Free and Equal: An Australian Conversation on Human Rights

Submission by the Australian Council of Trade Unions to the Australian Human Rights Commission

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Contents

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 working conditions for Australian workers and has participated in the development of almost every regulatory measure affecting rights at work in Australia. 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 workforce, the Australian trade union movement includes young people, members of the LGBTIQ community, First Nations workers, people with disability, and workers from 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, freedom and equality for all workers.

The ACTU strongly supports reform to strengthen Australia's human rights framework and welcomes the Australian Human Rights Commission's consultation on this important topic. In addition to the matters outlined below, we also refer you to the ACTU's submissions to the Sex Discrimination Commissioner's National Inquiry into Sexual Harassment in Australian Workplaces and the Attorney-General's consultation on the exposure draft Religious Freedom Bills.[1] Some ACTU affiliates have made separate submissions to this consultation addressing human rights issues specific to particular industries, which are endorsed.

Executive Summary

Concerns about the protection of rights and freedoms in Australia arise because we do not have strong, comprehensive, nationally consistent anti-discrimination laws and, while reforms made under Australia's Human Rights Framework in 2010 were steps in the right direction, we have not taken sufficient measures to ensure that a human rights-based approach is adopted in all policy-development, law-making and administrative and judicial decision-making processes, or to increase awareness and understanding of human rights in schools and the wider community. Australian Governments have to date failed to recognise First Nations people in the Constitution, continue to take insufficient steps to realise social, economic and cultural human rights, and have failed to enact adequate legal mechanisms to ensure that businesses are required to conduct due diligence to address the human rights impacts of their operations. Australia remains

[1] ACTU Submission to National Inquiry into Sexual Harassment in Australian Workplaces, 28 February 2019; ACTU Submission on the Religious Freedom Bills, 2 October 2019

the only western democracy without a national Human Rights Act.[2] Improvements in all of these areas are required.

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.[3] This is unsurprising, because work is absolutely central to human dignity and our ability to live a decent life. At the same time, the significant power imbalance between employers and workers means that workers are particularly vulnerable to exploitation, discrimination and other human rights abuses. Strong laws, effective enforcement regimes, free trade unions, adequate social protection and accessible and properly funded public services are absolutely essential in order to address this power imbalance and protect workers. The conditions experienced by a nation's workforce are a clear indicator of the effectiveness (or otherwise) of a country's human rights framework. Unfortunately, on this measure, Australia faces a number of serious challenges, which are discussed further below. Ensuring that the working lives of Australians are safe, respectful and decent should be a central and fundamental goal of any effective human rights and anti-discrimination law framework.

The ACTU broadly supports the priorities for reform outlined in the two discussion papers, and draws the Commission's attention to the matters outlined below in particular.

List of Recommendations

The protection of rights to work and rights at work relies on a wide range of laws, including the *Fair Work Act 2009*, workplace health and safety laws, workers compensation laws, paid parental leave laws, superannuation legislation, privacy laws and social security laws. The ACTU is campaigning for improvements in a range of these areas in order to improve human rights at work. Some of these reforms are referenced in this submission, while others are discussed in other submissions.[4] It is crucial that human rights and anti-discrimination laws operate effectively together with these other regimes in order to protect workers' rights comprehensively and consistently. One of the problems with the current regime is that anti-discrimination laws are

[2] The ACT, Victoria and most recently Queensland have passed human rights acts.
[3] 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.
[4] See for example ACTU Submission to the 2018 Review of Model WHS Laws, 2 May 2018; ACTU Submission to Productivity Commission Inquiry into Mental Health, April 2019; ACTU Submission to the Inquiry into the Adequacy of Newstart, September 2019; ACTU Submission to inquiry into public service outsourcing, 26 August 2019; ACTU Submission to the Victorian Inquiry into the on-demand workforce, February 2019

separate to, and comparatively weak compared with, other regimes protecting rights at work, with the result that discrimination and harassment are not treated by employers or regulators as 'mainstream' workplace issues.

The ACTU supports the review and strengthening of Australia's Human Rights Framework, including the following:

1. Consideration of options for a national Human Rights Act, including a review of the effectiveness of the current scrutiny process

2. Support for the Uluru Statement from the Heart, including a First Nations voice in the Constitution, and the abolition of the discriminatory CDP

3. Measures to ensure a human rights approach in Australia's law-making, policy-development and administrative and judicial decision-making processes, including a review of the effectiveness of measures taken under Australia's Human Rights Framework 2010

4. A stronger focus on Australia's obligations to realise social, economic and cultural rights, including a right for individuals to make complaints when these rights are breached

5. Strong, positive and enforceable legislative measures to require Australian businesses to conduct due diligence to eliminate or mitigate the impacts of their operations and supply chains on human and labour rights

6. Transparent and merit-based appointment processes for all Human Rights Commissioners

7. Reforms to make Australia's anti-discrimination laws stronger, more consistent and more comprehensive, including:

    a. Reforms to ensure our legal framework is able to respond effectively to multiple, intersecting and compounding forms of discrimination

    b. Consideration of a new, nationally consistent mechanism which allows competing or conflicting human rights to be fairly, consistently and appropriately balanced

c. Stronger employment protections in Division 4, Part II of the *Australian Human Rights Commission Act 1986*

d. The removal of the 'comparator' test from all anti-discrimination provisions

e. The introduction of a shifting or reverse onus of proof in all anti-discrimination provisions

f. Positive, enforceable legal duties on employers and other duty holders to take proactive measures to eliminate discrimination and harassment and advance equality

g. Reforms to ensure that the Australian Human Rights Commission, work health and safety regulators and other bodies have the full suite of regulatory tools and resources necessary to effectively tackle discrimination and harassment issues, including at a cultural/systemic level

h. Better complaints processes for discrimination and harassment matters, including a clear and effective alternative right of action under the Fair Work Act, extended time limits and stronger representative action provisions

i. New federal protections from discrimination on the grounds of thought, conscience or religious belief in the area of employment and other areas of public life

j. The removal of exemptions which allow discrimination against employees and students on religious grounds, and the withdrawal of the government's exposure draft Religious Freedom Bills

k. The removal of other permanent exemptions which are unfair and fail to meet community standards, including those which allow discrimination against domestic workers

l. Extension of protections to include indirect family responsibilities discrimination, and a new obligation on employers to 'reasonably accommodate' requests for family friendly working arrangements

m. The addition of family and domestic violence as a protected attribute in at least the areas of employment and accommodation

8. Regular and thorough review of Australia's international human rights commitments, with the aim of ratifying human rights and labour rights instruments which have not been ratified, and withdrawing reservations where they are no longer appropriate

9. The Australian Government should commit to ratify the ILO Convention on Violence and Harassment (C.190)

10. The Australian Government should actively support the development of a new UN Treaty on Business and Human Rights

11. The Australian Government should only support trade agreements which have adequate protections for labour and human rights

Question 1: What human rights matter to you?

Labour rights are human rights

All people are entitled to freedom and dignity in their working lives. Labour rights are fundamental human rights, and should be recognised and protected as such.

The right to work and rights at work, including the right to form and join trade unions, are recognised by a number of international human rights instruments. The International Bill of Human Rights[5] prohibits slavery or servitude, and provides that everyone has the right to freely chosen employment, to equal pay for equal work, and to just and favourable pay and conditions sufficient to ensure an existence worthy of human dignity. 'Just and favourable' conditions include fair wages, equal pay for equal work, safe and healthy working conditions, equal opportunities for promotion, and reasonable limits on working hours and holidays with pay. Article 22 of the International Covenant on Civil and Political Rights (**ICCPR**) protects people's right to freely join unions, and Article 8 of the International Covenant on Economic, Social and Cultural Rights (**ICESCR**) protects the right of trade unions to function freely, subject only to limitations necessary in the interests of national security, public order, or the protection of the rights and freedoms of others.

[5] Which consists of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights (**ICESCR**), the International Covenant on Civil and Political Rights (**ICCPR**), and their protocols.

