

TRANSCRIPT

LEGISLATIVE ASSEMBLY LEGAL AND SOCIAL ISSUES COMMITTEE

Inquiry into Anti-Vilification Protections

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WITNESS

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The CHAIR: Good afternoon. Thank you very much for being here today. I will just go through the protocol for this session. All evidence taken by this Committee is protected by parliamentary privilege; therefore you are protected against any action for what you say here today, but if you go outside and repeat the same things, including on social media, these comments may not be protected by this privilege.

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I now invite you, Dr Holly Lawford-Smith, Senior Lecturer in Political Philosophy, of the University of Melbourne, to begin your opening statement, followed by some questions from the Committee. Thank you so much for being here.

Dr LAWFORD-SMITH: Thanks. I am going to focus on the proposed protected attributes in the Racial and Religious Tolerance Amendment Bill. I will have nothing to say about sexual orientation or disability, but I am going to argue against the inclusion of gender, gender identity and sex characteristics and for the inclusion of sex and gender expression instead.

Of all the protected attributes, both the existing two in the current Act and the proposed five in the new Bill, one is ambiguous because it is a contested term whose meaning is not yet settled, and that is gender; one is not like the others because it is entirely subjective and unverifiable, and that is gender identity; and one is trying to do too much at once—and I think thereby failing its biggest constituency—and that is sex characteristics.

There is currently a culture war on over what the words 'woman' and 'man' should mean and what 'gender' should be understood to be. For one group gender should be one's subjective sense of gender identity and woman and man should refer to that sense of identity. If a male-bodied person, physically indistinguishable from any other adult male, identifies as a woman, then on this view he is a woman. For the other group 'gender' is just a polite term for sex, and woman and man are synonymous with female and male respectively. If 'gender' in the Bill is meant to pick out gender identity, then gender identity is protected twice under different names. If it is supposed to pick up sex, it cannot afford to be euphemistic, given that the culture wars may be won in the other direction.

Many feminists, as well as lots of other sensible people besides, think that sex matters and that sex should not be displaced either in the law or in social life. Even if we want to recognise gender identity or something like it, this is not the same concept as and not more important than sex. Women continue to experience disadvantage on the basis of sex all around the world—in Australia from the disproportionate rates of Indigenous women's incarceration, through rape and sexual assault, through domestic violence and through pregnancy and breastfeeding discrimination in the workplace. The international legal Convention on the Elimination of all Forms of Discrimination against Women, or—less of a mouthful—CEDAW, was set up explicitly to recognise that existing human rights law was not seeing women's rights fulfilled, and by its language it is absolutely clear that it means female people. If we are going to continue to protect sex—which we should, at least until such a time as it does not any longer disadvantage women—then we are also going to need to protect the words to refer to it. This means female; it means the pronouns she/her/hers; it may also mean the dependent terms lesbian, mother and arguably also woman, given how frequently 'woman' is used synonymously with female in both law and social life.

Will 'sex characteristics' do to protect sex? Arguably not, because the definition of these attributes has clearly been crafted with a view to inclusion, which means it is very much diluted. The list of sex characteristics that is given in section 7 'Definitions' on page 3 of the Bill separates out different aspects of sex for potential independent targeting. For example, an intersex female might be targeted on the basis of having male-typical genitalia, or a trans woman might be targeted on the basis of being a visibly male person with breasts, but when

a high-profile female journalist receives rape and death threats online because she is being outspoken about something that aggravates the trolls, that is not because of her genitalia or her chromosomes or her breasts in particular or in isolation. Rather it is because she is female, a member of the sex caste picked out in our society as subject to particular kinds of constraining norms, expectations and stereotypes. That she cannot progress as swiftly in her workplace because there is an expectation she will leave to have children and that she will end up with significantly less superannuation at the end of her life and so be more vulnerable is not due to possession of any particular sex characteristic. It is down to her sex—that is, simply being female. The discrimination that she faces is not the same as the discrimination a visibly male person with breasts faces. In trying to include everyone in this attribute fails to adequately protect its largest constituency, namely female people.

