SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
HUMAN RIGHTS AND ANTI-DISCRIMINATION BILL 2012

Questions on Notice for Attorney-General's Department

Senator Fierravanti-Wells asked the following questions in writing on 29 January 2013:

1. Please explain the relationship between the provisions of the proposed Anti-Discrimination Legislation and State and Territory Mental Health Legislation. Are there any exclusions?

2. Please explain the relationship between the provisions of the Anti-Discrimination Legislation and State Occupation Health and Safety legislation, especially in respect of disclosure of Mental Illness by prospective employees to their employers or employment agencies?

3. What are the specific obligations for disclosure by a person with a Mental Illness when seeking employment?

4. Please elaborate on the circumstances where discrimination on the grounds of Mental Illness would result in prosecution under the Anti-Discrimination Legislation?

The answers to the honourable senator's questions are as follows:

Question 1:

The draft Bill is not intended to change the general approach to interaction between Commonwealth anti-discrimination laws and State and Territory laws. Consistent with existing anti-discrimination law, there is no general exception for conduct in accordance with any State or Territory law. However, the exception for justifiable conduct (clause 23) provides a clearer basis for States and Territories to defend their laws.

In addition, clause 30 provides an exception for acts done in compliance with State and Territory laws prescribed by regulation (except in relation to race and sex). This mechanism currently exists under the *Disability Discrimination Act 1992* (Cth) ('DDA') (for example, the *Mental Health Act 1990* (NSW) and *Mental Health Regulations 1995* (NSW) are currently prescribed under the DDA).

The inclusion of the exception for justifiable conduct means that it will not be necessary in most cases to reply on clause 30, although this mechanism is available should States or Territories want further certainty regarding particular laws.

The Government will seek the views of State and Territory governments about what, if any, laws should be prescribed under this provision.

Question 2:

Consistent with existing anti-discrimination law, the draft Human Rights and Anti-Discrimination Bill 2012 does not regulate the disclosure of a mental illness by prospective employees to their employers or employment agencies. However, clause 52 of the Bill provides that it is unlawful to request information for the purpose of unlawfully discriminating against another person. This is consistent with existing law.

As with existing law, the draft Bill will only apply if the employer or employment agency treats the person unfavourably because of a disability. A reasonable request for information is unlikely to constitute unfavourable treatment.

Clause 24 provides that discrimination is not unlawful if the person cannot meet the inherent requirements of the job. The ability to comply with Occupational Health and Safety legislation could be an inherent requirement of the job. However, this exception does not apply to disability discrimination if the employer could have made a reasonable adjustment. This is consistent with existing law under the DDA.

The draft Bill also contains an exception for justifiable conduct in clause 23. Justifiable conduct could include conduct necessary to comply with Occupational Health and Safety legislation.

The response to Question 1 also applies to this issue.

Question 3:

Anti-discrimination law does not set out obligations for disclosure by a person with a mental illness when seeking employment.

Question 4:

There is no prosecution for discrimination on the grounds of mental illness under the draft Bill, as it creates civil, rather than criminal, liability (consistent with current law).

Under the draft Bill, a person with a mental illness may make a claim of discrimination to the Australian Human Rights Commission if the person believes they have been treated unfavourably because of their mental illness. The Commission will then investigate and/or attempt to conciliate the complaint. If the complaint cannot be conciliated, the person may then apply to the Federal Court or Federal Magistrates Court, alleging that unlawful conduct has occurred.

Whether a court finds in favour of a complainant will depend on all the circumstances of the case, including whether there was unfavourable treatment, whether it occurred in public life, whether it was because of the person's mental illness and whether it was justifiable or another exception applies.

Senator Pratt asked the following question in writing on 31 January 2013:

Definition of gender identity

There have been dozens of submissions to the inquiry advocating for amendments to the definition of 'gender identity'. Broadly speaking those advocating for change identify five main issues:

That the words "genuine basis" should not appear and is unnecessary, as the definition of each protected attribute includes 'characteristics' that would in effect render these words useless. Additionally, transgender communities appear concerned the inclusion of these words would require the Human Rights Commission and/or the courts to become some sort of "body police" in order to satisfy this requirement as genuine basis is not defined.