A number of other treaties also contain work rights, for example the *Convention on the Elimination of all Forms of Discrimination Against Women 1979* contains employment rights including equal pay for equal work and paid maternity leave (Articles 11(1)(d) and (2)(b)). The *Convention on the Rights of Persons with Disabilities* recognises the right of people with disability to work and to be provided with reasonable accommodations (Article 27) and the *Declaration on the Rights of Indigenous Peoples* contains provisions regarding the rights of First Nations peoples not to be subjected to any discriminatory conditions of labour, employment or salary (Article 17). International Labour Organization (**ILO**) treaties are relevant for the proper interpretation of all human rights at work, including the *Freedom of Association and Protection of the Right to Organise Convention* (C. 87), *Right to Organise and Collective Bargaining Convention* (C. 98) and the *Discrimination (Employment and Occupation) Convention* (C. 111).

Despite the clear recognition of labour rights under international human rights law, it has been observed that they are a 'somewhat neglected' part of the human rights framework.[6] Human rights are universal, indivisible and equal in status. It is crucial that Australia's human rights framework ensures that labour rights are treated with the same level of respect as other human rights. Some reforms to ensure that this occurs are outlined in this submission.

Human rights in Australian workplaces

Although Australia is one of the richest countries in the world, we continue to face grave human rights challenges in the world of work. Despite strong and sustained levels of economic growth, inequality is rising.[7] Changes to workplace laws have weakened the role of the independent umpire, reduced minimum employment standards and limited the capacity of unions to organise and bargain collectively. As a consequence, wage growth is non-existent, collective agreement coverage is declining and increasing numbers of workers are reliant on an inadequate set of minimum employment standards.[8]

Wage theft has become a business model and corporate avoidance of a range workplace laws is rife.[9] For example, a recent inquiry found that 79% of hospitality employers in Victoria did not comply with the national award wage system from 2013 to 2016, finding that:

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[6] Rosemary Owens & Joellen Riley *The Law of Work* (Oxford University Press, 1st ed, 2007) 74
[7] https://www.actu.org.au/media/1385450/actu_inequality_briefing.pdf
[8] ACTU Submission to the 2018-19 Annual Wage Review; See also: https://www.tai.org.au/sites/default/files/Collective%20Bargaining%20On%20the%20Brink%20[WEB].pdf
[9] ACTU Submission to Attorney-General regarding wage theft, 25 October 2019

> *Underpayment is so prevalent in some sectors that it can no longer be considered an aberration; it is becoming the norm… Nationwide, it is estimated that one in two hospitality workers are being illegally paid, with similar figures available for the retail, beauty and fast food sector*s.[10]

Industry Super Australia estimates that 2.85 million workers lose $5.94 billion per year in unpaid superannuation. Young and vulnerable workers are more likely to have their superannuation and wages stolen by their employers. [11] In the construction industry, large developers and principal contractors routinely delay and withhold payments from smaller sub-contractors.[12]

The traditional employment relationship is being undermined and circumvented by business models that include labour hire, sham contracting, franchising and the 'gig' economy. Over 40% of the Australian workforce is now employed in some form of precarious or insecure employment; the third highest rate in the OECD.[13] Evidence shows that these workers are more likely to be harmed and exploited at work for a range of reasons, including inadequate training and induction, fear of reprisals for speaking up, lack of access to participation and consultation processes, lack of regulatory oversight, poor supervision and exposure to frequent restructures and down-sizing. Temporary visa workers, labour hire-workers and migrants in the hospitality, agriculture, meat, cleaning, construction and disability and aged care industries are among those that are most vulnerable.

It is clear that slavery and slavery-like practices are occurring in a range of industries within Australia, as well as throughout the international supply chains of Australian businesses. The 'Walk Free' Foundation estimates that approximately 4,300 people in Australia are held in some form of slavery.[14] A number of government inquiries have uncovered evidence of serious labour exploitation and slavery-like practices Australia. For example, in 2015, the Senate Education and Employment References Committee found evidence of 'appalling and systemic' exploitation of workers, including exploitation of migrant workers on temporary visas in the meat processing and horticulture industries, and serious underpayment of wages and entitlements of international

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[10] The Report into Corporate Avoidance of the Fair Work Act (Parliament of Australia 2017:59/60)
[11] ACTU Submission to the Senate Economics Legislation Inquiry into Treasury Laws Amendment (Recovering Unpaid Superannuation) Bill 2019, 3 October 2019;
[12] John Murray AM, *Review of Security of Payment Laws*, December 2017, p 9 ff
[13] ACTU, Australia's Insecure Work Crisis: Fixing it for the Future, 21 May 2018, 5; Report of the Independent Inquiry into Insecure Work in Australia, Lives on Hold: Unlocking the Potential of the Australian Workforce, 16 May 2012
[14] https://s3-ap-southeast-2.amazonaws.com/walkfreefoundation.org-assets/content/uploads/2017/05/14093946/Walk-Free-Foundation-Submission-Inquiry-into-an-Australian-Moder….pdf

students working on temporary visas in many 7-Eleven convenience stores across Australia.[15] The Victorian Government inquiry into the Labour Hire Industry and Insecure Work heard evidence of abuse, violence, sexual harassment, excessive working hours, work in extreme heat with limited drinks breaks, untreated medical conditions, no access to workers compensation and other gross workplace health and safety breaches in relation to labour-hire workers in the horticulture, meat and cleaning industries.[16]

Australian workers continue to be killed or injured at work in large numbers. Between 2003 and 2016, at least 3,414 workers lost their lives in work-related incidents in Australia. As at 7 November this year, there have been 138 Australian workers killed at work.[17] While the number of fatal work injuries has declined over time in most developed countries, limitations in data collection continue to result in a significant underestimation of the true extent of work-related deaths, including those arising from work-related diseases such as cancer and cardio-vascular disease. For example, the Cancer Council estimates that work-related exposures to carcinogens will cause over 5,000 new cases of cancer in Australia each year: one in ten cancers in men, and one in fifty cancers in women are thought to be caused by work.[18] The ACTU's recent 'Work Shouldn't Hurt' survey shows that 79% of people have suffered a mental or physical injury at work. The majority of respondents (55%) were aware of existing hazards in their workplace which could cause serious injury or illness, and a shocking 61% have experienced poor mental health because their employer did not manage a hazard in their workplace.[19]

Women, young people, LGBTIQ people, people with disability and Aboriginal and Torres Strait Islander people and other discriminated-against groups are disproportionately and differently affected by these trends. Aboriginal and Torres Strait Islanders continue to fare much worse than the wider population in relation to rights to work and rights at work for example, and the government's punitive, discriminatory and ineffective Community Development Program (**CDP**) is exacerbating these poor outcomes.[20]

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[15] The Senate Education and Employment References Committee, *A National Disgrace: The Exploitation of Temporary Work Visa Holders*, March 2016; see also See also the Migrant Workers' Taskforce, the Fair Work Ombudsman's Harvest trail campaign and the Treasury's Black Economy Taskforce.

[16] Victorian Inquiry into the Labour Hire Industry and Insecure Work Final Report, August 2016 at Chapter 4 and pp 124-146

[17] https://www.safeworkaustralia.gov.au/statistics-and-research/statistics/fatalities/fatality-statistics#year-to-date-2019-preliminary-worker

[18] https://www.cancer.org.au/content/pdf/News/MediaReleases/2015/web%20%20Occupational%20report.pdf

[19] https://www.actu.org.au/media/1385647/work-shouldnt-hurt-report-clean-final.pdf

[20] https://www.actu.org.au/actu-media/media-releases/2017/australian-unions-welcome-senate-inquiry-into-racist-cdp

Australia's labour market continues to be characterised by significant gender-based inequalities. It is highly gender segregated[21] and Australia is one of the most unequal countries in the world with respect to men's and women's sharing of unpaid domestic and care work.[22] Despite the fact that the right to equal pay for equal work is specifically recognised as a fundamental human right in the International Bill of Rights and other instruments, the gender pay gap in Australia remains unacceptably high at around 14%, based on a comparison of average full-time weekly ordinary time earnings. It is important to recognise that this measure only includes base earnings, not overtime or other bonuses, and does not reflect the fact that women work fewer hours overall. The full-time total remuneration gender pay gap is 21.3%, meaning men working full-time earn nearly $25,717 a year more than women working full-time.[23] Women have on average 47% less superannuation than men.[24] The median superannuation balance held by women is only $39,000, and one-third of women over age 15 have no superannuation at all.[25] Women continue to be overrepresented among industries and occupations that are award reliant and low paid: data submitted to the Fair Work Commission in the most recent annual wage review show that 61% of adult award-reliant low-paid employees are women.[26] Australia's international human rights obligations cannot be met while the gender pay gap persists, and its elimination should be an urgent and central goal of reforms to law and practice to strengthen Australia's human rights framework.