Let us move on to the problem with the use of ‘gender identity’ as a protected characteristic. As I mentioned before, most of the other attributes pick out clear groups of persons on a basis that is objective and can be empirically verified. There is a fact of the matter about whether someone in fact has sexual or romantic relationships with people of the same sex—or is oriented so as to have, supposing they have not had the opportunity yet. There is a fact of the matter, or at least externally verifiable criteria that can be used to decide whether someone in fact has a disability. Et cetera. But gender identity is very different. First of all, it is entirely inside your head. Only you know whether you ultimately feel like a woman or feel like a man or neither or both. Some of those who endorse the idea of gender identity think that it can be fluid, changing yearly, weekly, daily or even hourly. This makes it a poor attribute indeed when vilification provisions are supposed to pick out particular groups of citizens who are at risk of not being able to participate equally in all social, political, economic and cultural aspects of society because of the way vilification of them diminishes their dignity, sense of self-worth and sense of belonging to the community—all as stated in the preamble of the 2001 Act.

Second of all, there has recently been a massive expansion in the membership of this group as a result of changing lobby group incentives. Where gender identity might at one time have been an indirect way of referring to people who experience a severe and debilitating sense of incongruence between the sex they desire themselves to be or believe themselves to be and the sexed bodies they in fact have, it is now a vague term that picks out absolutely anyone who chooses to identify as the opposite sex or as no sex or as a mixture of both sexes. It includes so-called non-binary people who are motivated not by bodily dysphoria but by a politics of “smashing the gender binary”, and note that this means it includes people who are indistinguishable from the most privileged people in our society, namely middle-class, straight, white males.

This group also includes young people who are simply experimenting with their personal styles and personalities, who might in previous eras have been punks or goths. It includes people who are refugees from their sex caste because of childhood trauma, and it includes people with undiagnosed autism, particularly female people whose style of thinking appears more male typical to them or those around them. In short, this is now a large and ever-growing group of people whose status depends entirely on their say-so. This is not even vaguely comparable to other attributes like race, religion, sex, sexual orientation or disability. It does not have the long history of social exclusion, and it does not have the same clarity in membership.

All of this can be avoided by substituting something more objective and verifiable in place of ‘gender identity’. ‘Gender expression’ would be a good substitute. It would allow the protection of a larger class of people, including butch lesbians, tomboys, effeminate men and really anyone who likes to have fun with the way they dress or present themselves. It could also cover secondary sex characteristics, such as when non-binary female people have voluntary double mastectomies and so lack a sex characteristic that female people typically have, or when trans women have breasts and so have a sex characteristic that male people typically lack. These can all be ways that people choose to express their gender. In conclusion, ‘sex’ and ‘gender expression’ would do a much better job than ‘gender’, ‘gender identity’ and ‘sex characteristics’ of protecting the various vulnerable social groups not already covered in the existing Act.

The CHAIR: Thank you very much.

Ms SETTLE: Thank you for that presentation. There are a few things I want to ask you about. I can absolutely see what you are talking about in terms of using the term ‘sex’, but the difference between ‘gender expression’ and ‘gender identity’—one of the problems with gender identity or debate around gender identity is the sort of growing group that can be defined. How does using ‘gender expression’ change that? Isn’t gender expression just as growing a collective?

Dr LAWFORD-SMITH: I think so long as you are always referencing existing norms you can make much better sense of the ways that gender expression can be vilified. We have an understanding now of what it means to be masculine or feminine, and I guess we understand maybe more or less in different cities and different parts of different cities what is going to be policed more. So if you think of a paradigm of masculinity and then departures from there, like an obviously male person wearing a dress or make-up, there is a sort of clear case for counting that as non-conforming gender expression, and that is empirically verifiable in a way that someone's feeling of being a woman is not.

Ms SETTLE: Okay. Something that came up, and it is something I am learning in life in government, is unintended consequences. We had someone, and I cannot remember which submission it was, with the concern that too many times we create legislation to protect a certain group and it ends up getting used against you. I think that submission cited the domestic violence stuff that we brought in, and it turns out that men are using it instead. So I guess my question to you is that if it becomes an issue of sex, is there a danger that this is going to have unintended consequences?