This definition may also not be consistent with the rulings of the High Court in the case of AB and AH VS the State of Western Australia. It also appears to contradict the notion that people have protection for presumed attributes in any case.

That the coverage of 'gender expression' should be included in some way to ensure all sex diverse Australians are covered.

That intersex is not a form of 'gender identity' and that a separate protected attribute addressing the physical differences of intersex people (as opposed to their identity) should be included.

That the current definition is harder to understand for business because its wording is complex and that a simpler / clearly worded definition would reduce burden on business if a 'lay' person upon reading it could clearly understand the definition/s meaning.

To this end, it's been proposed that the Bill should adopt the Tasmanian definition currently before their Parliament. It's understood that this was not considered as part of the consolidation process's assessment of state laws as it was not public at the time the bill was being drafted.

1. Could the Attorney-General's Department respond to each of the five concerns above and provide advice on the ability and implications if the Parliament were to replace the current definition of "gender identity" with the Tasmanian definitions of "gender identity" and "intersex"?

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

The Department is aware of the definitions in the Tasmanian Anti-Discrimination Bill 2012. It also acknowledges stakeholder views that 'intersex' is not a 'gender identity' and should not be characterised in this way.

The Department is currently considering the implications of using the definitions from the Tasmanian Bill, including any regulatory impact. In particular, the Department is considering what impact this approach would have on the collection of sex and/or gender data.

Senator Pratt asked the following question in writing on 31 January 2013:

Religious exemptions

2. What, if any, consultation has the Attorney-General's department undertaken to assess the magnitude of Australians who access services that would be eligible to discriminate?

3. Does the AGD know numbers of service providers across hospitals, disability services, homelessness services, welfare services and aged care services that would fall under this exemption?

4. What is the impact on universal service provision by this clause?

5. There have been proposals to limit the exemption's operation, so that they may only be relied upon if the organisation published an explicit, easy to access statement that it may choose to discriminate against people who are A, B or C. Testimony has been given that this similar to the requirement in South Australia.

   Can the AGD comment on the SA operation and advise how this option may be achieved in this bill?

6. Various faith-based groups have called for the "status-quo" to remain in terms of religious exemptions. However in this bill the existing grounds of "age" and "sex" do not appear under the religious exemption clause. Further, as the grounds of "sexual orientation" and "gender identity" are new to federal law, the status quo must refer to state law. It appears that in various states there is a higher benchmark for these draft provisions with some states requiring an inherent requirements test or requirement to publish notice.

   Can you comment if s33 is broader than the current law and if so, how and why is that so?

7. Finally, various faith-based groups appear to want the right positive right to associate, employ and service people who share their religious belief. That is, people who follow Anglican teachings can be employed or receive services by an Anglican organisations etc.

   However these laws set up an exemption for negative discrimination, that is, they say "church groups have the right to discriminate on the basis of sexual orientation". When probing the submissions, it seems that a don't ask, don't tell system is occurring, where if a gay or transgender persons isn't public or obvious and conforms to the religious doctrine everything is ok.

   An alternative appears to be that you would remove the protected attribute "exemptions" and insert a positively framed exemption that goes along the lines of "freedom of religion" without singling out individual attributes and "exempting them".

   It would seem that this has been occurring in Tasmania for the past 10 years and has operated without complaint from either gay people or the churches.

   Is this a realistic proposition for this legislation and how could it be achieved?

The answers to the honourable senator's questions are as follows:

Question 2:

The draft Bill does not seek to make significant changes to the exception for religious organisations or educational institutions, which is largely maintained from current law. However, the exceptions apply to the new grounds of sexual orientation and gender identity, while being limited with respect to the provision of Commonwealth Government-funded aged care services.

During consultation, the Government received a number of submissions which highlighted the difficulties faced by older LGBTI Australians in aged care. However, the Government has not undertaken any consultation specifically to assess access to hospitals, disability services, homelessness services or welfare services.

Question 3:

No.

Question 4:

Discrimination on the basis of gender identity is not currently prohibited by Commonwealth anti-discrimination law. The practical effect of the draft Bill is to either increase protection from discrimination or leave it unchanged. It does not authorise any conduct that cannot already occur under existing law.

Question 5:

This would be a policy change and is a matter for Government.

