

Working for business.
Working for Australia

Religious Freedoms Reforms

Submission to the Attorney
General's Department

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Chamber of Commerce
and Industry

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1. INTRODUCTION

- 1 The Australian Chamber of Commerce and Industry (ACCI) welcomes the opportunity to make a submission in response to the Attorney-General's Department public consultation on a package of three draft Bills that the Department describes collectively as the 'Religious Freedom Bills'. The Religious Freedom Bills comprise drafts of the:
 - (a) *Religious Discrimination Bill 2019* (Cth) (the Bill).
 - (b) *Religious Discrimination (Consequential Amendments) Bill 2019* (Cth) (the Consequential Amendments Bill).
 - (c) *Human Rights Legislation Amendment (Freedom of Religion) Bill 2019* (Cth) (the Freedom of Religion Bill).
- 2 ACCI supports well-designed anti-discrimination laws with clear duties that balance the interests of all parties, as the legislative element of wider societal efforts to support a more diverse and discrimination free Australia. As with long standing grounds such as sex, race and disability, Australian employers oppose discrimination on the basis of a particular religious belief or activity and on the basis of an absence of religious belief or activity.
- 3 ACCI notes the objectives of the proposed legislation. ACCI intends to limit this submission on the proposed reforms to those where there may be a potential impact on employers, including their ability to manage both their business and their employees.

2. RELIGIOUS BELIEF OR ACTIVITY

- 4 As with any protected attribute in anti-discrimination law, a workable definition, that is clearly defined and has appropriate limits of what is, and what is not a protected attribute is highly desirable, and critical to the legislation delivering on its stated purpose, being effective, and avoiding unintended consequences. This is particularly the case for employers, who are expressly obliged to ensure that they do not directly or indirectly engage in conduct or behaviours which may be deemed discriminatory.
- 5 The Bill seeks to make discrimination on the grounds of religious belief or activity unlawful in specific areas of public life. Accordingly, what constitutes 'religious belief or activity' has significant implications for both those who receive protections under the Bill, and those who the Bill seeks to impose obligations on, and who must conduct their activities going forward to not contravene any additional or extended application of anti-discrimination requirements.
- 6 Clause 5 of the Bill defines 'religious belief or activity' as:
- (a) holding a religious belief; or
 - (b) engaging in lawful religious activity; or
 - (c) not holding a religious belief; or
 - (d) not engaging in, or refusing to engage in, lawful religious activity.
- 7 Whilst ACCI recognises and appreciates that the Bill has adopted a broad definition to try to ensure that 'religious beliefs and activities' of all religions are captured by the Bill, the lack of definition of 'religion' itself and the circular nature of the definition of 'religious belief and activity' may prove problematic for employers (and others subject to the proposed legislation) who will assume new obligations under the new anti-discrimination laws. Particularly as the explanatory statement to the Bill highlights that the Bill is intended to capture "small and even emerging faith traditions".
- 8 As these terms are not adequately defined in the Bill, employers, in trying to determine whether an employee has a legitimate purported religious belief or activity, will need to rely on the High Court decision in *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)*¹ (Scientology case) in order to determine what constitutes a 'religion'. In the Scientology case Mason ACJ and Brennan J suggested that the word 'religion' has the following meaning:

[T]he criteria of religion are twofold: first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief, though canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion. Those criteria may vary in comparative importance, and there may be a

¹ (1983) 154 CLR 120

different intensity of belief or of acceptance of canons of conduct among religions or among the adherents to a religion.