Dr LAWFORD-SMITH: Can you say a bit more about what you might have in mind? You are worried—

Ms SETTLE: I guess it is a concern as to is it going to be used as an aggressive act or a defence? The example we were given was the—

The CHAIR: University of Melbourne, the law department—

Ms SETTLE: Yes, and I think it was domestic violence, wasn't it? We brought in those laws around domestic violence so there could not be—

The CHAIR: Or creating laws that then had the reverse—

Ms SETTLE: Impact. So does this mean that the incels suddenly start claiming vilification? Have I vilified them by calling them incels? All I am trying to tease out is how do we protect the people that are vulnerable and not open the legislation up to misuse.

Dr LAWFORD-SMITH: Misuse. I guess I feel like there are two issues here. One is the symmetry issue, which came up with the three women you had this morning—

The CHAIR: The previous submission.

Dr LAWFORD-SMITH: I think what they said there was right—that for whatever reason our various bits of law seemed to protect attributes symmetrically, and it is a bit bizarre because some groups are actually historically subordinated and some are not, so I do not see why we would want to protect men from sex-based discrimination. Maybe you could come up with specific domains where you would want to do that, but in general when we protect race we want to protect Indigenous people or people of colour; we do not want to protect white people from vilification on the grounds of race.

Ms SETTLE: And that is my concern: if for this vilification the terminology is 'sex'—and traditionally the people who have more power culturally enact those laws—are we opening ourselves up for incels to be claiming vilification? I am not going to heave it around if I am not proposing—

Dr LAWFORD-SMITH: There is just an interesting question about how the courts are going to handle this, because you are still going to need to settle all of the content of what counts as vilifying. Then I suppose they are going to be asking, 'Well, if a group of middle-class straight white males are told—I do not know what people say'—whatever people say about incels, 'does that exclude them from social and cultural life?'. No, they are the people pulling the strings on social and cultural life, so one would hope that when that gets to the courts it is thrown out.

I do not really know how to do the big social trade-off. It seems to me that sex is so important, and in this culture it is really under threat. I have been in this debate for two years, and there is really a concerted effort to displace and remove sex entirely, which just seems utterly bonkers to me given how important a site of discrimination sex still is all around the world and including in Australia. So even if we needed to have a big

conversation about what the unintended effects might be with male people weaponising this, it looks a lot worse to me actually to shift away from sex and to something as amorphous as gender identity.

Can I also just quickly comment on the unintended consequences. One thing I focused on in my written submission but did not say here was that I am worried that if the Bill goes ahead as proposed, there are going to be unintended consequences anyway for women, because this fight has been so ugly, with a lot of activists kind of weaponising grievances against women, and it is women who are being silenced on social media. So there is a real worry that if gender identity is protected, you are just going to open up a suite of legal cases against women.

Ms SETTLE: Can I make the point—we were talking about this earlier—that in fact the Bill is separate to this Inquiry. So this is not an inquiry into that Bill; it is a more general inquiry into what we should look at. I think it is interesting, because a lot of stuff has come out around vilification, for example, and the fact that a lot of the submissions have talked about vilification laws being more focused on harm rather than their current form, which is third-party incitement. So I think we are probably looking at those sorts of things. This Committee is not here to say whether that Bill is right or wrong, and it will go through its due process in Parliament. So I would be interested in: do you think at the moment that the vilification process does work? So there are two pieces. There is the discrimination Act, and discrimination does cover sex—

The CHAIR: Yes, it does.

Ms SETTLE: Yes—and also in the vilification?

Dr LAWFORD-SMITH: No.

Ms SETTLE: No; vilification does not have sex?

Dr LAWFORD-SMITH: No.

Ms SETTLE: No. So I would be interested to know what you think in terms of: discrimination is one thing, and absolutely that should be prosecuted, but are we also looking in the vilification space? For me that gets complicated because if someone calls me a woman, that is not vilification, but if someone says ‘You’re just a woman’, that is vilification. So I find it a really difficult thing to tease out—how we manage those.

