

Senate Legal and Constitutional Affairs Committee

Inquiry into the Religious Discrimination Bill and related Bills

Answers to Questions on Notice

Chair

1. On that note, could I ask you to take that consideration—in relation to the employers' response—on notice, and there is an opportunity to further consider their position and provide us, as a committee, with any further feedback or response.

Response

During oral evidence on 21 January 2022, Mr Smith of the Australian Industry Group said that:

Our preferred position is that proposed section 12 of the bill would be removed completely, excising the statement-of-belief provisions. But, if that's not achievable, it's very important that an additional defence be included in proposed section 39 of the bill to enable employers to take reasonable management action to deal with unreasonable religious activity in the workplace.

When asked to explain his concerns with the Statement of Belief provisions, Mr Smith said:

There are a number of problems with those provisions. As you know, 'statement of belief' in the bill is a very broad concept. There are two aspects to the particular provision in clause 12. One issue of concern is that it expressly overrides a long list of other antidiscrimination legislation. In effect it is putting religious beliefs ahead of a lot of other rights that people have under other antidiscrimination legislation. The second issue is the exclusions in the provision which talk about behaviour that is malicious or threatens, intimidates or vilifies. All four of those concepts set a very high bar. There are all sorts of other behaviour that may be unreasonable, harassing in various ways, that would not meet the definitions of those four provisions. We think it will be much better if clause 12 is removed completely.

Mr Smith added that:

We've identified the key concerns, but there's another issue that we haven't talked about in any detail: the overriding of other antidiscrimination legislation. If section 12 were to be removed, then the provisions in section 12 that do that would also be removed. If it's just a matter of getting the additional defence for reasonable management action then we still do have a concern about the fact that this bill does expressly override other antidiscrimination legislation.

The ACTU shares the view expressed by the Australian Industry Group that the Statement of Belief provisions should be removed completely. However, we do not agree that an amendment to s 39 to provide an additional defence to employers is an adequate alternative option to complete removal of the provisions.

Firstly, the proposed amendment to s 39 does not deal in any way with the other problematic aspects of the Bill, including the proposed broad new exemptions for religious employers to discriminate against staff on religious grounds, and limitations stopping qualifying bodies from taking action to enforce consistent standards of professional conduct. These other aspects of the Bill

will create confusion, unfairness and disharmony in workplaces and must also be removed completely from the Bill.

Significantly, an amendment to s 39 would also not address the concern regarding the override of State and Territory laws by s 12, as the Australian Industry Group acknowledged in its evidence. A worker who was subjected to discriminatory, hostile and harmful comments at work would still be denied the right to make a discrimination complaint about that conduct. Should s 12 remain in the Bill, doubt will still be cast on the effectiveness of employer policies, enterprise agreement clauses and codes of conduct that use existing discrimination laws as their foundation. 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. 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 proposed amendment to s 39 will not address these serious matters.

Further, an amendment to s 39 would not assist at all where an employer did not take reasonable management action to prevent harmful conduct; either because the hostile and discriminatory comments were made by members of management themselves; or because policies and processes at the organisations were inadequate or non-existent. A worker in such a workplace would be left without any recourse to a discrimination complaint, if the hostile or discriminatory statements could be justified based on an individual's religious views.

Complete excision of the Statement of Belief provisions, along with all other provisions of the Bill that depart from the usual framework of anti-discrimination laws, is the only way to effectively address these concerns.

Senator O'Neill

- 1. Senator Rice just referred to a piece of evidence which described Max. That was in material that we received yesterday. I think it's very important that we get a good response to this from the AEU, because it is about the collision point between somebody's beliefs and whether those are being accommodated in a workplace or not. The outcome is clear in this one. I'd be genuinely interested, particularly, in the AEU's response to that case, because people of faith, teachers and students, exist in non-religious schools as well, and parents are expecting their children to get the full gamut of a pluralist society. I think it's important to refer to that.**

Response

We understand that the reference to "Max" relates to a case study presented in a submission from the Human Rights Law Alliance (HRLA) to the Committee, the complete facts of which the HRLA was not at liberty to place on the public record. In these circumstances, the AEU is unable to provide an informed comment. We submit that further questions in relation to this matter should be referred to the HLRA.