Gender-based violence and harassment remains prevalent and grossly under-reported in Australian workplaces, with workers in insecure employment particularly susceptible. Almost 10,000 people responded to the ACTU's 'sexual harassment in the workplace' survey between 18 September and 30 November 2018.[27] Two in three women and one in three men told us they have been subjected to one or more forms of sexual harassment at work. Only a quarter of people who were harassed made a formal complaint, less than half reported the incident and 40% told no one at all, because workers do not believe that our current rules will deliver them justice.[28]

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[21] Senate Finance and Public Administration References Committee, Parliament of Australia, Gender segregation in the workplace and its impact on women's economic equality (2017) 1-96
[22] Natalie Skinner and Barbara Pocock, 'The persistent challenge: living, working and caring in Australia in 2014' (The Australian Work and Life Index, University of South Australia, Centre for Work + Life, 2014) 5
[23] https://www.wgea.gov.au/data/fact-sheets/australias-gender-pay-gap-statistics
[24] Hetherington & Smith, Not So Super, For Women, July 2017 at p 12;
[25] HESTA, 'Vital Signs' Report, 2019 p 18 https://www.hesta.com.au/stories/Why-equity-is-vital.html
[26] *Annual Wage Review* [2019] FWCFB 3500 at [399] see also [71], [77], [391] and [397], https://www.fwc.gov.au/documents/wage-reviews/2018-19/decisions/2019fwcfb3500.pdf

[28] https://www.actu.org.au/actu-media/media-releases/2018/sexual-harassment-1

Attacks on trade unions

In this complex, dangerous and rapidly changing world of work, the role of trade unions in protecting the interests of working people is even more critical than ever. However, despite the ratification of a number of international instruments which protect labour rights, Australian trade unions continue to be subjected to unjustified attacks for which there is no precedent in comparable democracies. Institutions and laws such as the Australian Building and Construction Commission (**ABCC**) and the 'Ensuring Integrity' Bill currently before the Parliament are just two examples of calculated attempts by the Australian state to weaken and undermine the democratic operation of trade unions and prevent them from fulfilling their purpose; namely the protection of the interests of workers. The Parliamentary Joint Committee on Human Rights has been heavily critical of such measures, determining that the ABCC is incompatible with the right to freedom of association, the right to form and join trade unions, the right to freedom of assembly, the right to freedom of expression, and the right to privacy,[29] and that the 'Ensuring Integrity' Bill is incompatible with the right to freedom of association, the right to just and favourable conditions at work, the right of unions to elect their own leadership freely, and the right to strike.[30]

While the establishment of the Parliamentary Joint Committee on Human Rights was a welcome reform, there is no effective mechanism to challenge, amend or delay legislation which is found by the Committee to breach human rights standards.

Social, economic and cultural rights

It is clear that governments must take a range of positive social, economic and cultural measures in order to ensure that human rights can be fully realised. The ICESCR sets out the positive steps that governments must take to ensure decent lives for people.

Human rights are often divided into two broad categories: civil and political rights, which have their foundations in liberal philosophy and restrain the state from abusing individuals (and so are often called 'negative' rights)[31] and social and economic rights, which require the state to take proactive steps to provide a decent standard of living for people (often called 'positive' rights).[32]

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[29] The Parliamentary Joint Committee on Human Rights considered the ABCC in its Second, Tenth, and Fourteenth Reports of the 44th Parliament.
[30] Parliamentary Joint Committee on Human Rights, Human rights scrutiny report (Report 9 of 2017) 17, commenting on the *Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017*.
[31] Those set out in the International Covenant on Civil and Political Rights 1966
[32] Those set out in the International Covenant on Economic, Social and Cultural Rights 1966

Civil and political rights are sometimes categorised as 'process' rights, which liberate people to engage fully in democratic processes (such as voting or collective bargaining) through which other rights and benefits can be achieved, whereas social and economic rights are concerned with substantive material outcomes. Labour rights fall into both categories: aspects of the right to form and join trade unions for example are recognised in both the ICESCR and the ICCPR. While the ICCPR requires states to 'respect, protect and fulfil' rights, the ICSECR allows them to be 'progressively realised', taking into account national resources and circumstances.

Although all human rights are equal in status, in practice civil and political rights are often privileged over social, economic and cultural rights. This occurs even though for many people, rights such as housing, education and decent work are absolutely fundamental to their capacity to live dignified lives from day to day. The differences in the character of the two categories of rights should be not overstated (most civil and political rights require states to take positive measures; the right to a fair trial for example requires the establishment and maintenance of properly functioning courts and tribunals etc) and should certainly not be used to justify the privileging of one set of rights over the other.

Australia must do much more to meet its obligations under the ICSECR, including providing access to affordable housing, quality education (including technical and vocational education), and adequate social security for those who need it. Australia's level of GDP spending on public services across all levels of government is currently among the lowest of all OECD countries.[33] The continued trend towards privatisation of public services has resulted in reduced access and reduced quality of services, and is hurting individuals and communities. The gap in outcomes between Aboriginal and Torres Strait Islander people and non-Indigenous people continues to be disgracefully high: the most recent 'Closing the Gap report' shows the gap in life expectancy is in fact widening.[34] Australia is a wealthy country and should commit as a priority to providing all who live here with the social, economic and cultural rights that they are entitled to.[35] Our human rights framework should afford those whose economic, social and cultural rights are breached the right to make a complaint.

- **The ACTU supports a greater focus on realisation of our obligations to provide social, economic and cultural rights, including a right for individuals to make complaints**

[33] https://data.oecd.org/gga/general-government-spending.htm
[34] https://www.humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/close-gap-report-our
[35]https://d3n8a8pro7vhmx.cloudfront.net/cpsu/pages/1573/attachments/original/1508714447/Taking_Back_Control_FINAL.pdf?1508714447

Question 2: How should human rights be protected in Australia?

Positive protections

The realisation of human rights requires more than just effective anti-discrimination laws: it requires positive, proactive steps to be taken by governments, businesses and others. At present, our reactive, complaints-based framework places the burden of addressing human rights breaches almost entirely on the individual. Discrimination laws aim to eliminate discrimination and promote equality, yet in reality they simply establish a complaints process that relies on individuals coming forward and reporting breaches. Complaints processes are costly and risky, and the reality is that many individuals do not complain at all for fear of victimisation or other reasons. In the employment context, there is no meaningful requirement on employers to implement effective, proactive measures to prevent discrimination and promote equality in workplaces. A number of inquiries have noted the inability of anti-discrimination laws to address systemic discrimination.[36] While we must ensure that people have access to quick and effective complaints processes, there is an urgent need to move away from sole reliance on an individual complaints-based framework towards a more systemic, proactive approach to the protection and promotion of human rights.

The ACTU supports new positive human rights protections at the federal level, including a Human Rights Act and a First Nations voice in the Constitution. It is also important that measures are taken to improve the human rights culture in our law making and policy development processes, as well as in administrative and judicial decision-making, and steps must be taken to ensure that the Australian Human Rights Commission operates at all times in a robust, independent manner consistent with our international obligations; including ensuring that all appointments to the Commission are transparent and merit-based.

The ACTU supports:

- **The Uluru Statement from the Heart, including the establishment of a First Nations Voice in the Australian Constitution**
- **The commencement of a project to consider options for a national Human Rights Act, including a review of the effectiveness of the current parliamentary scrutiny process**

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[36] For example: Australian Law Reform Commission, *Equality before the Law: Justice for Women Report* 69 (1994) Part 1, [3.10]; Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality* (2008) 47; Julian Gardiner, *An Equality Act for a Fairer Victoria: Equal Opportunity Review Final Report*, June 2008

- **The commencement of a project to develop and/or strengthen the human rights culture in Australia's law-making, policy-development and administrative decision-making processes, including a review of the effectiveness of measures taken under Australia's Human Rights Framework 2010**
- **Transparent and merit-based appointment processes for all Human Rights Commissioners**

International labour and human rights instruments

Australia has not yet committed to ratify some key International Labour Organisation (**ILO**) instruments which protect human rights at work. In June 2019, a new ILO Convention (**C.190**)[37] and Recommendation (**R.206**)[38] recognising the right of every worker to a world of work free from violence and harassment, including gender-based violence and harassment, were adopted at the International Labour Conference. C.190 will enter into force 12 months after two member States have ratified it, which is likely to happen fairly quickly in light of the large numbers of countries which voted for its adoption, including Australia. The new instruments outline a practical, proactive, preventative framework to identify and eliminate the risk of violence and harassment in the world of work. This is a significant development, particularly for women, young people, LGBTIQ people and other vulnerable workers who continue to be disproportionately affected by violence and harassment at work.

