

Religious Discrimination Bill 2021 and related bills

Submission by the Australian Council of Trade Unions to the
Senate Legal and Constitutional Affairs Legislation Committee

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Introduction

Since 1927, the ACTU has been the only national confederation representing Australian unions. The ACTU has played a leading role in advocating for improved wages and conditions for Australian workers and has participated in the development of almost every regulatory measure affecting the working rights of Australians during that time. The ACTU consists of 43 affiliated unions and trades and labour councils from across the country, representing approximately 2 million workers from all major industries, occupations and sectors.

Reflecting the diversity of the Australian workforce, the union movement includes people from all backgrounds and walks of life, including young people, members of the LGBTIQ+ community, First Nations workers, people with disability, and workers from religiously, culturally and linguistically diverse backgrounds. Over 50% of Australian union members are women. Australian unions have a long and proud history of fighting for workplaces free from racism, sexism and all forms of discrimination and prejudice, and standing up for justice, safety, respect and equality for all workers.

The Australian union movement has a significant interest in the effectiveness of Australia's anti-discrimination and human rights framework. Since the commencement of anti-discrimination laws, the majority of complaints have related to employment.¹ This is because work is absolutely central to human dignity and our ability to live a decent life. The significant power imbalance between employers and workers means that workers are particularly vulnerable to exploitation, discrimination and other human rights abuses.

On 2 December 2021 the Senate referred the following Bills to the Legal and Constitutional Affairs Legislation Committee for inquiry and report by 4 February 2022:

- *The Religious Discrimination Bill 2021 (RDB)*
- *The Religious Discrimination (Consequential Amendments) Bill 2021*
- *The Human Rights Legislation Amendment Bill 2021 (HRLAB)*

The ACTU has grave concerns that aspects of this proposed legislation will increase discrimination against workers, reduce job security, wind back hard-fought workplace rights and protections, and undermine psychological health and safety at work. This submission focuses

¹ [Australian Human Rights Commission 2018-19 Complaint statistics](#) show that in 2018-19, employment made up 36% of complaints under the Disability Discrimination Act; 73% of complaints under the Sex Discrimination Act; 35% of complaints under the Racial Discrimination Act and 61% of complaints under the Age Discrimination Act.

primarily on the RDB, but also makes some comments on the HRLAB. A number of our affiliates have also made submissions which detail the negative impact of aspects of the RDB on their members, including in the health, education and community sectors, which we endorse and draw to the Committee's attention.

Summary of position

This is now the third exposure draft of the RDB. Significant concerns about the first and second exposure drafts were raised by a wide range of stakeholders. While we welcome the removal of provisions that would have expressly prevented employers from taking action to create safe workplaces, and provisions allowing health practitioners to refuse to provide health services, the ACTU remains deeply concerned about a number of provisions of the RDB, as well as the government's approach to these important matters. We are concerned that despite the changes made, the RDB will still hamper the ability of employers to create safe and healthy workplaces, as well as enabling and encouraging further unreasonable discrimination against workers by religious employers.

These are complex and important matters. The intersection of religious freedom and anti-discrimination laws is a point of ongoing tension, and legislatures and courts must find a way to strike an appropriate balance between these rights when they come into conflict. We are concerned the government has failed to engage in timely or genuine consultation with key stakeholders in the development of these reforms. The consultation process and timeframe for submissions to this Inquiry is wholly inadequate, particularly in light of the complexity and significance of these changes, and the interruption of the holiday period.

Our analysis and consultation with affiliates suggests that a number of provisions of this Bill will have significant negative implications in the area of work. The RDB departs from the usual framework of anti-discrimination laws and introduces a series of untested concepts into discrimination law which are of uncertain effect. This will create a risk of increased confusion, conflict and harm in Australian workplaces. The RDB will increase, not decrease, the prospect of discrimination against workers on the grounds of their religious beliefs; it will increase job insecurity in religious organisations, and undermine workers' health and safety at work. We are extremely concerned that the RDB will impact negatively on employers' ability to meet existing duties to create safe, healthy, respectful and inclusive workplaces for all workers.

Existing religious exemptions in the *Sex Discrimination Act* and *Fair Work Act* which already allow religious employers to unfairly discriminate against workers on the grounds of sex, sexual orientation, gender identity, marital status or pregnancy are not addressed by this Bill. Our

affiliates in sectors already impacted by these exemptions, including education, are deeply concerned that this Bill will only enable and encourage further unfair discrimination against workers. The RDB will add a third level of religious exemptions for employers and workers to navigate, increasing unfairness, complexity and regulatory burden.

Human rights belong to all people equally, and governments cannot pick and choose which rights to respect. No right can 'trump' any another right. Unacceptably, the RDB explicitly and deliberately overrides hard fought and won human rights protections under State and Territory anti-discrimination laws. It is contrary to the basic principles of human rights law to privilege one category of rights over another: in this case, the right to make religious 'statements of belief' over the right to equality and non-discrimination, particularly for women, LGBTIQ+ people, people with disability, single mothers, and other groups susceptible to condemnation or discrimination on religious grounds. The RDB allows religious employers to discriminate against individual workers who have differing (or no) religious beliefs to their employer – even where religion is not relevant to the role – privileging the rights of religious employers over their workers.