Dr LAWFORD-SMITH: Yes. I have been working a bit more recently on cyberharassment and online misogyny against women. I mean, I agree with a lot of what was said in the earlier discussion and their written statement. There are horrific levels of online misogyny against women and especially high-profile women.

Ms SETTLE: We know.

Dr LAWFORD-SMITH: Yes. It would be great to be able to do more about that, and my understanding is there is very little done about that and various countries are trying to work out how. I am really interested in the way that this is going to kind of interact and come together with all of this current stuff about gender identity/transgender identities and the shifting ideology around gender, because when you try to think about what vilification would consist of for sex or for sexual orientation or for race or for anything else, the content is pretty similar. So we think about things like slurs, dehumanising language, things that really put someone down or make them inferior, and that content is just not what is on the table when we are talking about gender identity. So it is really things about talking about the reality of biological sex or whether we can use sex-based pronouns or pronouns that will have to refer to someone’s sense of identity. And there are legal cases going through the UK system at the moment, and that have gone through, that are really around this kind of terminology. But that is just a world apart from whether you can refer to a visibly male person as ‘he’ or recognise their sex and talk about that being relevant for sports. That is just something so different from using slurs against people. I think we really do have to always keep in mind not just how great it would be to be able to protect women from sex-based vilification but what it looks like when people like the women who made their submission this morning are saying, ‘We should do that with the word “gender” and simultaneously with protecting trans and gender-queer people’. That just mixes two completely different things together, and I think that is when there would be unintended consequences.

Mr TAK: My apology for being late. I was on a telephone interview. Sorry to hear your story here in your submission. It is not a question, but the perpetrator or the person that made this calling of a name—do you know his or her gender?

Dr LAWFORD-SMITH: Yes. I guess that is one of the things I did not choose to focus on. But it is another aspect of this culture war—that there is an awful lot of targeting of people that have a particular kind of feminist politics, which I have, and so it means that there is a lot of what would probably count as vilification. We would say there is disproportionate targeting of women and lesbians in this space—standing up for sex-based rights—but of course the comeback to that is, like: ‘Oh, no, it’s not because you’re lesbians or women, it’s because you have got shitty views’, right? So this is, like: ‘We’re not targeting men, we’re targeting incels’. And we have to then have that discussion, and that is quite a hard discussion to have. But at least the gloss on what you see in the debate is largely women and lesbians being kind of subject to extreme abuse and harassment because they are not toeing the line on gender identity ideology. So those things I put in my submission were just a few examples of what has been happening in the last couple of years and how I get spoken to, which I think has got nothing on how politicians and journalists and so on get spoken to, but it is a slice of the experience.

Mr TAK: Yes, interesting.

The CHAIR: Thank you for your submission and sharing your stories with the Committee. The Committee has heard from various stakeholders in relation to the current barriers for people making complaints in general and in particular the vilification under the *Racial and Religious Tolerance Act*, navigating the system and getting an outcome in a speedy—and I suppose there are extended long delays, the onus being on the victim to actually go through this process of trying to prove that they require justice and trying to correct a wrong that has been done on the victim, rather than the other way around. And we have heard, in particular, from vulnerable communities of non-English-speaking background, diverse, whether it is religious or based on gender, sex or colour—the list continues—where we are not getting a satisfactory outcome with the current regulations that are in place. I would be eager to hear you, I suppose, elaborate a bit more about the current system and some of the voids, and how that can be addressed.

Dr LAWFORD-SMITH: I do not know how much I really have to say about that. I mean, given that sex is not protected under the vilification provisions that exist now it is not a possibility to have used that system. So for the things that have happened to me on campus in the last couple of years there is not really any legal recourse. I have tried to use internal university systems, and that has been slow and difficult. And given the extremely low rate of prosecutions, when I looked into the effectiveness of the current Bill, I doubt that I would have bothered to try to use those procedures. But I am not an expert in the law, so I cannot really speak to—

The CHAIR: I think that is really important. We are really seeking not expert-only opinions but real-life stories about some of the voids in the system, and you have just highlighted one, being whether there was a successful prosecution or an outcome. And that should be recorded in the system—that most times victims do not go through the process because they have not seen anything, visually, of a satisfactory outcome. Therefore they do not go through the process or report it and so on. So it is a chain reaction.