In light of Australia's strong commitment to gender equality and undeniable capacity to fully apply C.190 in law and in practice, the Australian Government should publicly express a commitment to ratifying and fully implementing these new standards. Such a commitment would be consistent with Australia's *National Plan to Reduce Violence against Women and their Children*, and ongoing work to prioritise gender equality and women's empowerment in development aid initiatives and global advocacy efforts. In particular, Australia will have a key role working with our neighbours to build on existing initiatives and promote ratification and implementation of these important new standards across the Asia-Pacific. A number of governments have already made public commitments to work towards ratification of C.190, including the Irish government, which takes the same approach to treaty ratification as Australia.[39]

[37] https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C190
[38] https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R206
[39] https://www.kildarestreet.com/wrans/?id=2019-09-25a.253&s=38936#g254.q

Australia has not yet ratified other key ILO Conventions, including C138 *Minimum Age Convention 1973* (although ratification is currently under consideration), C189 *Domestic Workers Convention* 2011 and C187 *Promotional Framework for Occupational Safety and Health Convention* 2006. There are also four ILO Protocols that remain unratified. In 2017, at the 'IV Global Conference on the Sustained Eradication of Child Labour', the Australian Government pledged to progress ratification of the Forced Labour Protocol.

Australia maintains a number of reservations to international human rights instruments that should be reviewed and withdrawn, including the reservation to Article 11(2)(b) of the *Convention on the Elimination of All Forms of Discrimination against Women*, which requires the introduction of maternity leave with pay or with comparable social benefits throughout Australia.[40]

Australia should regularly and thoroughly review its international human rights commitments and consider ratifying human rights and labour rights instruments which have not been ratified, and withdrawing reservations to human rights treaties where they are no longer appropriate.

Federal discrimination law reform priorities

Anti-discrimination laws are an important aspect of the legal framework protecting human rights at work. Our national anti-discrimination laws have been drafted over many decades and there are significant differences and inconsistencies in the drafting and coverage of protections, including in relation to definitions and tests for discrimination.[41] For example, the definition of 'carer' differs between the FW Act (see ss 97 and 65) and anti-discrimination laws, and state government employees are excluded from the protection of the *Sex Discrimination Act 1984* (**SDA**).

It is crucial that our anti-discrimination framework is strong, comprehensive, consistent and able to respond effectively to multiple, intersecting and compounding forms of discrimination. There are a number of areas in which Australia's anti-discrimination laws need improvement, including the removal of unjustified and unnecessary exemptions and stronger compliance and enforcement mechanisms. These improvements are discussed below.

- **The ACTU supports the commencement of a project to review and reform Australia's anti-discrimination laws to ensure that they are strong, comprehensive and consistent, and**

[40] https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Righttomaternityleave.aspx
[41] Attorney-General's Department, 'Consolidation of Anti-Discrimination Laws' (Discussion Paper, Australian Government, 2011)

able to respond effectively to multiple, intersecting and compounding forms of discrimination

Exemptions

Human rights belong to all people equally, and governments cannot pick and choose which rights to respect. No right should be privileged over any other right. In recognition of the fact that human rights can and do frequently come into conflict, most human rights can be limited, either expressly or impliedly, as long as the limitations are prescribed by law, permitted in relation to the right concerned, and are reasonable, necessary and proportionate to pursue a legitimate objective. Legislatures and courts must strike an appropriate balance between human rights when they come into conflict. However, this balancing exercise is complex and Australia lacks the appropriate regulatory framework to enable this process to occur fairly or consistently. Currently, the primary way in which these conflicts are managed is through a system of permanent and temporary exemptions, which carve out categories of people from the protection of discrimination laws. A number of the permanent exemptions in anti-discrimination laws are outdated and unfair, including those discussed below. A new mechanism for fairly and consistently managing conflicting human rights is needed.

Domestic work

An increasing number of workers perform work in private residences, including home-based care under programs such as the National Disability Insurance Scheme. The rise of the gig economy is only exacerbating this trend. In recognition of the growing number of domestic workers around the world (the majority of whom are women) and their particular vulnerability to exploitation, discrimination, harassment and violence, a new ILO Convention was developed in 2011 to protect their rights on the same basis as other workers.[42] The permanent exemptions in Australia's discrimination laws for people performing domestic work[43] are inconsistent with these developments and need reconsideration.

Religious exemptions

Recent debates about the interaction between religious freedom and the right to equality and non-discrimination have revealed the weaknesses in our current regulatory regime. The interaction between religious freedom and rights to non-discrimination is a point of ongoing

[42] Domestic Workers Convention, 2011 (C.189)
[43] See s 14(3) of the SDA and s 15(5) of the RDA

tension, and existing exemptions (and new exemptions proposed in the government's 'Religious Freedom Bills') fail to strike a fair or appropriate balance between the two sets of rights. 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.

The permanent exemptions in the SDA 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 for religious bodies.[44] Since 2013, this general exemption does not apply to acts or practices connected with the provision of Commonwealth-funded aged care; however, it applies to the employment of people to provide Commonwealth-funded aged care.[45] The FW Act also contains a similar religious exemption, although it is different to the SDA in its framing.[46] Most State and Territory laws also contain similar religious exemptions, however there are significant differences in scope.

Concerns have been raised by numerous parties, including the trade union movement, that these exemptions limit the rights and freedoms of others in a way which is not reasonable, proportionate or justified.[47] Faith-based schools and other employers do not need to single out particular staff members or students for discriminatory treatment in order to uphold their religious ethos. These exemptions are causing harm to people and must be removed as a matter of urgency.

The ACTU recommends:

- **The removal of permanent exemptions which are unfair and fail to meet community standards, including exemptions in the SDA, the Fair Work Act and all State and Territory laws which allow discrimination against employees and students on religious grounds, and exemptions from anti-discrimination laws for domestic workers**
- **The withdrawal of the government's Religious Freedom Bills**

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[44] 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'

[45] The Fair Work Act reflects the SDA exemptions, and most State and Territory laws also contain similar religious exemptions, however there are differences in scope.

[46] Attorney-General's Department, *Consolidation – Religious Exemptions – Comparative Analysis*, undated, p 2

[47] 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.

- **Consideration of a new mechanism which allows competing or conflicting human rights to be fairly and appropriately balanced in accordance with existing human rights principles**

Comparator test

The 'comparator' test in discrimination laws requires the court to make a comparison between the treatment of the complainant and the treatment of others. Complainants must prove three things: firstly that there has been differential treatment (compared to a person in similar circumstances without the attribute); secondly that the complainant has experienced detriment or disadvantage because of the differential treatment; and thirdly that the differential treatment was 'because of' their protected attribute. Complainants have often had significant difficulty identifying a suitable 'comparator' as required by the first limb of this test. Often no real comparator can be identified, and so the court has to rely on a hypothetical comparator. In many discrimination cases, technically complex, abstract and time-consuming legal arguments about the suitability of the comparator have distracted courts and tribunals from the merits of the complaint in question.

In the pay equity context, the comparator test has caused, and continues to cause, significant problems.[48] In 2013, United Voice (**UV**), the Australian Education Union (Victorian Branch) (**AEU**) and the Independent Education Union of Australia (**IEU**) made applications seeking equal remuneration orders (**EROs**) pursuant to s.302(3)(b) of the FW Act for employees working in long day care centres or preschools covered by the *Children's Services Award 2010*, the *Educational Services (Teachers) Award 2010*, and the *Educational Services (Schools) General Staff Award 2010*, excluding local, state or territory government employees. These applications were heard by the Full-Bench of the Fair Work Commission together (**the Equal Remuneration Case**).