Question 6:

The religious exceptions at clauses 32 and 33 of the draft Bill are not broader than the religious exceptions under current Commonwealth anti-discrimination law.

Clause 14 of the draft Bill makes clear that it is not intended to affect the operation of anti-discrimination laws in States and Territories. Accordingly, if certain conduct is unlawful under a State or Territory anti-discrimination, that position would be unchanged by the draft Bill.

Question 7:

The religious exceptions in the draft Bill use the same approach as the religious exceptions from existing Commonwealth anti-discrimination law. Introducing a broad protection of this nature would go beyond the stated aims of this project and the Department is not in a position to comment on how it could be achieved.

Senator Pratt asked the following question in writing on 31 January 2013:

Questions for coordination with DOHA, DEEWR, FAHCSIA & DHS

Concerns have been raised that the proposed religious exemptions can lead to Australians being unaware they are accessing a service that would be legally entitled to discriminate against them in the provision of that service. Research from the Australian Parliament House Library has shown that even in statistical reporting, it is very hard to determine who is a faith-based group and who is not.

For example, in Aged Care Registered organisations that are Not-For-Profit are asked to identify their primary purpose as “Charitable”, “Religious” or “Community”. When looking at this data there are a range of faith-based organisations such as Catholic Health Care and HammondCare who are not listed as religious, rather they are listed as "Charitable".

While not suggesting this is inaccurate, it is nonetheless confusing and potentially misleading that there is a greater number of religious organisations than is reported.

Similarly school figures blend religious schools not associated with the catholic school system with secular schools under the banner of “independent schools”. This is particularly problematic where there is no alternative service provider because they are the sole provider in a local geographical area or other services do not have available capacity.

Can the responsible Department provide information to the following questions for each of the below areas:

- Service Types:
- Homelessness Services
- Mental Health Services
- Hospitals
- Disability Services
- Aged Care
- Youth Services
- Schools

1. If the Department has clear data on the number of faith-based organisations providing services in this area.

2. The number of faith-based providers broken down by regional/remote/rural, outer suburban and inner suburban for each state.

3. The actual or approximate number of clients serviced by these providers in each category listed in question 2.

4. Any known geographical area where service availability is limited to a faith-based provider.

5. Comments from the Department about the impact of these laws on the provision of services under a universal access approach.

The answer to the honourable senator's questions is as follows:

Each of the identified Departments has confirmed that it does not hold clear data on the number of faith-based organisations providing services in the areas listed.

More generally, the Attorney-General's Department notes the information requested was not sought as part of the policy development stage on the basis these changes will not have any negative impact on service provision.

In this context, the Department reiterates its response to Question 4 above:

> Discrimination on the basis of gender identity is not currently prohibited by Commonwealth anti-discrimination law. The practical effect of the draft Bill is to either increase protection from discrimination or leave it unchanged. It does not authorise any conduct that cannot already occur under existing law.

Senator Brandis asked the following question at the hearing on 4 February 2013:

> **Senator BRANDIS:** All right. Mr Wilkins, are you in a position to tell us approximately when the government would intend to introduce the bill in whatever ultimate form it takes? Is it the government's intention to introduce the bill into the parliament before the parliament expires?
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> **Mr Wilkins:** I do not know that. I cannot answer that question. I guess it will depend to some extent on the extent of revisions that may need to be made what further processes might be required. So I cannot answer your question.
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> **Senator BRANDIS:** Would you take that on notice for me, please.
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> **Mr Wilkins:** I will take it on notice. I might not be able to provide you with much more information, though.
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> **Senator BRANDIS:** That is fine, but—
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> **Mr Wilkins:** I will attempt to clarify that.

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

The Government will wait for the report and any recommendations from the Senate Committee before it commits to any changes to the draft Bill or next steps, including timing for the introduction of the Bill.

Senator Brandis asked the following question at the hearing on 4 February 2013:

> **Senator BRANDIS:** Why isn't it—and one of the witnesses we had in Sydney addressed this—that the state of mind of the person against whom the complaint is brought, if that person were not to go into evidence and offer an explanation—that his silence—would invite a Jones v Dunkel inference against him?
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> **Mr Wilkins:** Sorry, that—
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> **Senator BRANDIS:** His silence—if he chooses not to explain his real reason or purpose, would invite a Jones v Dunkel inference against him?
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> **Mr Wilkins:** I am not sure that it would.
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> **Senator BRANDIS:** I am asking you why not.
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> **Mr Wilkins:** I would have to take that on notice.
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> **Senator BRANDIS:** Perhaps Mr Manning could help.
>
> **Mr Wilkins:** No, we will take it on notice.