Guiding Principles

The ACTU's submission is guided by the following principles:

- *Every worker has the right to a safe, healthy and respectful workplace, regardless of race, religion, sexual orientation, sex, gender identity, disability, age or other personal attribute.*
- *No worker should be unlawfully discriminated against by their employer because of their religion, unless religion is essential to the role, and the discrimination is reasonable and proportionate in the circumstances.*
- *The ACTU supports the extension of the federal anti-discrimination law framework to protect workers from unlawful discrimination because of their religious beliefs or activities.*
- *Religious organisations have the right to act in accordance with the doctrines, beliefs or teachings of their faith, subject to limitations necessary to protect public health, safety or the fundamental rights and freedoms of others.*
- *No changes to the federal anti-discrimination framework should leave any worker worse off, or override or remove existing protections from any form of unlawful discrimination.*

- *There should be no double standards when it comes to consequences for misconduct in a profession, trade or occupation – religious and non-religious workers should be treated equally.*
- *Human rights belong to people, not bodies corporate.*

Key Recommendations

The *Religious Discrimination Bill 2021* should not be passed by the Parliament in its current form. We strongly recommend that:

- *All sections and parts of the RDB that are inconsistent with existing anti-discrimination laws should be removed, including all provisions overriding state and territory anti-discrimination laws.*
- *The Sex Discrimination Act and the Fair Work Act should be amended to remove the capacity for religious schools and organisations to unfairly discriminate against staff, students and people who rely on services they provide to the public; with urgent consideration given to a new, nationally consistent mechanism which allows competing or conflicting human rights to be fairly, consistently and appropriately balanced.*
- *The ACTU does not support the proposed amendment to the Marriage Act to provide that a ‘religious educational institution’ can refuse to provide goods or services for ‘non-traditional’ marriages, or the proposed amendment to the Charities Act providing special treatment to charities who promote ‘traditional’ marriages.*
- *The ACTU supports amending the objects clauses in the federal anti-discrimination acts to recognise the universality and indivisibility of human rights.*

Support for new protection against religious discrimination

No worker should be discriminated against because of their religion, unless religion is absolutely essential to their role and the discrimination is reasonable and proportionate in the circumstances. All states except NSW and SA already protect against religious discrimination, but there is no protection at the federal level, and there should be. Every worker has the right to a safe, healthy and respectful workplace, regardless of religion, sexual orientation, sex, gender identity, disability or other personal attribute. Parts of the RDB would protect workers and others against unlawful discrimination on the grounds of ‘religious belief or activity’, in the same way as other discrimination laws prevent unlawful discrimination on the basis of sex, race, age, disability

or other attributes. The Australian union movement supports these parts of the Bill. They are not controversial. However, the RDB does not stop there. It goes much further and includes some very troubling provisions that will enable and encourage workers to be discriminated against on the grounds of their religion; as well as their sex, race, gender identity, disability and other personal attributes. These parts of the Bill will take away workers' rights and protections; and undermine job security and health and safety at work. They are strongly and unequivocally opposed by the ACTU and our affiliated unions and should be removed from the Bill.

Existing Religious Exemptions

There are already a range of existing exemptions which permit religious organisations to discriminate against workers and others. The permanent exemptions in the *Sex Discrimination Act 1984 (SDA)*² have been the subject of significant criticism over many years.³ These exemptions permit a religious organisation to discriminate against a staff member or a student on the grounds of that person's 'sex, sexual orientation, gender identity, marital or relationship status or pregnancy', as long as the discrimination is in 'good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed'. The SDA also contains a general exemption allowing religious bodies to engage in discriminatory acts or practices as long as they 'conform to the doctrines, tenets or beliefs of the relevant religion', or are 'necessary to avoid injury to the religious susceptibilities of adherents of that religion'.⁴ Since 2013, this general exemption does not apply to acts or practices connected with the provision of Commonwealth-funded aged care; however, it can apply to the employment of people to provide Commonwealth-funded aged care. The *Fair Work Act* also contains a similar religious exemption, although it is different to the SDA in its framing.⁵ It permits adverse action to be taken against a staff member of a religious institution as long as it is taken in good faith to 'avoid injury to the religious susceptibilities of adherents of that religion or creed.'⁶

² Sections 38(1), (2) and (3)

³ A number of inquiries have recommended their review and/or removal, for example: Australian Law Reform Commission, 'Equality Before the Law: Justice for Women', Report No. 69 (1994); Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the effectiveness of the Sex Discrimination Act, 2008*; Senate Standing Committee on Legal and Constitutional Affairs, Legislative exemptions that allow faith-based educational institutions to discriminate against students, teachers and staff, November 2018.

⁴ SDA, paragraph 37(d) exempts 'acts or practices of a body established for religious purposes, that conform to the doctrines, tenets or beliefs of the relevant religion or are necessary to avoid injury to the religious susceptibilities of adherents of that religion'

⁵ [Attorney-General's Department, Consolidation – Religious Exemptions – Comparative Analysis, undated](#), p 2

⁶ FW Act s 351(2)(c)

Concerns have been raised by numerous parties, including the union movement, that these religious exemptions limit the rights and freedoms of others in a way which is not reasonable, proportionate, justified or necessary. The majority of faith-based organisations do not want or need to single out particular staff members or students for discriminatory treatment in order to uphold their religious beliefs. As outlined in the submissions of our affiliates, these existing exemptions are already causing significant harm to workers.

In 2019, the Australian Law Reform Commission was asked to conduct an inquiry into religious exemptions in anti-discrimination legislation and consider whether to 'limit or remove altogether (if practicable) religious exemptions to prohibitions on discrimination, while also guaranteeing the right of religious institutions to conduct their affairs in a way consistent with their religious ethos'. The Australian Human Rights Commission's 'Free and Equal' inquiry has recommended reform to Australia's human rights framework more broadly, including a review of permanent exemptions to discrimination laws, including religious exemptions, to ensure they reflect contemporary community standards.⁷

It is unacceptable that the RDB locks in broad new exemptions for religious bodies, while existing exemptions for religious schools and bodies are under review. If the RDB passes, employers and workers will have to navigate *three* different levels of religious exemptions at the Commonwealth level in the *Sex Discrimination Act*, the *FW Act* and the *Religious Discrimination Bill 2021*. This will substantially increase unfairness at work, as well as increasing complexity and regulatory burden on employers.

The broad exemptions in the RDB have revealed the weaknesses in our current anti-discrimination law regime. The interaction between religious freedom and rights to non-discrimination is a point of ongoing tension, and existing exemptions (and new exemptions proposed in the RDB) fail to strike a fair or appropriate balance between the two sets of rights. The *Sex Discrimination Act* and the *Fair Work Act* should be amended to remove the capacity for religious schools and organisations to unreasonably discriminate against staff, students and people who rely on services they provide to the public; with urgent consideration given to a new, nationally consistent mechanism which allows competing or conflicting human rights to be fairly, consistently and appropriately balanced.

