



Australian Education Union

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17 December 2021

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Sir/Madam,

Re: Australian Education Union Submission to the Senate Legal and Constitutional Affairs Committee inquiry to the Religious Discrimination Bill 2021 [Provisions]; Religious Discrimination (Consequential Amendments) Bill 2021 [Provisions] and Human Rights Legislation Amendment Bill 2021 [Provisions].

Please find attached the Australian Education Union's Submission to the Senate Legal and Constitutional Affairs Committee inquiry to the Religious Discrimination Bill 2021 [Provisions]; Religious Discrimination (Consequential Amendments) Bill 2021 [Provisions] and Human Rights Legislation Amendment Bill 2021 [Provisions].

Please contact me if you have any questions in relation to this submission.

Yours sincerely,

Susan Hopgood
Federal Secretary



Submission

to the

**Senate Legal and Constitutional Affairs Committee inquiry to the
Religious Discrimination Bill 2021 [Provisions];
Religious Discrimination (Consequential Amendments) Bill 2021
[Provisions] and
Human Rights Legislation Amendment Bill 2021 [Provisions]**

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Contents

Introduction	3
Statements of belief	4
<i>An attack on all Australians’ protection against discrimination</i>	<i>4</i>
<i>Impact of legalising discrimination against teachers, students and families in public education</i>	<i>5</i>
<i>Additional harms to vulnerable and religious Australians</i>	<i>5</i>
<i>Further implications for public sector education settings’ workplace relations</i>	<i>6</i>
<i>Implications for the regulation of the teaching profession.....</i>	<i>7</i>
Increasing the power of religious educational institutions to discriminate against staff and students	8
Conclusion	9

Introduction

The Australian Education Union (“**AEU**”) makes this submission on behalf of its 195,000 members employed in government schools, public early childhood centres, public vocational, technical and further education and training providers, and in disability services.

This submission demonstrates that the *Religious Discrimination Bill 2021* (“**RDB**”) threatens the safety and wellbeing of AEU members, of students in public education settings, and of our colleague teachers and students in private education settings. Specifically, the AEU is concerned by:

- The provisions relating to “statements of belief”, which would legalise discriminatory statements and conduct in public education settings, would have a confusing effect on parallel anti-discrimination workplace policies thereby increasing industrial disputes, would undermine teaching regulators’ role in maintaining professional codes and standards, and would have amplified negative effects on vulnerable and religious Australians;
- The provisions relating to the overturning of recent State-based anti-discrimination reforms which prevent religious organisations from discriminating against staff and students. The Bill would allow, for example, a religious school to expel and sack LGBTIQ students and teachers on religious grounds. These State-based anti-discrimination protect *religious* staff of minority religions in religious organisations – by overturning these protections, the RDB would have the cruel irony of reducing rights of religious employees; and,
- The effect of the RDB’s legalising and legitimising of discriminatory statements and conduct against the LGBTIQ+ and other communities. The AEU and its members are deeply aware of the significant harm caused by religiously motivated conduct during the 2017 Australian Marriage Law Postal Survey to LGBTIQ+ students and families. Similar conduct enabled by the RDB would have similarly ongoing negative effects on LGBTIQ+ students and families.

The AEU believes all Australians should be protected from discrimination on the grounds of their religious beliefs. However, the RDB will increase, not decrease, the prospect of discrimination against religious Australians, and constitutes a significant attack on the existing protections against discrimination afforded to all Australians.

The AEU condemns the Morrison Government for introducing a Bill attacking the rights of all students and teachers to participate, without prejudice or discrimination, in their education and employment. The RDB must not be passed in its current form.

The AEU has had the benefit of reviewing the Australian Council of Trade Unions’ draft submission to this inquiry; the AEU supports this submission.