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

The Department does not consider that clause 124 of the draft Bill is inconsistent with the *Jones v Dunkel* principle, as it does not require the court to make adverse inferences from a respondent's failure to provide evidence. However, the Department will consider this issue further.

Senator Brandis asked the following question at the hearing on 4 February 2013:

> **Senator BRANDIS:** Would you take this on notice please, Mr Manning. Could you, just for our guidance, give us the source in each of the existing five statutes, of the nine areas of public life listed there.
>
> **Mr Manning:** Yes, Senator.

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

The source of the areas of public life specified in subclause 22(2) of the draft Human Rights and Anti-Discrimination Bill are set out in the following table.

Area of public life	**Old provisions**
(a) work and work-related areas;	Section 15 RDA Part II, Division 1 SDA Part 2, Division 1 DDA Part 4, Division 2 ADA
(b) education or training;	Section 21 SDA Section 22 DDA Section 26 ADA
(c) the provision of goods, services or facilities;	Section 13 RDA Section 22 SDA Section 24 DDA Section 28 ADA
(d) access to public places;	Section 11 RDA Section 23 DDA Section 27 ADA
(e) provision of accommodation;	Section 12 RDA Section 23 SDA Section 25 DDA Section 29 ADA
(f) dealings in estates or interests in land (otherwise than by, or to give effect to, a will or a gift);	Section 12 RDA Section 24 SDA Section 26 DDA Section 30 ADA
(g) membership and activities of clubs or member-based associations;	Section 25 SDA Section 27 DDA
(h) participation in sporting activities (including umpiring, coaching and administration of sporting activities);	Section 42 SDA* Section 28 DDA
(i) the administration of Commonwealth laws and Territory laws, and the administration or delivery of Commonwealth programs and Territory programs.	Section 26 SDA Section 29 DDA Section 31 ADA

* Section 42 of the SDA is an exception from what would be otherwise unlawful discrimination in relation to sport, but the exception does not apply to umpiring, coaching or other administration of sporting activities

Note: In addition to the provisions identified above, section 9 of the RDA prohibits racial discrimination in any area of public life.

RDA: *Racial Discrimination Act 1975*
SDA: *Sex Discrimination Act 1984*
DDA: *Disability Discrimination Act 1992*
ADA: *Age Discrimination Act 2004*

Senator Cameron asked the following question at the hearing on 4 February 2013:

> **Senator CAMERON:** Okay. Can you take on notice whether this clause 33 is consistent with our international obligations on any convention.
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> **Mr Manning:** We can take that on notice.
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> **Senator CAMERON:** That is all the international conventions or treaties we have signed. Can you advise whether this is consistent with our obligations? I am sure that this must have been done, given the importance of this issue. It might be a big job for you, but I think it is an important job to know that our domestic law is consistent with those international obligations.
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> **Mr Manning:** The International Covenant on Civil and Political Rights, which I mentioned earlier, does contain obligations in relation to religious freedom, and we will look at what has been done on that.

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

In accordance with long-standing practice, the Attorney-General's Department cannot provide legal advice to Committees. The Government carefully considered all of its international obligations in the drafting of clause 33.

Exemptions for religious organisations in similar terms to clauses 32 and 33 of the draft Bill are currently in the *Age Discrimination Act 2004* (ADA) and the *Sex Discrimination Act 1984* (SDA) and have been since those Acts commenced in 2004 and 1984 respectively.

During initial consultations on the existing anti-discrimination framework, the Government stated that it did not propose to change the current religious exemptions, apart from considering how they may apply to discrimination on the grounds of sexual orientation or gender identity.

Consistent with the broader aged care reform agenda and its particular focus on care for vulnerable groups, the draft Bill introduces a limitation on the religious exemptions as they relate to the provision of aged care services with Government funding. Aside from this change, the religious exemptions preserve existing policy from the current laws.