The requirement to prove discrimination was removed from the FW Act's pay equity provisions[49] and it was thought that this had removed the need to identify a comparator. While the requirement to prove that differential treatment was 'because of' the protected attribute was removed, the Fair Work Commission decided in 2015 that a male comparator group would still be required.[50] It is inherently problematic to require a comparison of female and male-dominated jobs which may be unsimilar in character, but equal in value – this is the very issue pay equity provisions need to be able to grapple with effectively. The gender pay gap arises precisely

[48] Smith, M., & Stewart, A. (2017). Shall I compare thee to a fitter and turner? : the role of comparators in pay equity regulation. Australian Journal Of Labour Law, 30, 113-136
[49] Part 2-7
[50] *Equal Remuneration Case* [2015] FWCFB 8200, at [290] and [292]

because of the historical undervaluation of work predominantly done by women, which arises from the discriminatory view that it is less skilful or valuable than work predominantly done by men. Requiring women seeking pay equity to compare themselves to male workers simply exacerbates and entrenches this problem.

The IEU's ERO claim identifies male primary school teachers, or alternatively the lowest paid quartile of professional engineers in their first 5 years of work, as comparators for Early Childhood Teachers, seeking the same rates of pay as NSW primary teachers. Demonstrating the inherent problems with the comparator test, the Australian Federation of Employers and Industries claims that the comparator groups selected by the IEU are unsuitable, arguing that junior engineers are 'required to apply a higher level of technical knowledge, reasoning and judgment' and 'higher level problem solving and analysis'.[51] The IEU has argued that it is gender-related factors which have contributed to the undervaluation of the work of ECTs, namely gendered assumptions about the role of early childhood teachers as 'nurturers' and 'carers' of preschool age children rather than teachers; an undervaluation of early childhood teaching skills on the basis that they are skills that 'naturally' occur in women rather than that are learned or developed; and the discriminatory view that the work of ECTs is not skilful or valuable. The IEU points out that the undervaluation of the work of ECTs is not only unfair, but contributes to high turnover and low tenure in the sector, which reduces the quality of educational outcomes for children in their crucial first five years of life. In light of the inherent limitations of the FW Act's ERO provisions, the IEU has also commenced a claim under the work-value provisions of the FW Act (s 158), arguing that rates under the *Educational Services (Teachers) Award 2010* (the top rates are $69,000) do not properly reflect the work value of teachers. Under a work value case, the Fair Work Commission examines the characteristics of the work and considers whether it has been appropriately valued under award pay scales. The ERO and work value claims are being heard concurrently. [52] A final decision is expected to be handed down between December 2019 and April 2020.[53]

The current pay equity provisions in the FW Act appear incapable of fulfilling their objective, largely due to the continued existence of the comparator test. ACTU and its affiliates are continuing to campaign for stronger and more effective pay equity provisions which do not require a male comparator group.

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[51] Workplace Express, *IEU equal pay claim fails comparison test: Expert*, 25 May 2018 https://www.workplaceexpress.com.au/nl06_news_selected.php?act=2&selkey=56797
[52] https://www.fwc.gov.au/cases-decisions-and-orders/major-cases/equal-remuneration-case-2013-14
[53] http://publications.ieu.asn.au/2019-september-ie/articles2/decision-landmark-equal-pay-case-coming-soon/

The comparator test has resulted in inconsistent, unpredictable and undesirable outcomes wherever it appears. It exacerbates and entrenches discrimination rather than promoting equality. It should be removed from all anti-discrimination and workplace laws.

Onus of proof

It is extremely difficult for an employee to obtain evidence that proves that unfavourable treatment is connected with their sex, pregnancy, race, disability or other protected attribute. A manager will rarely explicitly confirm that the reason for an action or inaction is a person's protected attribute. The significant difficulties involved have been summarised as follows:

> *A complainant must therefore prove the reason for another person's conduct, when all knowledge of it is in the mind of the other person, any evidence of it is in the control of the other person, and the power to contradict any allegation is with the other person. A complainant must prove as fact, on balance of probabilities, the unarticulated reason for a person's conduct – a very difficult exercise. This approach to proof often enables a person to avoid accountability for their discriminatory conduct, simply because they are not called on to explain it.*[54]

In the UK and Europe, the onus in discrimination matters shifts to the respondent once the applicant has made out a prima facie case that there is a relationship between their attribute and the treatment they received. The effect of this is that the court or tribunal must find that unlawful discrimination has occurred, unless the respondent presents an adequate explanation for their behaviour.

The 'General Protections' provisions in Part 3-1 of the FW Act consolidated (and in some respects expanded) protections previously contained in the *Workplace Relations Act 1996* (**WR Act**) and its predecessors. The General Protections provisions protect against adverse action in relation to workplace rights, freedom of association and lawful industrial activities, protect against discrimination and dismissal for temporary absence due to illness or injury and include protections relating to 'sham' employment arrangements. The discrimination provisions in s 351 of the FW Act were intended to 'broadly cover' paragraph 659(2)(f) of the former WR Act, which made it unlawful to dismiss an employee for discriminatory reasons, and extend the protection to prohibit *any* adverse action on discriminatory grounds. The general protections were intended to

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[54] Submission by Simon Rice to the Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Inquiry into the effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality (2008) 63, [6.47]

be 'streamlined and simple' provisions ensuring 'fairness and representation at the workplace by recognising the right to freedom of association and preventing discrimination and other unfair treatment'.[55]

Under s 361 of the FW Act, it is presumed that an action the subject of a general protections complaint was taken, or is being taken, for a prohibited reason, unless the respondent proves otherwise. This type of shifting onus has been a long-standing feature of the freedom of association and unlawful termination protections in Australia's workplace laws. The *Explanatory Memorandum to the Fair Work Bill 2008* notes that in the absence of a shifting onus in the general protections provisions '…it would often be extremely difficult, if not impossible, for a complainant to establish that a person acted for an unlawful reason'.[56] However, the shifting onus has not provided the protection and assistance it was intended to provide, largely because of the narrow, overly technical way in which it has been interpreted by the courts. In *Board of Bendigo Regional Institute of Technical and Further Education v Barclay*,[57] an employee who was a manager and a union delegate was suspended for sending an email to union members stating that several members had advised him they had been asked to produce fraudulent documents for an audit being conducted for the purposes of re-accreditation. The employee was suspended and asked to show cause why he should not be disciplined. The employer claimed that the reason for the suspension was not that the email constituted lawful industrial activity, but that it was inappropriate for a manager to send an email of that nature. The case initially succeeded but ultimately failed in the High Court. The High Court said that the fact that the employer led credible evidence that the HR Manager believed that her decision was unrelated to the employee's lawful industry activity was sufficient for the employer to defeat the case. This means that a decision-maker merely needs to assert that the reason for their action or inaction was not the prohibited reason alleged, and in the absence of clear contradictory evidence, such an explanation will be accepted. This interpretation significantly limits the ability of the general protections to meaningfully protect workers' rights and prevent discrimination.

The AHRC should consider the implications of Barclay, including whether a complete reversal of onus may be a more appropriate option for reform in light of the vulnerable position of complainants and the serious difficulties they face in litigation against powerful, well-resourced and experienced respondents.

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[55] *Fair Work Bill 2008 Explanatory Memorandum* at p ii and [1333]
[56] At [1461]
[57] [2012] HCA 32

Enforcement and complaints

There is no effective enforcement or compliance mechanism under discrimination laws, and the current complaints process has been described as *'onerous, too legalistic and too formal.*[58] As in most employment disputes, a significant power imbalance exists. The playing field is not level. Individuals wanting to pursue discrimination and sexual harassment complaints must navigate a complex and technical area of law (often without legal representation) and compete with well-resourced, well-informed and experienced respondents. Even when the legal avenue is successfully pursued, compensation for breaches of anti-discrimination legislation, including for sexual harassment, have consistently been low.[59] The case of *Richardson v Oracle Corporation Australia Pty Ltd*[60] for example is widely recognised to have changed the landscape in relation to sexual harassment damages. On appeal, the court increased the general damages awarded from $18,000 to $100,000, and added an additional $30,000 for economic loss. However, when compared with other jurisdictions such as defamation, the damages are still relatively modest. In Oracle, the complainant was subjected to repeated comments, slurs and sexual advances by a co-worker over many months, some of which occurred in front of clients and colleagues. By way of comparison, in 2015 the Federal Court awarded former Treasurer Joe Hockey $200,000 in damages for hurt feelings arising from a poster headline and tweets reading 'Treasurer for sale'.[61]

In some jurisdictions, statutory caps on damages operate as an absolute and unjustified bar to complainants achieving justice.[62] Costs follow the event in the Federal Circuit Court and the Federal Court, so unsuccessful complainants risk having to pay the respondent's costs. In addition, civil penalties are not available, there is no capacity for a court to award punitive or exemplary damages, and there is no ability to apply for an injunction to restrain harassment or discrimination.

