidence on 14 January 2022:

> [T]o practice in Australia, nurses and midwives have to adhere to a professional code of conduct and to a code of ethics and professional standards, and this is set out by our regulatory body. It sets out that individuals, nurses, midwives and their personal beliefs and values are bound by a code of conduct. Whilst some standards are directly linked to

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[3] Australian Medical Association, *Submission to the Parliamentary Joint Committee on Human Rights' Inquiry into the Religious Discrimination Bill 2021*, pp 3–6.

[4] Australian Nursing and Midwifery Federation, *Submission of the Australian Nursing and Midwifery Federation to the Parliamentary Joint Committee on Human Rights, Religious Discrimination Bill 2021 and related bills* (December 2021), pp 6–12.

> practice, the obligation for nurses to act ethically and in accordance with values of public health and respect for individuals does not cease at the end of the shift. This is something that nurses and midwives are bound to, whether they are getting paid or not paid, whether they're volunteering in the community or whether they're working as a nurse. You can see the example that we have articulated in our submission about vaccination and potential antivax sentiment based on any religious belief and the dire consequences that that can have on public health consequences, and also confidence in the general community.

The vice of clause 15 is in prohibiting too much. Qualifying bodies should have the ability to make codes of conduct that are reasonable in all of the circumstances. That is a test that is used in each other piece of federal discrimination law. That would be the position if clause 15 was removed from the Bill.

Indirect effect: statements of belief

During the hearing on 14 January 2022, the Commission gave the following evidence in relation to the possible interaction between codes of conduct and clause 12 of the Bill:

> I think our primary concern is that clause 12 purports to override protections against discrimination law. That's what's pretty clear on the face of it. There might be complicated issues that arise in relation to codes of conduct. I don't know if we've teased all of those out. I guess one issue that potentially could arise is people pointing to clause 12 to say, 'This kind of speech is considered to be lawful and so therefore should not be prohibited by a code of conduct.' Codes of conduct aren't dealt with explicitly in clause 12, and so I think any effect would be indirect.

This is consistent with evidence given earlier that day by the Australian Council of Trade Unions (ACTU). Ms Sophie Ismail, Legal and Industrial Officer at the ACTU gave evidence that:

> We're very unsure how this is going to play out in workplaces. While the so-called Folau clause has gone from this bill, we still think that these provisions are going to hamstring employers who want to act to create safe and harmonious workplaces. Many employers' enterprise agreements contain provisions that refer to discrimination laws, and, because section 12 will make certain statements no longer discriminatory, it's very unclear how that's going to impact on employers' ability to deal with these issues in workplaces. Indeed, the employers have raised a concern along those lines in their current submission.

The concern expressed by the ACTU appears to be that if a code of conduct requires employees to act in accordance with discrimination law, the content of that code of conduct will be indirectly affected if the scope of discrimination law is narrowed by making available a new defence based on a 'statement of belief'. That is, clause 12 may indirectly remove or limit a prohibition contained in a code of conduct by rendering some statements lawful.