⁷ Australian Human Rights Commission, *Position Paper: Free and Equal: A reform agenda for federal discrimination laws* (2021)

Religious Discrimination Bill 2021

The RDB departs from the usual anti-discrimination law framework in a number of ways which are unfair, unnecessary and may have highly undesirable consequences in workplaces. Some key areas of concern to the union movement are set out below.

Discriminatory 'Statements of Belief' protected

Currently, Australian commonwealth anti-discrimination laws protect workers against unlawful discrimination on the grounds of sex, pregnancy, marital or relationship status, breastfeeding, gender identity, intersex status, sexual orientation, family responsibilities, race, colour, descent, national or ethnic origin, immigrant status, age, and/or disability.⁸ State and territory laws also provide additional protections on other grounds, such as irrelevant criminal record and religion.⁹

Part 2, s 12 of the RDB will override all existing Federal and State anti-discrimination laws¹⁰ to protect people who make discriminatory religious 'statements of belief', including at work, even if those statements are hostile, offensive, damaging, inappropriate and harmful. The express override of laws intended to protect vulnerable groups from discrimination at work and other areas of public life is completely unwarranted and unacceptable. Australians are already free to express their religious beliefs, unless this impinges on the rights of others to be free from discrimination. There is no need to protect discriminatory statements that will impact negatively on the rights and freedoms of others, and that will be potentially harmful. These provisions will impact negatively on both workers and employers. As highlighted by the Australian Industry Group in their submission on the second exposure draft, the 'statement of belief' provisions are likely to 'reduce tolerance for religious diversity in workplaces by protecting a broad range of statements of belief about religion and/or other religions, including statements that cause offence', which is likely to lead to 'increased workplace grievances that are unable to be resolved by employers, but which nonetheless impact an employer's business'. The Australian Industry Group also notes that these provisions will 'impose further complexity upon employers in navigating Australia's web of anti-discrimination laws, by elevating legal protections for some employees over others'.¹¹ These concerns are likely to be compounded by the changed definition

⁸ Racial Discrimination Act, Sex Discrimination Act, Disability Discrimination Act and Age Discrimination Act.

⁹ For example see the Equal Opportunity Act 2021 (Vic)

¹⁰ There is also a broad provision (s 12(1)(c)) allowing other laws to be overridden by regulation.

¹¹ https://www.ag.gov.au/sites/default/files/2020-05/australian-industry-group_0.PDF at p 3

of statement of belief in this version of the Bill, which now contains no objective test at all (discussed further below).

These provisions, if passed, will remove a worker's right to make a complaint to a discrimination tribunal where they would otherwise have had the right to do so. It is crucial to have external complaints processes available to workers, because internal workplace processes may fail to resolve an issue or dispute; or may not be used by an employer; or may be non-existent or not fit for purpose. For example, an internal complaints process may not be appropriate where discriminatory and harmful comments are made by a senior leader themselves. This is by no means a rare occurrence. For example, the Sex Discrimination Commissioner's recent review into Commonwealth Parliamentary Workplaces heard evidence from staff about the way in which 'leaders themselves were responsible for bullying, sexual harassment and sexual assault, and also their inadequate responses to the misconduct of others'.¹² In these types of circumstances, where an employer themselves makes harmful and discriminatory statements of belief, or simply fails to prevent others from making such statements, or where an internal process fails or is not fit for purpose, these new laws would block a worker's access to an external anti-discrimination body; and potentially to the Fair Work Commission as well, as detailed below.

Fair Work Act 2009

The elimination of discrimination at work is an important objective of the *Fair Work Act 2009 (FW Act)*:

- Section 3(e) provides that one of the objects of the FW Act is to provide 'a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians' by 'enabling fairness and representation at work and the *prevention of discrimination* by recognising the right to freedom of association and the right to be represented, *protecting against unfair treatment and discrimination*, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms'.
- Section 578 of the FW Act requires the Fair Work Commission when performing all its functions to take into account 'the need to respect and value the diversity of the work force by helping to *prevent and eliminate discrimination* on the basis of race, colour, sex,

¹² [Australian Human Rights Commission, Set the Standard: Report on the Independent Review into Commonwealth Parliamentary Workplaces, November 2021](#) at p 16

sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin'.

- Section 336(c) provides that one of the objects of the general protections provisions is to 'provide *protection from workplace discrimination*'.
- Section 351(1) prohibits an employer from taking adverse action against a person who is an employee, or prospective employee, of the employer because of the person's race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin (subject to exemptions, discussed further below).

Consistent with these objectives, many enterprise agreements negotiated by workers and employers contain clauses committing an employer to respect and value the diversity of its workforce; and to strive to prevent and eliminate discrimination.¹³ However, conduct that would previously have constituted discrimination will no longer be discrimination if this Bill passes in its current form. The way in which this will practically affect the operation of provisions of the FW Act and clauses of enterprise agreements aimed at preventing and eliminating discrimination at work is very uncertain. It is highly likely to increase confusion and conflict in Australian workplaces.

The scope of the exemptions in s 351 are different to those in the RDB (discussed further below), meaning employers will now have to navigate three different types of religious exemptions at the Commonwealth level. The RDB may also prevent a worker from bringing a cause of action under s 351(1) of the FW Act, because conduct that is 'not unlawful' under any anti-discrimination law in force in the place where the action is taken is not covered by the adverse action protections in that section. In circumstances where a discriminatory statement by an employer to an employee constituted 'adverse action' within the meaning of s 342 (for example where the statement 'discriminated between the employee and other employees of the employer'), and amounted to 'less favourable treatment' of that employee, a claim that might otherwise have been available under s 351 may be effectively blocked by this Bill, leaving the employee without effective legal recourse under either discrimination laws or the FW Act.