The 'Max' case study appears to have been tabled to highlight the lack of protection in NSW against discrimination on the grounds of religion. All states except NSW and SA protect against religious discrimination. New federal protections are needed to fill these gaps. 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 *Religious Discrimination Bill* 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 ACTU and its affiliates support these parts of the Bill.

2. **Could I go to section 12? The Australian Human Rights Commission has submitted that it's not aware of any cases where genuine statements of belief have actually been held to be contrary to Australian antidiscrimination law. I'm not talking about vilification; I'm specifically talking about antidiscrimination law. Are you aware of any such examples, particularly cases involving disputes between employers and employees? Perhaps you can take that one on notice.**

Response

The proposed statement of belief provisions are not yet law. Should they become law, the ACTU is concerned that they will allow significant scope for some very hostile and harmful statements to be made at work, which will 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 manage such behaviour would be uncertain.

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.

Employers and workers navigate the intersection of religious freedom and anti-discrimination laws in workplaces on a daily basis. There is no evidence of a problem in this country with a lack of religious freedom. Aside from the gap at the federal level protecting workers and others against religious discrimination, there is no need for additional laws allowing people to make discriminatory statements of religious belief.

3. **Senator O'NEILL: Ms Ismail, I point you to the evidence of Dr Renae Barker, who quoted St Thomas Aquinas—'To one who has faith, no explanation is necessary; to one without faith, no explanation is possible'— and the concerns that have been raised about the Victorian situation, in particular, where a very narrow definitional lens has been applied to what constitutes an inherent requirement. I know that this will vary from school to school. She writes:**

The maths teacher at a religious school is often used as an example of a secular role where the person fulfilling that role does not necessarily need to comply with the religious ethos of the school in order to fulfil the requirements of their job—

which has been commonly cited in the community—

However as with the administrative assistant or gardener discussed above the role of maths teacher may be seen by religious people very differently to those from a secular background. As with other teachers the maths teacher is likely to be approached by students for guidance on a range of issues, not just trigonometry or algebra. They may also be required to participate in religious activities of the school. A teacher whose belief and values conflict with the religious ethos of the school is unlikely to be able to do either of these things both in line with the school's religious ethos nor authentically.

I cite that because I think it starts to get to the complexity of the huge variation in the understanding of the support for the ethos of a religious based school, which we all

applaud and believe should be a right in a free and pluralist society, and the attempt to provide protections in a heavy-handed way that doesn't understand the differentiation for religious communities. We've heard, from Christian groups, a wide range of views about whether the maths teacher has to be practising or not—

CHAIR: Senator O'Neill, I'm going to have to ask you to put this question on notice because we are out of time. I'm sorry.

Senator O'NEILL: Well, I think it's an important question—

CHAIR: I'm not debating that.

Senator O'NEILL: If we could get a little response and then responses on notice from anybody who wishes to respond. I think we're at the nub of some of the debate here—

CHAIR: Could I ask you to put that on notice? Get to the nub of the question and then put it on notice, because we are going to have to finish up.

Response

The ACTU refers to the evidence of Ms Ismail during the Committee hearing where she said in response to this question:

We think these are things that need to be dealt with on a case-by-case basis by courts, if it comes to that. But we need to get the test right. We think that, where it's an inherent requirement of the job and it's reasonable and proportionate, an employer should be able to make a decision about someone's employment based on their religion, but only in those circumstances. When that comes into dispute—which it will, as you pointed out, in a range of circumstances—courts can decide in each case whether it's appropriate or not.

The intersection of religious freedom and anti-discrimination laws is a point of ongoing tension and complexity, and legislatures and courts must find a way to strike an appropriate balance between these rights when they come into conflict. Currently, we do not have the balance correct in our discrimination laws, and the *Religious Discrimination Bill* will only make matters worse. 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. Religious organisations should 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 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.

Senator Rice

1. I wanted to get a response to the evidence that the Buddhist and Hindus gave to us yesterday about discrimination in employment in service provision, essentially. The complexity of section 7, 8 and 9 does my head in in terms of what would and wouldn't be permitted in terms of discriminating against people on the basis of faith. They were very concerned that they would be discriminated against on the basis of being Buddhist and Hindu by service providers who are of different faiths. Could you give us a response to that?