While a 'representative complaint' can be lodged under discrimination laws by a representative body or a trade union on behalf of one or more persons aggrieved by an alleged act of unlawful discrimination if certain conditions are met,[63] these bodies cannot commence legal proceedings

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[58] Sara Charlesworth, Submission No 39 to the Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Inquiry into the effectiveness of the Sex Discrimination Act (2008) 7
[59] Therese MacDermott 'Reassessing Sexual Harassment: It's Time' (2015) Vol 40 Alternative Law Journal 157
[60] [2014] FCAFC 82
[61] Louise Hall and Michaela Whitbourn, 'Treasurer Joe Hockey awarded $200,000 in defamation case against Fairfax Media', The Sydney Morning Herald, 15 July 2015 <https://www.smh.com.au/politics/federal/hockey-awarded-200000-in-defamation-case-against-fairfax-media-20150630-gi1axg.html>
[62] For example, section 108 of the NSW Anti-Discrimination Act caps the compensation payable for discrimination or harassment complaints at $100,000.
[63] Under s 46P(2)(c) of the Australian Human Rights Commission Act 1986 (AHRC Act)

on behalf of the aggrieved person.[64] A number of reports have recommended that representative bodies such as advocacy groups, human rights organisations and trade unions should be able to bring actions in the federal courts in order to improve the capacity of our laws to address systemic discrimination and harassment.[65]

Compounding this, sexual harassment is not explicitly proscribed by the FW Act: while the Fair Work Commission can handle a dispute about adverse action on the grounds of sex, it is unlikely that this extends to sexual harassment disputes.[66] Even reporting an incident of sexual harassment or discrimination at the workplace level is not considered an option for many, let alone pursing a lengthy, costly, risky, technically complex anti-discrimination case to conclusion, with a low likelihood of a satisfactory outcome.

Other workplace rights, for example those under the FW Act and work health and safety laws, are supported by positive obligations, penalties for breaches and the capacity for prosecutions to be brought by the regulator or unions (under the FW Act) where appropriate and necessary. There is no justification for the comparatively weak compliance and enforcement mechanisms under anti-discrimination laws. The ACTU strongly supports calls for a complete rethink of the mechanisms for promoting equality and enforcing anti-discrimination laws, including penalties for breaches, the expansion of the powers of the Australian Human Rights Commission to conduct audits or inquiries and to commence legal action without the need for individual complaint, significantly increased time-limits, a stronger process for representative complaints and the removal of statutory caps on damages in state-based legislation.

At a more fundamental level, criticism of Australia's anti-discrimination law framework focuses on the inherent limits of an individual complaint-based framework and its inability to address systemic discrimination.[67] In the case of equal pay for example, not only are strong pay equity and discrimination protections required, but positive measures such as the provision of adequate amounts of paid parental leave and secure, quality flexible working arrangements, among other things, in order to ensure that that the right to pay equity is realised in practice. While unlikely by themselves to address the limitations of anti-discrimination laws, the ACTU strongly supports new 'positive duties' on public sector organisations, employers, educational institutions and other

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[64] AHRC Act, s 46PO(1)
[65] See Attorney-General's Department, 'Consolidation of Anti-Discrimination Laws' (Discussion Paper, Australian Government, 2011) at 48
[66] *Wroughton v Catholic Education Office Diocese of Parramatta* (2015) 255 IR 284l [2015] FCA 1236, [51]-[64]
[67] For example, this issue was considered in detail by the 2008 Gardiner Review of Victoria's anti-discrimination laws.

duty-holders to take proactive steps to eliminate discrimination and harassment and promote equality.

In the context of the Sex Discrimination Commissioner's National Inquiry into Sexual Harassment, the ACTU is part of a broad coalition of over 100 organisations including academics, law firms, health organisations and others (known as the 'Power to Prevent' coalition) calling for reforms to workplace health and safety, anti-discrimination and workplace law and practice to improve the complaints process and place stronger and clearer legal duties on employers to take proactive steps to prevent sexual harassment at work, including a new right of action in the FW Act and a new regulation on psychosocial risks under work health and safety laws.[68]

Gaps in protections

Federal discrimination laws currently prohibit discrimination on the grounds of race, sex, disability, age, sexual orientation, gender identity and intersex status.[69] This list has evolved over time in order to keep pace with community expectations and the development of human rights law. Protections should be further expanded as outlined below.

Family and domestic violence

Family and domestic violence is a crime and a pervasive social harm. The evidence and research showing the prevalence and seriousness of family and domestic violence across the Australian community is overwhelming and incontrovertible. Family and domestic violence affects people from all walks of life. Approximately one in four Australian women (23% or 2.2 million) and one in thirteen men (7.8% or 703,700) have experienced violence by an intimate partner since the age of 15.[70] Research suggests that family and domestic violence is the leading contributor to death, disability and ill-health among women aged between 15 and 44.[71] Family and domestic violence is a gendered phenomenon which affects women disproportionately and differently. While men are also subjected to family and domestic violence, family and domestic violence among adults is overwhelmingly a crime against women.[72] Aboriginal and Torres Strait Islander people, people with disabilities, and LGBTIQ and culturally diverse communities face particular challenges.[73]

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[68] https://www.legalaid.vic.gov.au/sites/www.legalaid.vic.gov.au/files/power-to-prevent-joint-statement-ahrc-inquiry-sexual-harrassment-work.docx
[69] Some state laws protect additional attributes.
[70] Australian Bureau of Statistics (ABS) 2017. Personal Safety, Australia, 2016, ABS cat. no. 4906.0. Canberra: ABS
[71] Victorian Health Promotion Foundation (VicHealth), The Health Costs of Violence: Measuring the Burden of Disease Caused by Intimate Partner Violence, 2004
[72] Expert Report of Dr Michael Flood, 26 May 2016 [3.21]–[3.23].
[73] Victorian Royal Commission into Family Violence, Volume 5, Chapter 26 - Family Violence and Diversity

Violence against women costs the Australian economy almost $22 billion per year, including $1.3 billion in lost productivity, absenteeism, and the cost of replacing employees who have left the workforce, either through injury or death.[74]

Working people seeking to recover from and leave violent relationships need protection and safety. The evidence shows that a significant factor in realising this is access to economic resources.[75] Therefore, minimum employment standards that provide both job and financial security for workers form a critical part of an effective whole of community response to family and domestic violence. It is clear that workers experience discrimination at work because of their experience of family and domestic violence.[76] Despite this, there is currently no specific protection for such workers in our federal anti-discrimination laws. This gap in our laws should be addressed by including a new protected attribute in the SDA.

On 26 March 2018, the Fair Work Commission varied all modern awards to include a new entitlement to 5 days unpaid family and domestic violence leave. The Commission's decision followed an application by the ACTU under s 156 of the FW Act to vary all modern awards to include an entitlement to 10 days paid family and domestic violence leave. While the provision of 5 days unpaid leave is a step in the right direction, it is not sufficient to provide the support required. The ACTU continues to strongly support 10 days paid family and domestic violence leave as a minimum employment standard for all workers.[77]

Family and caring responsibilities

OECD data show that Australia is one of the most unequal countries with respect to men's and women's sharing of unpaid domestic and care work.[78] In order to accommodate their unpaid caring or parenting responsibilities, many employees are forced to either drop out of the paid workforce altogether, or work fewer hours in poorer quality jobs. Significant numbers of parents and pregnant women suffer workplace discrimination. These factors lead to various social and economic problems and contribute to gender inequality in Australia, including our persistent

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[74] Price Waterhouse Coopers (PWC), A High Price to Pay: The Economic Case for Preventing Violence Against Women, November 2015; KMPG, The Cost of Violence Against Women and their Children, 2009; KPMG, The Cost of Violence Against Women and their Children in Australia, 2016.
[75] See for example, Cortis N & Bullen J (2015), Building effective policies and services to promote women's economic security following domestic violence: state of knowledge paper, Australia's National Research Organisation for Women's Safety, Landscapes, Issue 07, August at pp 2 and 8; Victorian Royal Commission into Family Violence Report, Volume IV, Chapter 21 'Financial Security', 93
[76] See for example *Alexis King –v- DC Lee & LJ Lyons* [2016] FWC 1664
[77] ACTU Submission to the Senate Inquiry into the Fair Work Amendment (Family and Domestic Violence Leave) Bill 2018
[78] R Cooper, M Foley and M Baird, *Women at Work: Australia and the United States*, The United States Studies Centre at the University of Sydney, 15.

gender pay gap. Discrimination and workplace laws have failed to make sufficient progress in overcoming these human rights problems.