¹³ See for example Clause 1.9 of the *Avivo: Live Life Inc Community Based Agreement 2018*; Clause 58 of the *Australian National University Enterprise Agreement 2017 - 2021*; Clause 1.12 of the *Energy Queensland Union Collective Agreement 2020*.

New definition of 'Statement of Belief'

Significant changes to the definition of 'statement of belief' have been made since the second exposure draft of this Bill. Section 5 now defines a 'statement of belief' as:

- a. *a statement of a religious belief held by a person*
- b. *made in good faith*
- c. *by written or spoken words or other communication (other than physical contact)*
- d. *that the person 'genuinely considers to be in accordance with the doctrines, tenets, beliefs or teachings of that religion'¹⁴*

This is a much lower bar than the definition in the first and second exposure drafts, because it requires only the person who makes the statement *themselves* to 'genuinely consider it to be in accordance with the doctrines, tenets, beliefs or teachings of that religion'. There is no longer any objective element to the test at all.

In the recent case of *Larter v Hazzard*,¹⁵ a senior paramedic and deputy mayor refused vaccination because he believed that the AstraZeneca vaccine was product of research, testing and production processes developed from cell lines derived from the foetus of an aborted child, contrary to his religious beliefs. The judge found that while the plaintiff's religious beliefs were genuinely held, they departed from public statements made by the Catholic Church in response to the pandemic.

This case illustrates the types of statements that would likely meet the new definition of statement of belief in the RDB, given that the only requirement is that the person *themselves* genuinely considers their statements to be in accordance with their faith. This means there are essentially no objective boundaries around what statements could be made under the banner of religious freedom, regardless of whether or not they actually conform to the tenets of a religion.

In addition, the common law definition of 'religion' is very broad, requiring only belief in a supernatural being (not limited to God) and the acceptance of canons of conduct in order to give

¹⁴ There is a similar definition for statements about *not* having a religious belief.

¹⁵ (No 2) [2021] NSWSC 1451 (10 November 2021)

effect to that belief. This definition extends well beyond traditional faiths. For example, the High Court has determined that Scientology meets the definition of a 'religion'.¹⁶

Further, the Bill provides that 'statements of belief' can be written, spoken or made via 'other communication (other than physical contact)'. In practice this could include notices on a staff notice board; notes or letters left on people's desks; social media posts; all staff emails; slogans on t-shirts, banners, signs or posters, video messages or text messages. Only statements that are 'malicious' or 'threaten, intimidate, harass or vilify' someone, or promote a 'serious offence' (i.e. one punishable by at least two years' imprisonment) are not protected by the Bill. The types of statements that will and will not be protected is very uncertain, and there is significant scope for some very hostile and harmful statements to be made at work which may no longer constitute discrimination. It will not be sufficient to show that the comments were for example hostile, degrading, harmful, inappropriate, or offensive. An employer's ability to act effectively to prevent such statements would be uncertain, as outlined below. For example, it is not clear whether the below statements – despite clearly being potentially hostile, offensive and harmful - would be found by a court to be 'malicious' or to 'threaten, intimidate, harass or vilify' someone, or promote a 'serious offence':

1. *A religious group pamphleteering teachers and students outside a school to denounce the 'unholy' education of girls.*
2. *A post in a work-related Facebook group saying that divorcees, blended families, and rainbow families live in sin and will go to hell.*
3. *An employee putting a sign up in a staff room that white people are God's chosen people.*
4. *A manager attending a workplace wearing a t-shirt with a slogan reads "God made Adam and Eve, not Adam and Steve".*

Work Health and Safety risks

There is a real risk that the statement of belief provisions will conflict with existing WHS duties, causing uncertainty and confusion for employers and potentially undermining workers' health and safety. WHS laws require employers to manage risks to workers' physical and psychological

¹⁶ *Church of the New Faith v Commissioner of Pay-Roll Tax (Victoria)* (1983) 154 CLR 120, 131, 150, 173

health and safety.¹⁷ In order to meet these duties, employers must (in consultation with workers and unions) 'systematically and comprehensively' identify work-related hazards and risks, assess those risks, and implement effective control measures to eliminate them, including creating safe systems of work and ensuring appropriate behaviour at work. These duties apply equally to managing 'psychosocial' risks and hazards as they do to managing physical risks and hazards.¹⁸ A 'psychosocial' risk is a risk to health and safety arising from the psychological and social aspects of the design, planning, organisation and management of work, the work environment and equipment, and includes work relationships and interactions.

Safe Work Australia identifies a common psychosocial hazard and risk factor as 'poor workplace relationships' where there is *'workplace bullying, aggression, harassment including sexual harassment, discrimination, or other unreasonable behaviour by co-workers, supervisors or clients'*.¹⁹ Psychosocial hazards present a significant risk of harm in Australian workplaces.²⁰ In mid-2019, the ACTU conducted a major 'Safe at Work Survey' of Australian workers. Over 25,000 people participated: 58% of respondents were women and 41% were men, with 2.8% identifying as Aboriginal or Torres Strait Islander. Respondents were from a wide range of sectors, including health care, construction, education and training, manufacturing, finance, transport, retail and public services. A significant number (61%) had experienced poor mental health as a result of hazards in their workplace which their employer had failed to manage, and almost one in two (47%) said they had been abused, threatened, assaulted or exposed to traumatic events at work in the past 12 months. More than two thirds (67%) said they did not believe that their employer knew how to address mental health issues in the workplace, and about a quarter of those (24%) said their employer *never* takes mental health seriously, with almost half (47%) saying that their employer only takes mental health seriously sometimes. In the last 12 months, almost half (49%) had experienced poor workplace relationships (e.g. bullying, aggression, harassment, conflict, lack of fairness and equality between workers).