Statements of belief

An attack on all Australians' protection against discrimination

Section 12 of the RDB would legalise discriminatory “statements of belief”. It would override the protection against discrimination provided by 13 Commonwealth, State, and Territory anti-discrimination laws. It would legalise discrimination against all Australians, including public sector teachers, students, and families based on their:¹

1. Religious belief or activity
2. Age
3. Disability
4. Race
5. Sex
6. Sexual orientation
7. Pregnancy or potential pregnancy
8. Marital or relationship status
9. Gender identity
10. Intersex status
11. Breastfeeding
12. Family responsibilities
13. HIV/AIDS status
14. Employment activity
15. Sex characteristics
16. Industrial activity
17. Parental status or status as a carer
18. Physical features
19. Political belief or activity
20. An expunged homosexual conviction
21. Irrelevant medical record
22. Irrelevant criminal record
23. A spent conviction
24. Personal association as a relative or otherwise with a person with a protected attribute

The RDB defines “statement of belief” at sections 5 and 12. Section 5 broadly construes “statement” to include any form of words, conduct or communication – the one exception being where the person making the statement makes “physical contact”. The AEU is deeply concerned that, with the exception of literal, physical contact being made against a teacher, student, or family member, any other form of communication to express discriminatory messages would be legal – including pamphleteering, traditional and social media communications, text messages and emails, voice messages and voicemails, notices and posters, physical gestures, pickets and protests.

Section 5 provides that a “statement of belief” does not need to align with any commonly understood tenets of a religion – only that it is made in “good faith”, and that the person *making the statement* must “genuinely consider” that their view is in accordance with their religion. Naturally, the “genuineness” and “good faith” of the holding and expression of a person’s idiosyncratic religious views, as assessed by that same person, is subjective and unfalsifiable. As such, these ‘limitations’ on discriminatory statements in fact provide very little protection to the teachers, students, and families harmed by such statements.

Section 12 is vague as to when a discriminatory statement is not legalised by the RDB and would therefore contravene the otherwise-excluded 13 Commonwealth, State, and Territory anti-discrimination laws. Section 12 provides that the “statement” must not be “malicious” or “threaten, intimidate, harass or vilify a person or group”. However, rather than accept the conventional role of the judiciary in defining and interpreting the phrase “threaten, intimidate, harass or vilify” the RDB weakens this protection in Note 1 to s 12, which provides that “a

¹ This list is only a short sample of the attributes currently protected in the 13 Commonwealth, State and Territory laws which would be overridden by the RDB.

moderately expressed religious view that does not incite hatred or violence would not constitute vilification”.² This presents three issues. First, it introduces a novel and highly subjective concept into Australian law – it is unclear and untested as to what constitutes such a “moderately expressed religious view”. Second, as with the inefficacy of the s 5 test for assessing the “good faith” and “genuineness” of a person’s idiosyncratic religious views, the question of what is “moderate expression” in the context of religious views is untested and highly subjective. Third, Note 1 to s 12 of the RDB, by diverging from conventional legal tests and increasing the threshold for what actions are permissible, encourages litigant-activists to test the new, reduced limits on offensive and discriminatory behaviour. Such encouragement of new forms of potentially legal discrimination poses real harm to the mental health of teachers, students, and their families.

Impact of legalising discrimination against teachers, students and families in public education

The RDB would legalise behaviour that is currently illegal against teachers, students and families in the public education system. Currently, using the conventional test in anti-discrimination legislation, it is illegal for person to treat a teacher, student or family with a protected attribute less favourably than a person without the attribute. In contrast, the RDB would reduce this protection in the context of discriminatory statements, introducing a far higher-threshold, multi-element legal test: the court must consider whether the statement is made in “good faith”; whether the belief is “genuinely held”; whether it is “moderately expressed”; and/or, whether it is less than a “threat, intimidation, harassment or vilification”.

The creation of such legal complexity burdens a complainant trying to prove the discriminatory statement is unlawful. The AEU considers that teachers, students, and their families deserve the strongest, clearest protections from discriminatory behaviour. The RDB would reduce and confuse such protections.