There is a significant number of Australian employees who cannot access flexible working arrangements and who continue to struggle to combine paid work and unpaid parenting and caring responsibilities. Evidence shows that lower paid, lower skilled, casually employed, and award-reliant employees working in smaller workplaces have particular difficulty.[79] Research also shows that many employees (around 30%) do not ask for changes at all, even though they need them.[80] Many of these 'discontented non-requestors' do not make a request because they feel their workplace is openly hostile to flexible work and fear reprisals.[81]

A large number of discontented non-requestors are men, which is consistent with research by the Diversity Council of Australia which shows that a significant number of men desire greater access to flexible work arrangements than they currently experience, and that this is especially the case for young fathers.[82] It is also consistent with research showing that 19% of fathers who were secondary carers for their disabled child report that they could not obtain flexibility if they wanted it.[83]

In 2014, the Australian Human Rights Commission published a national review of employees' experiences of pregnancy and return to work,[84] finding that discrimination against parents (particularly mothers) in the workplace is 'pervasive': 36% of women who returned to work after parenthood reported discrimination related to family responsibilities when returning to work, with half of those reporting discrimination when requesting flexible working arrangements.[85] One in ten mothers still on parental leave could not find work or negotiate return to work arrangements.[86]

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[79] Ian Watson, *Family Friendly Working Arrangements: Labour market and workplace trends*, 17 May 2017, at pp x, 57 and 63, paras [11], [128]-[129] and [135] https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/expert-ian-watson.pdf

[80] Natalie Skinner and Barbara Pocock, 'Flexibility and Work-Life Interference in Australia' (2011) 53(1) *Journal of Industrial Relations* 65.

[81] Natalie Skinner, Abby Cathcart and Barbara Pocock, 'To ask or not to ask? Investigating workers' flexibility requests and the phenomenon of discontented non-requesters' (2016) 26 *Labour and Industry* 103

[82] Quoted in AHRC, *Supporting Working Parents*, 18.

[83] Wright, A Crettenden and N Skinner, 'Dads care too! Participation in paid employment and experiences in workplace flexibility for Australian fathers caring for children and young adults with disabilities' (2016) 19 *Community, Work and Family* 340, 356, quoted in Murray Report, [68]

[84] Australian Human Rights Commission, Supporting Working Parents: Pregnancy and Return to Work National Review Report (2014) (**Supporting Working Parents**).

[85] AHRC, Supporting Working Parents, 29.

[86] AHRC, Supporting Working Parents, 47.

Due to the lack of an enforcement mechanism, the 'right to request' flexible working arrangements in s 65 of the FW Act does not provide employees with a substantive entitlement to anything at all. It is a right to request a change to working arrangements only, not a right to changed working arrangements, with no capacity for an employee to challenge an adverse decision. In practice, s 65 merely places minimum procedural requirements on employees and employers when a request for flexible working arrangements is made. Sections 351 and 772 prevent adverse action or unlawful termination on the grounds of carer's responsibilities; but these are reactive and remedial provisions. In response to these problems, the ACTU lodged a claim in the Fair Work Commission to vary all modern awards to include stronger positive rights for working parents and carers. The ACTU's claim was rejected, but the Commission inserted a clause that is slightly stronger than s 65 into all modern awards. While this decision was a step in the right direction, the ACTU will continue to campaign for strong, enforceable access to secure, quality flexible working arrangements for parents and carers as a minimum employment standard.[87]

Federal anti-discrimination law makes it unlawful for an employer to discriminate against an employee or prospective employee because of their family responsibilities, sex and/or pregnancy (SDA ss 5, 7 and 7A), or because they are an associate or carer of a person with a disability (*Disability Discrimination Act 1992*, s 7). Under the SDA, the definition of 'family responsibilities' is restricted to *direct* discrimination only, and applies only to discrimination in employment. However, there is no provision for *indirect* discrimination based on the imposition of a 'condition, requirement or practice' that disadvantages people with family responsibilities. It is legally complex to make out the causation and comparator elements of a direct family responsibilities discrimination claim,[88] and for this reason, a number of disputes regarding requests for reduced hours have been commenced as indirect discrimination claims under the SDA on the grounds of sex, rather than family responsibilities, or under applicable state or territory laws. In addition, these laws simply require an employer not to discriminate; they do not place a positive duty on employers to accommodate the needs of workers who are pregnant and/or have family or caring responsibilities.[89]

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[87] https://www.actu.org.au/actu-media/media-releases/2018/fwc-ruling-a-step-forward-for-people-juggling-family-work-and-care

[88] Hon John von Doussa QC and Craig Lenehan, 'Barbequed or Burned? Flexibility in Work Arrangements and the Sex Discrimination Act' (2004) 27 University of New South Wales Law Journal 892.

[89] The exception is Victoria's *Equal Opportunity Act 2010*, which provides at s 19 that an employer must not unreasonably refuse to accommodate a person's parenting or caring responsibilities in relation to their work arrangements.

There are a number of international instruments ratified by Australia which are relevant to the protection of people against family responsibilities discrimination, including the ILO *Convention Concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities* (**C.156**), the ILO *Convention Concerning Discrimination in Respect of Employment and Occupation* (**C.111**), the *Convention on the Elimination of all Forms of Discrimination Against Women* (**CEDAW**) and the *Convention on the Rights of the Child* (**CROC**).

Ensuring access to quality, secure flexible working arrangements for all who need it remains a pressing issue in Australian workplaces, and regulatory reform is required to achieve this important goal.

The ACTU supports:

- **the extension of the prohibition on discrimination on the grounds of family responsibilities to include indirect discrimination in all areas of public life**
- **a specific positive duty on employers to reasonably accommodate requests by employees for flexible working arrangements for family or carer responsibilities**
- **stronger positive rights to secure, quality flexible working arrangements for parents and carers in the FW Act**

Trade union activity

Division 4, Part II of the *Australian Human Rights Commission Act 1986* was passed in order to implement some of Australia's obligations under the ILO *Discrimination (Employment and Occupation) Convention, 1958* (**C.111**). These provisions establish a process under which AHRC can conciliate complaints of discrimination in work-related areas on the grounds of religion, medical record, nationality, trade union activity, political opinion, social origin, and criminal record. However, discrimination on the basis of these attributes is not unlawful and complaints cannot proceed to the Federal Court or the Federal Magistrates Court. There is no justification for treating this type of discrimination differently to other types of discrimination. Free and democratic trade unions are of fundamental importance to the protection of human rights at work, and protections for trade union activity are particularly pressing given the unjustified and unwarranted attacks on trade unions that continue to occur. Discrimination on the grounds of irrelevant criminal record is also common, and impacts significantly on the lives of people who are overrepresented in our criminal justice system, including First Nations people. Discrimination on the grounds of irrelevant criminal record is not covered by the Fair Work Act at all, and while there are some protections in the Fair Work Act for trade union activity, these should be supplemented by strong protections in our anti-discrimination laws as well, in recognition of the status of labour rights as fundamental human rights.