The RDB may impact on an employer's capacity to take action under a policy, code of conduct, contract or enterprise agreement to prevent discriminatory and harmful statements from being made at work. In order to meet obligations under discrimination and WHS laws to prevent sexual harassment and sex-based harassment at work for example, a workplace code, contract, policy

¹⁷ Model WHS Law, s 19

¹⁸ https://www.safeworkaustralia.gov.au/system/files/documents/1911/work-related_psychological_health_and_safety_a_systematic_approach_to_meeting_your_duties.pdf

¹⁹ Safe Work Australia, *Work-related psychological health and safety: A systematic approach to meeting your duties National guidance material, January 2019* at p 10

²⁰ World Health Organization, *Guidance on the EU Risk Framework for Psychosocial Risk Management*, 2008

or enterprise agreement might prohibit 'sexist or discriminatory statements' or commit an employer to work to 'prevent discrimination'. Such provisions often use discrimination laws as their foundation.²¹ However, if the RDB passes in its current form, certain statements (where they are religiously based) would no longer constitute any form of discrimination. It is therefore entirely unclear whether a 'sexist or discriminatory' statement would still amount to a breach of that provision of the code, contract, policy or enterprise agreement, casting doubt on an employer's capacity to act effectively to create safe and inclusive workplaces. As noted by the Australian Industry Group, the statement of belief provisions would give religious employees 'a very wide ability to argue that they should not have to comply with reasonable company policies'.²² Disputes about these matters will almost certainly be dragged into the federal court system – which is lengthy, costly and complex for everyone involved.

The RDB will create further confusion in an already complex area for employers, by casting doubt on an employers' capacity to prevent aggressive, harmful, discriminatory or unreasonable statements at work where they are religiously-based. Poor psychological health and safety at work can lead to both psychological and physical injuries, harming workers and placing a significant cost on employers and the wider community. The prevention of mental health conditions at work has been identified by Safe Work Australia as a national priority, based on 'the severity of consequences for workers, the number of workers estimated to be affected, and the existence of known prevention options'.²³

Unions are extremely concerned that the statement of belief provisions will interfere and conflict with existing WHS obligations on employers to eliminate or minimise the risk of psychological injuries being caused by work due to discrimination and other inappropriate and harmful behaviour.²⁴

Case study - Sexual Harassment at Work

While conduct that meets the definition of 'harassment' will not be protected by the Bill, the RDB will protect comments that would otherwise be considered discrimination on the grounds of sex. These types of comments can play a significant role in creating a hostile, humiliating or offensive

²¹ See for example the Victorian Department of Education and Training's [Equal Opportunity and Anti-discrimination Policy](#)

²² https://www.ag.gov.au/sites/default/files/2020-05/australian-industry-group_0.PDF at p 3

²³ <https://www.safeworkaustralia.gov.au/system/files/documents/1902/australian-work-health-safety-strategy-2012-2022v2.pdf> at p 17

²⁴ https://www.safeworkaustralia.gov.au/system/files/documents/1911/work-related_psychological_health_and_safety_a_systematic_approach_to_meeting_your_duties.pdf

work environment for women and are often a pre-condition for sexual harassment.

Respect@Work found that hostile work environments of this kind foster sexual harassment.²⁵

Most often, this kind of hostility is verbal in nature:

*In Australian workplaces, verbal forms of sexual harassment are among the most common types of sexually harassing behaviours experienced. Specifically, sexually suggestive comments or jokes were the behaviours that people said they experienced most commonly in most national surveys on workplace sexual harassment which the Commission has conducted.*²⁶

Respect@Work found that the second most common example of verbal sexual harassment is intrusive or offensive questions about women's private life or physical appearance. There is a wide range of offensive and harmful comments that may be made about women's private life or personal appearance that could be justified on religious grounds as outlined below.

Respect@Work finds that these kinds of comments can have a 'significant impact on victims and the broader workplace, reinforcing gender inequality and marking spaces as 'masculinised' in a socially acceptable way'.²⁷ Sexist and hostile comments are often a precursor to other forms of sexual harassment. Technology-facilitated sexism and abuse is also on the rise, with women 'more likely to experience abuse that is personal, sexual and gender-based' and to be subjected to significant repercussions compared to their male counterparts for 'perceived online transgressions, especially when they are perceived to have violated gender stereotypes'.²⁸ There is a range of humiliating and hostile comments that may meet the definition of a religious statement of belief, despite otherwise being sexist, hostile, offensive and harmful. For example, the Bill could allow:

- *A senior manager to verbalise his opposition to leadership roles for women in the organisation on religious grounds*
- *Criticism by a colleague of a women's clothing as being 'too provocative' or a woman's sexual choices or behaviour as being 'impure'*

²⁵ Respect@Work at pp 458-460

²⁶ Respect@Work p 124

²⁷ Respect@Work at p 124

²⁸ Respect@Work at p 130

- *Comments tolerating and defending sexual assault of women by men because women are to blame for ‘tempting’ men.*

Where the maker of such statements thought these comments were genuinely based on their religious beliefs, they would be protected by the Bill, denying a person subjected to such hostility at work from taking action under discrimination laws, and potentially also the FW Act. A worker subjected to such hostility would only be able to make a discrimination complaint if they were able to prove that the comments were ‘malicious’ or ‘threatened, intimidated, harassed or vilified’ them, or promoted a ‘serious offence’ (i.e. one punishable by at least two years’ imprisonment). It would not be sufficient to show for example that the comments were hostile, degrading, harmful, inappropriate, or offensive. An employer’s ability to act effectively to prevent such statements would be uncertain, as outlined above.

These types of comments would contribute to a very hostile, sexist and unsafe work environment. They would also create fertile ground for sexual harassment and potentially violence to occur, as well as reducing the likelihood of reporting of such incidents. The [ACTU’s 2018/19 Sexual Harassment Survey](#) found that only 27% of those who experienced sexual harassment ever made a formal complaint, and just over 40% told no one at all. The two most common reasons given for this were a fear of negative consequences (55%) and a lack of faith in the complaint process (50%). These low reporting rates are consistent with the findings of the [Australian Human Rights Commission](#)’s fourth national survey on sexual harassment. It is clear that workers are already highly unlikely to report sexual harassment – they will be even less likely to do so if laws are passed that sanction and encourage sexist and demeaning comments about women on religious grounds.²⁹ Where an employer did not or could not effectively act to address this behaviour, a worker would be left without recourse to a discrimination or adverse action complaint.