Additional harms to vulnerable and religious Australians

We note that many of the persons and groups who would lose protection against discrimination are already vulnerable, and that further exposure to discrimination will have an amplified effect – for example, LGBTIQ+ people have highest rates of both suicidal thoughts and suicide attempts in Australia.³ The AEU and its members are deeply aware of the significant harm caused to our LGBTIQ+ colleagues, students and families during the 2017 Australian Marriage Law Postal Survey. Religiously-motivated ‘no’ campaigns as part of the Survey exposed LGBTIQ+ students and families to significant stigma, trauma, and harm – leading to the increased use of suicide-prevention and mental health services during the Survey period.⁴ However, whereas the Survey was time-bound; the RDB will provide ongoing legitimacy to and legalisation of discriminatory statements, amplifying and making permanent the potential for harm against the LGBTIQ+ community.

² RDB, s 12, Note 1.

³ Beyond Blue webpage accessible [here](#), citing the following references: Schutzmann, K. et al (2009) Psychological distress, self-harming behaviour, and suicidal tendencies in adults with disorders of sex development, p 1; Rosenstreich, G. (2013) LGBTI People Mental Health and Suicide. Revised 2nd Edition. National LGBTI Health Alliance, p 3; Suicide Prevention Australia Position Statement, Suicide and self-harm among Gay, Lesbian, Bisexual and Transgender communities 2009, p 6.

⁴ ABC News, ‘Same-sex marriage survey sparks spike in access of LGBTI mental health support’ 18 September 2017.

Finally, a cruel irony of the RDB is that it will increase the potential for discrimination against religious Australians. The RDB’s normalising of discriminatory statements has the further effect of encouraging more extreme acts of prejudice, including anti-religious prejudice, violence and hate crimes: a 2020 Report of the Australian Human Rights Commission and the Victorian Equal Opportunity and Human Rights Commission correlates increasing Islamophobia with increased violence against Muslim Australians, and antisemitism with violence against Jewish Australians.⁵ The Report states: “While negative attitudes are not in themselves examples of serious harms, the prevalence of negative attitudes towards particular groups can make serious harms on the basis of religion more likely to occur.”⁶ The RDB’s effect of legalising discriminatory statements against religious Australians will increase the risks to these communities of even more harmful actions.

Further implications for public sector education settings’ workplace relations

The RDB would legalise discriminatory “statements of belief” that would otherwise be unlawful in public sector education settings. Although the RDB does not explicitly prohibit employers from taking action against employees for making discriminatory statements, the broader overriding of anti-discrimination laws will have flow-on effects in workplaces, potentially invalidating, and at least complicating, enterprise agreements and employer policies regarding anti-discrimination.

For example, the New South Wales Department of Education’s Anti-Racism Policy provides that the *Anti-Discrimination Act 1977* (NSW) and the *Racial Discrimination Act 1975* (Cth) “provide the legislative context and foundation for the Anti-Racism Policy of the department”.⁷ Similarly, in Victoria, the Department of Education and Training’s Equal Opportunity and Anti-discrimination Policy refers to the *Equal Opportunity Act 2010* (Vic), *Racial Discrimination Act 1975* (Cth), *Sex Discrimination Act 1984* (Cth), *Disability Discrimination Act 1992* (Cth) and the *Age Discrimination Act 2004* (Cth) as the “legal framework” for the Policy, and that such laws “apply to the Department as an employer and to Department employees”.⁸

Every one of the anti-discrimination legislation referred to as foundational in the Victorian and NSW policies would be overridden by the RDB’s “statement of belief” provisions. Accordingly, the RDB would create internal contradictions within such workplace policies that purport to prevent discrimination but which also incorporate the obligations and entitlements of anti-discrimination legislation – how do the policies account for the overriding effects of the RDB on anti-discrimination laws? This will increase workplace disputation and confusion as to conditions and complaints mechanisms, and will increase industrial conflict.