Response

The evidence Senator Rice appears to be referring to is extracted below:

Venerable Akaliko: *I think the bigger concern for us in terms of this meeting is that this bill will actually create further discrimination against minority religions, by reducing access to employment, because of the provision that allows for religious organisations and domestic employers, people employing cleaners or gardeners. Buddhists and Hindus, people from minority religions, are employed in hospitals, in schools, and these people will have their opportunity for employment reduced. People from Buddhist and Hindu backgrounds are employed as personal carers, as cleaners, as gardeners. These people will have their opportunities for employment reduced. This will actually increase discrimination against minority religions. Minority religions don't have the resources and economic power of larger religions. We don't have the ability to create employment opportunities, schools and other education or aged-care opportunities for our community members.*

This legislation will create more discrimination and lock our members out of employment opportunities. It will stop our children going to certain schools. It will stop people being employed in aged care, in hospitals. Although there is a provision, thankfully, which was removed from previous iterations of the bill, where services could be denied to people of different faiths, unfortunately this means that those people will be allowed to access aged care, hospitals, education or whatever but they won't be able to be employed in those places. It's a strange and curious double standard that I have the right to access services but not employment in a publicly funded hospital or in a publicly funded aged-care provider. It's going to be a weird environment for those people from minority faiths or LGBTQI+ people being in organisations where they're not reflected by the staff base. What kind of culture will that create? What kind of culture, in an aged-care home, does a Hindu person or a Buddhist person have, where they are the only Hindu or the only Buddhist in the village, so to speak? They won't have any connection to their religion in the staff. Who knows what kind of intolerant culture that might create? This is a real concern. These organisations provide essential services. Religious employers are some of the largest employers in Australia. Buddhists, Hindus and other minority religions work in these places and this will lock us out of these opportunities and create further discrimination against our people.

The ACTU acknowledges the concerns expressed in this testimony that the proposed exemptions will increase discrimination against workers of minority faiths and lock people out of employment in organisations such as religious aged and disability care facilities, hospitals and schools. Sectors such as health, aged care and education are already dealing with significant workforce challenges. Not only are they dealing with the immediate crisis brought about by the latest wave of COVID-19 infections and the staff shortages that have followed, but they are sectors that are overwhelmingly facing labour shortages in the medium to long term. Aged care alone is facing a shortfall of over 100,000 workers in the coming decade. Provisions such as these, which send the message to people of minority faiths that they are not welcome, will only further compound this problem.

The new exemptions in Part 2 of the *Religious Discrimination Bill* 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 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, the

broad exemptions in the Religious Discrimination Bill are ‘starkly at odds with the requirement on secular businesses to not discriminate on the basis of religion.’¹

As pointed out by the witness quoted above, 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 the same religious beliefs as their employer. 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. The submission of the Health Services Union highlights example of 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).’

These incidents are already occurring, and the *Religious Discrimination Bill* will make matters much worse. The new 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 appear to 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. 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.

2. My other question is the same one I ended up putting on notice last week. Could you expand on your concerns about how these provisions might be used as a cloak for taking action against workers who are raising issues in the workplace—basically that, on the grounds of religion, they could have employment action taken against them?

Response

Despite protections in the *Fair Work Act* and Work Health and Safety laws, while many employers do the right thing, discrimination, bullying and victimisation of workers who take on roles at work such as union delegate or health and safety representative (HSR) still occurs in workplaces regularly. For example, a 2021 ACTU survey of workers found that 44% of HSRs have experienced some level of increased intimidation by management as a result of their role, with at least 10% experiencing regular intimidation or bullying. Workers in non-standard and precarious employment are particularly vulnerable: see for example evidence provided to the *Victorian Inquiry into the Labour Hire Industry and Insecure Work Final Report*, August 2016 at p 129.

The Bill, if passed in its current form, will provide ‘cover’ for employers who wish to discriminate against a staff member for taking on a role such as union delegate or HSR. As outlined in the answer above, in circumstances where that staff member does not share the same religious beliefs as their employer, the Bill (at sections 7 – 11) provides a very wide scope for adverse action to be taken against the staff member, ostensibly because of their religion. It would be very easy for an employer wanting to get rid of a worker taking action for better health and safety at work for example, to

¹ https://www.ag.gov.au/sites/default/files/2020-05/australian-industry-group_0.PDF at p 4

demote or fire that worker ostensibly because their religious beliefs differed from the employer's beliefs. The exemptions are too broad and the protections and safeguards in the Bill are not sufficient to ensure that these exemptions will not be used to victimise workers who stand up for better rights at work.