The statement of belief provisions will cause confusion and complexity for employers, create disharmony and conflict in workplaces, and damage the health and safety of workers. They are divisive and contrary to the public interest. These provisions should be deleted in their entirety.

Unfair and unnecessary religious exemptions

²⁹ The [ACTU’s 2018/19 Sexual Harassment Survey](#) found that only 27% of those who experienced sexual harassment ever made a formal complaint, and just over 40% told no one at all. The two most common reasons given for this were a fear of negative consequences (55%) and a lack of faith in the complaint process (50%). These low reporting rates are consistent with the findings of the [Australian Human Rights Commission](#)’s fourth national survey on sexual harassment.

As noted, there is already a range of exemptions in discrimination and workplace laws that allow religious employers to discriminate against workers and others on religious grounds. The new exemptions in Part 2 of the RDB are *in addition* to the ‘inherent requirements’ exemption in s 39(2) of the RDB, as well as existing exemptions in the *Sex Discrimination Act* and *Fair Work Act* that allow religious organisations (including schools) to discriminate or take adverse action against workers on the basis of any attribute otherwise protected by those Acts. As highlighted in the Australian Industry Group’s submission on the second exposure draft Bills, these broad exemptions are ‘starkly at odds with the requirement on secular businesses to not discriminate on the basis of religion.’³⁰

Religious employers employ hundreds of thousands of workers, provide essential services to the public and receive significant amounts of government funding. As outlined in the submissions of our affiliates, workers are already being subjected to a range of discriminatory actions under existing exemptions by (some) religious employers because they do not share certain religious beliefs. The submission of the Independent Education Union highlights examples of:

- *Workers in schools forced to sign detailed statements of religious doctrine that they do not agree with in order to keep their jobs, regardless of relevance to their work.*
- *Workers losing pay or promotions or being subjected to unfounded performance reviews if they do not agree to certain religious principles.*
- *Workers discouraged from trying to leave a marriage even though it was violent and abusive.*
- *Workers prevented from celebrating an IVF pregnancy or a same sex relationship.*

The submission of the Health Services Union highlights the following examples:

- *A Muslim cleaner working in aged care under an insecure subcontracting arrangement who lost shifts for a month and was told, ‘you won’t work as hard in that month that you’re hungry (Ramadan).’*
- *A male manager (who had opposed parental leave, reproductive leave, and domestic violence leave in enterprise agreement negotiations) telling a young administrative staff member at a private religious hospital to ‘hurry up and get pregnant, your ovaries are getting dusty’.*

³⁰ https://www.ag.gov.au/sites/default/files/2020-05/australian-industry-group_0.PDF at p 4

- *A disability support worker working for a family run not-for-profit hiding her same sex relationship as her managers were all evangelical Christians and she felt she would be treated less favourably if she disclosed it, even though being religious formed no part of the requirements of her job.*

The RDB will only further enable and encourage this kind of unfair discrimination against workers. The exemptions in ss 7, 8 and 9 of the RDB are confusingly drafted and broader than those that currently exist. It is deeply concerning to the ACTU that s 11 of the Bill goes even further and expressly overrides 'prescribed' State and Territory laws to allow a religious educational institution to give preference to workers based on their religious belief, as long as the conduct is in accordance with a written public policy. State laws that are not prescribed are intended to operate concurrently to the extent they are 'capable of doing so'. Most State and Territory laws contain religious exemptions, however there are significant differences in scope. For example, in Queensland the religious exception related to employment is limited to discrimination where a person 'openly acts' in a way that is contrary to the employer's religious beliefs and it is a genuine occupational requirement that the person acts in a way consistent with the employer's religious beliefs in the course of work. Tasmania only permits religious educational institutions to discriminate in employment on the grounds of religious belief, affiliation or activity (not on the grounds of sexual, gender identity etc), if religious observance or practice is a genuine occupational requirement of the position. Victoria limits discrimination by religious employers to circumstances where the employee's religion is an inherent or essential part of their job, and the discrimination is reasonable and proportionate in the circumstances. Section 11 of the RDB purports to allow these carefully considered State protections to be completely overridden. The way in which this 'override' will work in practice is extremely unclear. It will undoubtedly increase unfairness, conflict and confusion in Australian workplaces.

The RDB exemptions are different in scope to exemptions in the FW Act, which permits discrimination by religious bodies if the action is taken in good faith *to avoid injury to the religious susceptibilities of adherents of that religion or creed*. This is a narrower exemption than the RDB. Under the RDB, there would be no need for a religious employer to show that the conduct was necessary to avoid an injury to religious susceptibilities; only that the conduct accorded with the doctrines, tenets, beliefs or teachings of that religion. Further, a religious employer would not need to show that the conduct was *actually* in accordance with the doctrines, tenets, beliefs or teachings of the religion, only that another person of the same religion *could reasonably consider* it to be. This would permit a broader range of discrimination than current exemptions in the FW Act allow, with the only limitation under the RDB being to have a publicly available policy.

The definition of 'religious bodies' is extremely broad and covers a much larger range of employers than other Commonwealth discrimination laws, which limit exemptions to 'bodies established for religious purposes'. The definition in the RDB is broader and covers religious schools, registered charities, and *any other* faith-based body, even if it engages in some commercial activities - as long as it doesn't have commercial activities as its sole or primary purpose. As noted in the IEU's submission to the second draft of the Bill, there are a wide range of faith-based schools, including those in which no religious instruction is provided to students and in which a majority (or all) of the teaching staff are not adherents of a particular religion. The broad definition in the Bill fails to distinguish between different types of religious bodies.