Article 18 of the *International Covenant on Civil and Political Rights* provides that everyone shall have the right to freedom of thought, conscience and religion. Article 18 also protects the right to demonstrate or manifest religious or other beliefs, whether individually or collectively, and whether through worship, observance, practice or teaching. The UN Human Rights Committee has stated that the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications.[1] Article 18(3) provides that the freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.

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[1] UN Human Rights Committee, *General Comment No. 22: The right to freedom of thought, conscience and religion* (Art. 18): 30/07/1993. http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/9a30112c27d1167cc12563ed004d8f15?Opendocument.

Senator Cameron asked the following question at the hearing on 4 February 2013:

> **Senator CAMERON:** I am not going to ask you for an opinion on any of this; it is not what you are there for. But I am interested in the application of the law to all Australians. You can take this on notice: could you provide, for want of a better word, a mud map of the introduction of this discriminatory legislation against some Australians, both state and federal. The argument has been put on a number of occasions that nothing has changed. Could you advise of when these laws came in and how long they have been there on the statute, because I just think, quite frankly—
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> **Mr Wilkins:** You are talking about these exceptions?
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> **Senator CAMERON:** Yes, this section, because I think it is quite outmoded and certainly does not reflect a secular society.
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> **Mr Wilkins:** It has certainly been there for a long time. I worked in New South Wales for many years, and it was in that legislation from inception and is still there.
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> **Senator CAMERON:** Yes. I would just like to know when it came in, because it is still there. Not too many laws have been constant for this period of time, and I just think it is time for it to change. That is why I would like to get some history from the department about why they were introduced, how they were introduced and when they were introduced. Could you take that on board.
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> **Mr Wilkins:** Yes.
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> **Senator CAMERON:** Thanks.

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

Commonwealth legislation

Exemptions for religious organisations in similar terms to clauses 32 and 33 of the draft Bill are currently in the *Age Discrimination Act 2004* (ADA) and the *Sex Discrimination Act 1984* (SDA) and have been since those Acts commenced in 2004 and 1984 respectively.

State and Territory legislation

Australian Capital Territory: The *Discrimination Act 1991* (ACT) contains exemptions for religious bodies in similar terms to clauses 32 and 33 of the draft Bill. The exemptions have been in the Act since it commenced in 1991.

New South Wales: The *Anti-Discrimination Act 1977* (NSW) contains exemptions for religious organisations in similar terms to clauses 32 and 33 of the draft Bill. Religious exemptions have been in the Act since it commenced in 1977.

Northern Territory: The *Anti-Discrimination Act* (NT) contains exemptions for religious bodies in similar terms to clauses 32 and 33 of the draft Bill. The exemptions have been in the Act since it commenced in 1992 with the exemption regarding religious educational institutions inserted into the Act in 2004.

Queensland: The *Anti-Discrimination Act 1991* (QLD) contains an exemption for religious bodies in similar terms to clauses 32 and 33 of the draft Bill. The exemption has been in the Act since it commenced in 1991. Employment in educational institutions under the direction or control of a religious body is covered under the section on genuine occupational requirements. A similar exemption was in the Act when it commenced in 1991.

South Australia: Religious exemptions were first included in the *Sex Discrimination Act 1975* (SA). The *Equal Opportunity Act 1984* (SA) contains an exemption for religious bodies in similar terms to clauses 32 and 33 of the draft Bill. The Act also contains exemptions for employment in educational institutions, but requires these institutions to make publicly available a written policy to this effect.

Tasmania: Exemptions for religious institutions were included in the *Sex Discrimination Act 1994* (TAS). The *Anti-Discrimination Act 1998* (TAS) contains exemptions for religious bodies in similar terms to clauses 32 and 33 of the draft Bill but only on the grounds of religious belief or affiliation. There is an additional exception for religious institutions in similar terms to clause 33(2) but on the ground of gender.

Victoria: The *Equal Opportunity Act 2010* (VIC) contains exemptions for religious bodies in similar terms to clauses 32 and 33 of the draft Bill. Religious exemptions were included in the original *Equal Opportunity Act 1977* (VIC) since it commenced in 1977.

Western Australia: The *Equal Opportunity Act 1984* (WA) contains an exemption for religious bodies in similar terms to clauses 32 and 33 in the draft Bill. These exemptions have been in the Act since it commenced in 1984.