A particular concern to the AEU is the RDB’s effect on the chaplaincy programs in public schools. Chaplains are typically engaged as independent contractors or through third party providers, and accordingly are often not covered by any employer policies and enterprise agreements that only attend to the employer-employee relationships. Instead, the principal documents regulating chaplaincy programs are often State and Territory education Departments’ commercial-in-confidence contracts of engagement with chaplaincy organisations. Such documents are not publicly available and not reviewable by the AEU; we are concerned that, if they do not provide for specific anti-discrimination protections, instead

⁵ AHRC and VEOHRC, ‘Freedom of Religion in Australia: a focus on serious harms, p 8-10.

⁶ Ibid, p 14.

⁷ NSW Department of Education Anti-Racism Policy, cl 3.1.

⁸ Victoria Department of Education and Training, Equal Opportunity and Anti-discrimination Policy, cl 3.

exclusively referring to chaplains' obligations under State and Territory anti-discrimination laws, such documents would provide no protection against discriminatory statements by chaplains subsequent to the RDB overriding such legislative protections. This concern extends to other outside bodies visiting school sites, who may not be covered by employer policies and industrial instruments, and who would be empowered to make discriminatory statements to teachers, students and families.

Implications for the regulation of the teaching profession

The RDB may prevent the maintenance of a safe and respectful teaching profession by undermining State and Territory legislation providing for the regulation of the teaching profession. Currently, a teacher's discriminatory statements outside of the course of their employment or profession is a relevant factor to be considered when a decision is made about their permission to teach. The RDB may disallow laws which allow for such consideration discriminatory statements outside the course of the teacher's employment or profession. This undermines the role of teaching regulators in maintaining professional codes and standards, and puts colleagues and students at risk of harm.

The Australian teaching profession is regulated by State and Territory teaching registration legislation, administered by State and Territory teaching regulators. These laws and regulators control a person's entry into the teaching profession, and their ongoing permission to practice as a teacher. Varying by State and Territory, legislation imposes that a person's eligibility to be a teacher includes requirements that person is "suitable"⁹ to be a teacher, or that they are a "fit and proper person".¹⁰

Section 15 of the RDB would prohibit "qualifying bodies" – including teaching regulators – from "imposing" a "conduct rule" that "has, or is likely to have, the effect of restricting or preventing the person from making a statement of belief other than in the course of the person practising in the relevant profession".

First, it is unclear whether s 15 of the RDB overrides State and Territory requirements relating to "suitability" to be a teacher, or whether the person is a "fit and proper person", as these are statutory requirements imposed by State and Territory Parliaments, which may be distinct from being "conduct rules" "imposed" by a qualifying body.

However, if teacher registration requirements do constitute "conduct rules" "imposed" by a qualifying body, the RDB may prohibit such requirements in teacher registration as the "suitability" and "fit and proper" tests. "Suitability" and "fit and proper" tests are character requirements that take into account factors outside of the course of a teacher's employment. For example, in WA, a determination regarding a person being "fit and proper" includes consideration of, among other matters, "any behaviour that generally does not satisfy a standard of behaviour expected of a teacher or shows that the person is not of good character".¹¹ Currently, a teacher who makes illegal discriminatory statements would have that conduct closely considered in determining their "suitability" or fitness and propriety to be a teacher.

However, requirements such as being "suitable", "fit and proper", and "of good character" may be incompatible with s 15 of the RDB in that the requirements "restrict" or are likely to restrict,

⁹ For example, *Education (Queensland College of Teachers) Act 2005* (Qld) s 10(1)(c).

¹⁰ For example, *Teacher Registration Act 2012* (WA), s 15(c), and *Teacher Registration and Standards Act 2004* (SA) s 21(1)(e).

¹¹ *Teacher Registration Act 2012* (WA) s 24(d).

a person from making discriminatory statements that, but for the RDB, would be illegal. Naturally, any person who makes discriminatory statements calls their suitability to be a teacher in to question, but the RDB would appear to prevent State and Territory Parliaments and teacher regulators from imposing such character requirements on teachers.