Section 7 of the RDB allows a 'religious body' (defined broadly as a **religious school, charity or 'any other kind of body'** conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion; other than a body that engages 'solely or primarily' in commercial activities) to discriminate under the Bill (the conduct might still constitute discrimination under another law) against workers who have different (or no) religious beliefs by engaging in conduct that a person of the same religion as the religious body *could reasonably consider* to be in accordance with the doctrines, tenets, beliefs or teachings of that religion (s 7(2)); or to avoid injury to the religious susceptibilities of adherents of the same religion as the religious body (s 7(4)). Religious schools must have a publicly available policy if they wish to discriminate on religious grounds in employment under the RDB (s 7(6)).

Section 9 of the RDB provides that **religious hospitals, aged care facilities, accommodation providers and disability service providers** are allowed to discriminate on religious grounds in employment and partnerships under the Bill (the conduct might still constitute discrimination under another law) if they have a publicly available policy (s 9(5)(d) and 9(3)(d)) and engage in conduct that a person of the same religion as the religious body *could reasonably consider* to be in accordance with the doctrines, tenets, beliefs or teachings of that religion (s 9(3)(c)); or to avoid injury to the religious susceptibilities of adherents of the same religion as the religious body (s 9(5)(c)). Religious hospitals, aged care facilities, accommodation providers or disability service providers cannot discriminate if they are undertaking certain activities (s 8); subject to other provisions (see ss 40(2) and 15(5)). 'Conduct' under includes 'giving preference' to persons of the same religion as the religious body (ss 7(3), 7(5), 9(4) and 9(6)).

These provisions will mean that workers in religious organisations with differing religious beliefs to their employer will have little protection at work. The rights to discriminate provided by the Bill extend not just to giving priority to applicants of a certain faith in recruitment practices, but to any kind of discrimination in employment on religious grounds, including refusing an existing staff member a promotion or a pay-rise, or terminating their employment. The Bill will give

significant power to religious employers to dictate via a policy document what a particular religious ethos or teaching must mean to individual workers. This will go well beyond requiring all workers to be of a certain religion; it will extend to pledging specific support for traditional marriage or opposition to abortion for example. Some religious employers have extremely detailed policies on their religious ethos.³¹ Under the Bill, employees could be required to sign up to every aspect of such a policy in order to keep their jobs, even where this was not at all relevant to their role. For example, a part-time Muslim cleaner working in an aged care facility could be fired or have shift cuts or be refused a promotion if she was unwilling or unable to sign a statement committing her to detailed Catholic religious principles, even if this was not at all relevant to her work.

As highlighted above, this is already occurring under existing exemptions, with very harmful consequences for workers and workplaces. Many religious organisations would be unable to staff their operations if they required that all members of their staff be of a particular faith, and many religious facilities greatly value their diverse workforces. Some high-profile religious employers, such as Anglicare and Vinnies,³² have already clearly stated that they do not need or want further rights to discriminate against their staff in order to uphold their religious ethos, and have raised concerns that in fact these new laws will undermine their efforts to attract and retain the diverse workforces that are essential for their continued operation.

Case study – Aged Care

The recent Royal Commission report shows that the Aged Care sector is facing extraordinary workforce and industry challenges.³³ A key aspect of addressing this huge challenge is improving working conditions in the sector. The aged care workforce is very diverse – almost a third of workers were born overseas, and the vast majority are women. Workers in aged care come from a wide range of cultural, linguistic and religious backgrounds. Aged care is also characterised by high levels of insecure work, which impacts particularly on migrant workers and women workers with caring responsibilities. These workers already experience a significant lack of consistency in their hours of work and lack of access to paid leave and other entitlements. CEDA identifies that ‘low wages, a lack of career progression and poor training outcomes, combined with negative

³¹ See for example Catholic Health and Aged Care’s Code of Ethics: <https://www.cha.org.au/wp-content/uploads/2021/06/Code-of-ethicsfullcopy.pdf>

³² <https://unitingcare.org.au/download/submission-to-the-attorney-generals-department-on-the-religious-freedoms-bills-second-exposure-drafts/>;
https://www.vinnies.org.au/icms_docs/313863_11_12_19_Don_t_use_Vinnies_in_the_religious_freedom_debate.pdf

³³ <https://agedcare.royalcommission.gov.au/publications/final-report>

public perceptions of the industry' is constraining the supply of workers. There is an urgent need to grow the aged care workforce in order to improve the quality of care for older Australians. CEDA estimates an aged care workforce shortage of over 100,000 workers by 2030, unless workforce growth at least doubles.³⁴ Improving working conditions, including job security, is absolutely crucial to address these challenges. The RDB will further undermine job security and working conditions in the sector, by enabling aged care providers to insist that workers sign up to detailed religious codes of conduct, regardless of whether or not their religious beliefs are relevant to their jobs. Workers who cannot or do not wish to comply may face demotion, disciplinary action or termination of employment.

Case study – Social and Community Services

The Australian Services Union represents workers in religious organisations providing social and community services, disability services and private health services on the open market, under contract with the government, or through government funding schemes (such as the NDIS). These are significant employers receiving high-levels of government funding, and providing essential services to the public. As the ASU submission notes:

These religious organisations provide services in every part of Australia, from major cities to remote and rural areas. In many locations, religious organisations are the only provider of these services. Many ASU members who work at religious organisations share the organisation's social mission but do not share the organisation's faith. The majority of employees at religious health and social service organisations will have been hired for their professional skills and experience without concern for their faith.

ASU members have expressed deep concern that the RDB will give their employers the right to discriminate against them for their beliefs or identity, even where this has no significance or relevance to their job. There is a real risk that these laws could be used as a 'cloak' to discriminate against workers who raise complaints, seek assistance from their union or take other action in their workplaces to stand up for their own rights or the rights of others. The laws could also easily be used to disguise other forms of discrimination against workers, including on the grounds of sex, sexual orientation, gender identity, pregnancy or other status. For example, one worker recently told the ASU:

³⁴ CEDA, Duty of care: Meeting The Aged Care Workforce Challenge, 2021

I am worried about my gender identity and sexuality being used to justify discrimination against me. It will impact not only my ability to obtain work, but also retain it and proudly be who I am within it. I am a good worker, and I do not want my inherent identity being used to erase and disregard that. I do not want to constantly live in fear of losing my livelihood or not being accepted again.