Dr LAWFORD-SMITH: Yes.

The CHAIR: So that is one particular point that consistently has been raised—navigating the system and getting a good outcome at the end of it.

Dr LAWFORD-SMITH: Can I mention something just on that point, which again relates to the sort of tension between the two groups in the culture wars at the moment. I have been paying a lot of attention to the UK situation, and again something that is kind of interesting there is that the, sort of, gender activists are very much, making use of the legal provisions. They are not the same provisions, so it is things like hate incidents or online complaints under the *Communications Act*, for example. But there has been, a real series of cases where women are being targeted through the courts for misgendering or having a particular view of what a woman is.

And this is again some of the, asymmetry that I have been worried about. If particular people are better informed or more aggressive in pursuing these claims, you are going to end up with this outcome that maybe is not what you wanted. If you wanted to have law that actually protected women from abuse online, and then they felt frustrated about the legal system—as we know they do for sexual assault cases, so they do not really

use it—but then you have empowered this other group of people to use the law against them, what a terrible outcome. So that is something I have been really worried about in the process of thinking about this submission, the way that it is actually happening in the UK, that it is being used disproportionately and aggressively against women. I think I interrupted.

The CHAIR: No, I was just making the point that the navigation of the system and where the victims actually are able to get a good, satisfactory outcome, and I suppose that there is prosecution at the end of—

Dr LAWFORD-SMITH: Yes.

The CHAIR: And not everybody has the knowledge or, I suppose, has that power to go through the systems.

Dr LAWFORD-SMITH: Agreed.

The CHAIR: We live in a very diverse Community—and vulnerable citizens do not have that ability to go through a very long process and a very complex process, as well. So what we are trying to do is to seek the opinions of everyday Victorians as to how we can better protect, and whether we do need to extend the current—and I think you have just noted that we do need to extend some of the protections to others so that the current regulations are effective and encompassing. So we have had a broad range of submissions. But just on one more point that I would like to ask you about: as someone who has experience of hate attacks, and that is what I would say they are, hate attacks—and you have just touched on the fact that you did not feel that were you going to get to a satisfactory outcome; how did you feel in those circumstances knowing that you were not able to reach out to the police or to your workplace? What was the next step that you took?

Dr LAWFORD-SMITH: Yes, I guess it seems clear to me that it is a kind of workplace harassment, so that should not be happening on campus. I should not arrive at my building of work to a placard talking about pissing on my grave. That is absolutely unacceptable. I think I could recognise and articulate that that is really bad and should not be happening. At the time I think I just sent a photograph to the vice-chancellor. And he had recently circulated an email decrying bullying in the other direction. I think there were some posters put up around campus about the sex self-ID legislation, and he considered them to be bullying of trans and non-binary people, so I wanted a statement in the other direction, like, 'Let's also not be bullying women', and that statement was not forthcoming. As I said, I just tried to use the internal university/workplace procedures to resolve that, because those were the procedures that were available to me. It is not like there is anything broader in the law that would have worked. God, I do not know, what is the best case? I suppose if these protections do go through, one might just hope that something like—you know, Sydney has Feminist Legal Clinic, and that is offering support and advice to women on these kinds of matters. Maybe it will be possible to do something like that here in Victoria so that more women do feel empowered about how to use the legal system and actually take those claims through.

The CHAIR: Well, our next presenter will be the CEO of Gender Equity Victoria, so we will no doubt ask some questions in relation to some of the things that you have raised. I have no further questions. Thank you very much for presenting today. The next steps will be that we will continue to hear submissions from various stakeholders, and hopefully we will be able to deliberate in the near future and be able to put forward a report with some strong recommendations to Government considering all of the evidence that has been submitted to the Committee. Thank you, and all the very best in your endeavours.

Witness withdrew.