The discrimination provisions in the FW Act (s 351) prohibit an employer from taking 'adverse action' against an employee (or a prospective employee) because of a 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. These provisions do not apply if the action is 'not unlawful' under an applicable state anti-discrimination law. It is unclear whether this means that the action must be expressly exempted, or simply not specifically proscribed, by a state law. Religious and 'inherent requirements of the job' exemptions apply. Section 772 of the FW Act makes termination of employment on any of the listed grounds unlawful, with religious and 'inherent requirements of the job' exemptions applicable. Pursuant to s 342, an employer takes 'adverse action' against an employee if the employer dismisses or otherwise 'injures' the employee in her employment, or discriminates between the employee and other employees. The terms 'discrimination' and 'discriminates' are not defined in the FW Act. Courts and tribunals have taken a narrow interpretation, finding that they should be given their ordinary meaning rather than interpreted by reference to anti-discrimination statutes. Problematically, courts have required employees to prove that the employer *intended* to or *consciously* treated them less favourably. This presents a significant obstacle to a successful claim of discrimination under the FW Act.[90]

In addition, the vicarious liability provisions under s 793 of the FW Act reflect the common law test and are therefore unsuited to discrimination matters. At common law, an employer will be vicariously liable for acts committed by an employee in the course of their employment, to the extent that the employee is acting within the scope of their authority and performing duties or acts incidental to the performance of those duties. This includes acts committed while carrying out an authorised act in an unauthorised way. However, an employer will not be vicariously liable for acts committed by an employee outside the scope of their employment, while 'on a frolic of his own'.[91] It follows that the more egregious an act of discrimination or harassment, the less likely it would be that the employer would be vicariously liable.[92] Anti-discrimination law attempts to address this problem through provisions[93] under which an employer or principal will be vicariously liable for an unlawful act committed by their employee/agent, where the unlawful act

[90] Dominique Allen, 'Adverse Effects: Can the Fair Work Act Address Workplace Discrimination for Employees with a Disability?' (2018) Vol 41 No 3 *University of New South Wales Law Journal* 12-15
[91] *Morris v C W Martin & Sons Ltd* [1966] 1 QB 716, 733-4, discussed in *NSW v Lepore* (2003) 212 CLR 511, 535-6, 614
[92] *South Pacific Resort Hotels Pty Ltd v Trainor* (2005) 144 FCR 402, [65]
[93] For example, s 106(1) and (2) of the SDA

is 'in connection with' the person's employment or duties as an agent, unless 'all reasonable steps to prevent the employee or agent from doing the act' have been taken by the employer.[94]

Sections 346 and 347 of the FW Act prohibit adverse action on the grounds of membership of an industrial association or 'industrial activity', and s 772 extends to prohibit termination of employment on the grounds of trade union membership or participation in trade union activities outside working hours or, with the employer's consent, during working hours. However, the existence of these protections is no reason not to provide additional specific protections for trade union activity under anti-discrimination laws. There are shortcomings in both the FW Act and anti-discrimination regimes, and complainants should be able to choose which jurisdiction best applies to their circumstances. Overlaps of this kind between workplace and discrimination law have existed for some time. For example, a woman discriminated against at work on the grounds of her disability would be able to choose to bring a complaint in either a state or federal anti-discrimination commission, or under the FW Act.

Reforms should be introduced to allow individuals to access a court if their C.111 discrimination complaint is unresolved under the AHRC Act, and to give unions and others with standing the right to bring representative complaints.

Thought, Conscience and Religious Belief

The ACTU supports new federal protections from discrimination on the grounds of thought, conscience or religious belief in the area of employment and other areas of public life.

However, the ACTU does not support the government's draft Religious Freedom Bills.[95] The Bills depart from the usual framework of discrimination law in a number of concerning ways, including extending human rights to corporations, altering the 'indirect discrimination' and 'inherent requirements of the job' tests, overriding state and territory laws, and introducing unclear new concepts such as 'unjustifiable financial hardship' and 'unjustifiable adverse action'. These departures present a clear risk of undesirable, unpredictable and unintended consequences. The ACTU supports consistent federal protections for workers and others against discrimination on the grounds of religious belief. Religious freedom should be protected, but it should not be privileged over people's rights to work, study, and access healthcare in safety and with dignity.

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[94] In some State jurisdictions (for example, NSW), the test is different, and employers are only vicariously liable if they express or impliedly 'authorise' the unlawful act

[95] https://www.ag.gov.au/Consultations/Pages/religious-freedom-bills.aspx

It is of significant concern to the ACTU that the Bills do not address concerns about existing exemptions for religious schools and bodies, and ignore review processes currently under way. In 2019, the Australian Law Reform Commission (**ALRC**) was asked to conduct an inquiry into the *Framework of Religious Exemptions in Anti-discrimination Legislation*. Under the original terms of reference, the ALRC was due to report its findings on 10 April 2020 and consider what reforms to Commonwealth, state and territory law, the FW Act and 'any other Australian laws' should be made in order 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'. In August 2019, the Attorney-General altered the terms of reference to require the ALRC to exclude the new RDB from its review, and to extend the reporting date until December 2020. The current Free and Equal Inquiry will also consider the permanent exemptions.

The government is proposing to create new permanent exemptions while the existing exemptions are under review. This piecemeal approach to anti-discrimination law reform is unacceptable. The Bills should be withdrawn and all matters related to religious freedom, including the appropriateness of existing exemptions, should be addressed together.

Question 7: Trade, Business and Human rights

A lack of respect for human rights by private sector actors is a key barrier to the promotion and protection of human rights in Australia and around the world. Governments are required to take action to prevent others, including businesses, from breaching human rights. Businesses have a significant impact on human rights, particularly in their capacity as employers. As outlined above, there is overwhelming evidence of significant, systemic corporate non-compliance with workplace laws by companies and company directors in Australia. For example, the Fair Work Ombudsman has found a non-compliance rate of 72% in the food, restaurants and cafes industry and 48% in the textile, clothing and footwear industry.[96] In the Queensland, NSW and Victorian retail and hair and beauty industries, 55% of employers have been found to be in contravention of industrial laws.[97] During the Harvest Trail inquiry into the horticulture sector, over half of the businesses in the industry were found to be breaching industrial laws, with the full extent of worker underpayments estimated to be significantly higher.[98] The government's Modern Slavery Act

[96] https://www.fairwork.gov.au/how-we-will-help/helping-the-community/campaigns/national-campaigns/fast-food-restaurants-and-cafes-campaign
[97] Fair Work Ombudsman, National Hair and Beauty Campaign 2012-13 Final report, July 2013
[98] Fair Work Ombudsman, Harvest Trail Inquiry 2018: A report on workplace arrangements along the Harvest Trail, 4

imposes only a reporting requirement, which relates to slavery only.[99] Legislation should be passed to require Australian businesses to conduct due diligence to identify, prevent and mitigate all adverse human rights impacts of their operations, with strong enforcement and compliance mechanisms applicable.

While there are United Nations' Guiding Principles on Business and Human Rights, there is currently no legally-binding global treaty requiring business to conduct proper due diligence on the human rights and environmental impacts of their operations and supply chains. To address this gap, in June 2014, the UN Human Rights Council established an Intergovernmental Working Group to develop a legally binding instrument to regulate the activities of transnational corporations and other business enterprises. We understand that after many years of delay and opposition, discussions are now progressing well. The Australian government should publicly express its commitment to the completion of this treaty.

It is crucial that trade is conducted in a way which respects human rights. The Australian government should undertake mandatory, independent human rights assessments of trade agreements before they are signed by Australia, and make these assessments publicly available. The assessments should include the projected costs and benefits of any trade agreement, including economic, regional, social, gender, cultural, regulatory and environmental impacts. The Australian government should seek to protect workers' rights, raise wages and improve living standards in all its trade negotiations. Australia should only sign up to trade agreements that contain labour chapters protecting at least the eight fundamental ILO conventions,[100] with agreed arbitration processes and binding trade or economic sanctions in cases of abuse, with capacity-building support provided to strengthen industrial relations regimes. Trade agreements which include the capacity for corporations to sue governments for taking steps to protect the human rights of their citizens (such as improving the minimum wage or reducing exploitation) should never be supported.[101]

Conclusion

The ACTU strongly supports reform to strengthen Australia's human rights framework and would be happy to provide further information on any aspect of this submission.

[99] https://www.actu.org.au/actu-media/media-releases/2018/bill-too-weak-to-eradicate-modern-slavery
[100] ILO Declaration on Fundamental Principles and Rights at Work 1998
[101] https://www.actu.org.au/media/1385731/actu-release-191021-ftas.pdf

address

ACTU

Level 4 / 365 Queen Street

Melbourne VIC 3000

phone

1300 486 466

web

actu.org.au

australianunions.org.au

ACTU D No.

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