Such laws are not necessary or justifiable in contemporary Australia. No worker should have to fear discrimination because of their religion or lack of religion, or any other personal attribute. These provisions privilege the rights of religious organisations over individual workers with different or no religious beliefs, even where their religious beliefs or activities have no relevance to their job. The provisions are complex and confusing, and the way in which these exemptions will practically operate in workplaces is very unclear. Workers should not be disadvantaged at work because they don't share identical religious beliefs to their employer, except where this is an essential part of the job and the discrimination is reasonable and proportionate in the circumstances. These provisions will increase unfairness at work and undermine job security and working conditions in already challenged sectors. They are unjustified, unnecessary and of uncertain effect, and should be deleted.

Restrictions on Qualifying Bodies

Part 3, s 15 provides that a 'qualifying body' is prevented from imposing a condition, requirement or practice that restricts a person from making a statement of belief outside of the course of practicing in the relevant profession, trade or occupation, unless the restriction is an essential requirement of the profession/trade/occupation. This will make it impossible for bodies regulating professions, trades or occupations to set consistent standards for those professions, trades or occupations. It will create a two-tier system, where workers who are religious are treated differently to workers who are not.

The ANMF submission highlights the example of the Nursing and Midwifery Board of Australia, which establishes and monitors evidence-based codes of conduct, standards of practice and guidelines for nurses and midwives.³⁵ Aspects of these standards, codes and guidelines apply whether or not the nurse or midwife is at work, and are critical for the protection of the public.³⁶

³⁵ <https://www.nursingmidwiferyboard.gov.au/codes-guidelines-statements/professional-standards.aspx>

³⁶ For example the National Board's guidance on '[Social media: How to meet your obligations under the National Law](#)' confirms that "(w)here relevant, National Boards may consider social media use in your private life (even where there is no identifiable link to you as a registered health practitioner) if it raises concerns about your fitness to hold registration."

These documents outline specific standards which all nurses and midwives are expected to adopt, regardless of their own personal beliefs and values.

Under the Bill, the Board may not be able to enforce these standards, codes or guidelines in relation to a nurse or midwife where comments made outside the course of practice are religiously based, whereas another worker who made the same comments without a religious basis may be subjected to disciplinary action under the Code. For example, public comments opposing COVID-19 vaccinations where a person genuinely believes this is based on a religious belief may not be able to be regulated, unless the qualifying body can prove it is 'essential' to the profession, trade or occupation; or where the workers' comments are 'malicious' or 'threatened, intimidated, harassed or vilified' someone, or promote a 'serious offence' (i.e. one punishable by at least two years' imprisonment). This will create unfairness, division and confusion among the profession in regard to standards of conduct and behaviour. This sector is already facing extraordinary and unprecedented industry, workforce, and health and safety challenges due to the impact of the pandemic. New laws which may undermine professional standards, complicate the work of the regulator, and cause confusion and division among staff are the last thing the sector needs. These provisions are unfair, unnecessary, divisive, and harmful and should be deleted.

Rights for corporations to sue for religious discrimination

The RDB (s 16(3)) would extend the right to sue for discrimination to a body corporate if they suffer a detriment because of an association with an individual who holds (or doesn't hold) a religious belief. This opens the possibility of a religious employer commencing legal action against an individual worker or a union because they have taken action in support of stronger working rights for women or LGBTIQ+ staff members for example; or a charity commencing legal action against consumers for a consumer boycott or other protest action, on the basis that the action was directly or indirectly discriminatory on the grounds of the organisation's religious beliefs or activities. Such outcomes run completely contrary to the spirit and intent of Australia's anti-discrimination regime, which is to protect vulnerable people and groups from discrimination on the grounds of certain personal attributes. These provisions should be deleted from the Bill.

Human Rights Legislation Amendment Bill

The ACTU does not support the proposed amendment to the Marriage Act to provide that a 'religious educational institution' can refuse to provide goods or services for "non-traditional" marriages. In the context of existing exemptions for religious schools to discriminate against staff and students on a range of grounds, as well as new exemptions under the RDB which will give

religious schools additional rights to discriminate against staff, students and others on the grounds of religion, the ACTU considers these further rights to discriminate to be disproportionate, unreasonable, unfair and unjustified.

The ACTU does not support the proposed amendment to the Charities Act that would provide special treatment for charities that promote 'traditional' marriage.

The ACTU supports amending the objects clauses in the federal anti-discrimination acts to recognise the universality and indivisibility of human rights. As outlined in this submission, it is contrary to these principles for States to elevate one human right over another, or to pick and chose which ones to protect and promote.

Conclusion

Every worker has the right to a safe, healthy and respectful workplace. The RDB will increase, not decrease, the prospect of discrimination against workers on the grounds of their religious beliefs and personal identity. It will increase job insecurity and undermine workers' rights and health and safety at work. We are extremely concerned that the RDB will impact negatively on employers' ability to meet existing duties to create safe, healthy, respectful and inclusive workplaces for all workers.

There is no need for these divisive, harmful, complex and confusing new laws. New federal protection for workers and other individuals against unlawful discrimination on the grounds of religion could be achieved by a simple amendment to an existing discrimination act. The RDB goes too far, allowing organisations and individuals to trample over the rights of others on religious grounds. Unacceptably, the RDB explicitly and deliberately overrides hard fought and carefully considered human rights protections under other State and Territory anti-discrimination laws.

The RDB should not be passed by the Parliament in its current form. We strongly recommend that all sections of the RDB that depart from the usual framework of anti-discrimination law be removed. The *Sex Discrimination Act* and the *Fair Work Act* should be amended to remove the capacity for religious schools and organisations to unfairly discriminate against staff, students and people who rely on services they provide to the public; with urgent consideration given to a new, nationally consistent mechanism which allows competing or conflicting human rights to be fairly, consistently and appropriately balanced.

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ACTU D No.

61/2021