It is disgraceful that the RDB may prohibit States and Territories from imposing requirements that a teacher's discriminatory statements – which would be illegal but for the RDB – be considered in assessing whether that person should be a teacher. The AEU considers such an outcome to be extremely harmful to the maintenance of appropriate teaching professional standards, and, by extension, a threat to the safety, health and wellbeing of teachers, students and families.

Increasing the power of religious educational institutions to discriminate against staff and students

Section 7 of the RDB entitles religious educational institutions to discriminate against teachers, students and families. The AEU wishes to draw attention to problematic elements of the provisions, and to note that the RDB would shamefully overturn recent State legislation protecting teachers, students and families from such discrimination.

The s 7 provisions provide religious schools with a broader entitlement to discriminate than the entitlements currently existing in the *Fair Work Act 2009* (Cth) (“**FW Act**”).¹² These provisions of FW Act already permit discrimination against employees where the discrimination is performed by “an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed”, “in good faith” and “to avoid injury to the religious susceptibilities of adherents of that religion or creed.” The RDB expands this entitlement by including the s 7(2) entitlement to discriminate against a person without reference to the limitation of a need “to avoid injury to the religious susceptibilities of adherents of that religion or creed” – replacing this test with the lower threshold that *one other person* “of the same religion as the religious could reasonably consider [the conduct] to be in accordance with the doctrines, tenets, beliefs or teachings of that religion”. This entitlement is further expanded in favour of religious schools by modifying s 7(2), per s 7(3), to explicitly permit a religious school to give “preference to persons of the same religion as the religious body”.

Section 7(6) requires that the school's discriminatory conduct must be taken “in accordance” with a “publicly available policy”. This supposed limitation on a school's power to discriminate is utterly insubstantial and ineffective – there are no prescriptions as to what and how much detail such a policy must contain. The RDB contains no provisions as to when a policy must be made or varied to be effective – it could, for example, be made and varied simply to accommodate the school's discriminatory whims as and when the school sees fit. The s 7(6)(b) and s (7) referral of such details to the Minister for determination is a significant abrogation of Parliament's responsibility to legislate, and offers no comfort or protection to the teachers, students and families threatened by these provisions.

The AEU supports legislation and reforms to protect employees and students from discrimination by religious schools, including the recently-passed *Equal Opportunity (Religious Exceptions) Amendment Bill 2021* (Vic), which limits the exceptions to anti-discrimination laws that apply to religious schools. The RDB, in purporting to override and

¹² FW Act, ss 153, 195, 351, and 772.

remove the protection of such legislation, would re-permit the discriminatory dismissals of teachers and expulsion of students. The extreme harms caused to a teacher sacked or student expelled on discriminatory grounds cannot be overstated.

Conclusion

The AEU believes religious Australians should be protected against discrimination. However, the RDB significantly departs existing forms and regimes protecting Australians against discrimination – including existing protections for religious Australians. More radical still, and profoundly contradictorily, a key effect of the RDB is to override Commonwealth, State and Territory anti-discrimination regimes *so as to legalise discrimination, including against religious Australians*.

In legalising new forms of discriminatory statements, communications and campaigns, the RDB provides for only the barest limitations on the contents and form of such prejudiced, harmful, discriminatory statements. The legalisation of discriminatory statements will negatively affect workplace relations in public education, limit the proper regulation of the teaching profession, and will cause disproportionate harm to vulnerable and religious Australians.

The RDB would expand religious educational institutions’ power to discriminate against religious and other Australians, and would override State legislation that protects against such legislation. It is disgraceful that, in 2021, the Morrison Government needs to be told this simple truth: *no worker and no child should ever lose their livelihood and education because of who they are*.

The AEU fundamentally believes every education setting should be a safe and welcoming space for staff, students and families, irrespective of who they are, or what they believe. The RDB profoundly threatens these values. The RDB must not be passed in its current form.