- 9 The reliance on High Court authority instead of a set definition in the Bill will present a challenge for employers in trying to navigate their obligations and objectively establish what is and what is not a 'religious belief or activity'. It will also present difficulties for legal advisers.
- 10 For example the High Court's definition of 'religion' appears to not capture an indigenous employee's activities in respect of indigenous spirituality which has existed for thousands of years but could nonetheless capture another employees activities in respect of an esoteric or emerging religion, the bona fides of which are yet to be established. The burden of trying to determine whether or not a purported religious belief or activity is "legitimate" rests with the employer which appears in some cases set to result in unnecessary conflict and controversy in workplaces.
- 11 In addition, the Bill does not provide guidance to employers on the meaning of 'religious activity' aside from the circular definition in clause 5. This will be problematic for employers who will again be required to make an objective assessment on an area upon which even religious groups have disagreements, when trying to determine whether a particular activity or practice constitutes a religious activity or something more cultural in nature. The operation of new law in this area would seem to be most effective if employers are not tasked with making theological judgements that both courts and theologians find difficult.
- 12 Finally, the lack of an effective / sufficient definition of what constitutes a 'religious belief' for the purposes of the legislation is further aggravated for employers by the fact that there are already differences between the scope of what is defined as 'religious belief' across the various pieces of existing State and Territory legislation, regardless of the fact that naturally the quality and value of religious belief to a person does not change across State and Territory jurisdictions. This issue seems to be compounded by the somewhat circular definition provided in the Bill.
- 13 ACCI considers that clarity of responsibility is critical to supporting compliance, and in particular efforts to see more Australians able to work free from forms of discrimination our lawmakers deem unacceptable. Therefore in order to address some of the issues that are likely to stem from the currently proposed definition of 'religious belief or activity' in clause 5, ACCI suggests that the definition in parts (a) and (b) be expanded to provide for the following additional words (underlined):
 - (a) genuinely holding a religious belief; or
 - (b) engaging in lawful religious activity that is in accordance with the doctrines, tenants, beliefs or teaching of a religion; or
 - (c) not holding a religious belief; or

(d) not engaging in, or refusing to engage in, lawful religious activity.

- 14 These changes would bring the definition of ‘religious belief’ into line with the intention of the clause as described in the explanatory statement, *“the term religious belief is intended to capture genuine religious beliefs. It is not intended to capture, for the purposes of this Act, beliefs caused by mental illness or which are motivated by criminal intent.”*
- 15 The amendments proposed to clause 5 will also bring the definition of ‘religious belief or activity’ in line with the practices of religious bodies as established in clause 10 of the Bill.
- 16 Making these small changes will greatly assist both employers and employees in better determining what may constitute a ‘religious belief or activity’ for the purposes of ensuring those who the Bill seeks to protect are adequately captured, whilst still recognising that the concept of ‘religion’ may not be able to be exhaustively captured in a prescriptive definition. The changes would also better accord with the capacities of employers to apply / work within the new requirements.

3. EMPLOYER CONDUCT RULES – RELEVANT EMPLOYER

- 17 Under subclause 8(3) of the Bill ‘relevant employers’ (as defined in clause 5 of the Bill) are prohibited from imposing or proposing to impose conduct rules onto employees that restrict employees from making a statement of religious belief outside of work, unless necessary to avoid unjustifiable financial hardship.
- 18 ACCI is concerned with this subclause of the Bill as it prevents large sector organisations with annual revenue of \$50 million or more, from imposing reasonable conditions with respect to statements of belief made by an employee outside of the performance of work.
- 19 Whilst ACCI notes the different views of business of differing sizes, ACCI is particularly committed to ensuring the needs and interests of small to medium sized business are taken into account. For this reason, ACCI strongly commends the decision to not apply this requirement any further, instead limiting it to businesses with revenue of at least \$50 million.
- 20 Federal discrimination law should be sensitive, balanced and proportionate to the size and capacities of businesses. Businesses are not homogenous, and measures to combat discrimination need to take this into account. In particular, the circumstances of smaller and medium-sized businesses without recourse to in-house or external lawyers need to be taken into account in framing and implementing the law, and what our laws ask of particular businesses.
- 21 Differential treatment for smaller business already exists in many other areas of federal regulation, including the *Fair Work Act 2009* (Cth) and the *Privacy Act 1988* (Cth), and in a number of state schemes.
- 22 A differential approach is particularly prudent in the current Bill in light of the fact that there are not any commensurate protections for small businesses to be able to manage their business operations without the threat of being drawn into expensive and time-consuming legal action by a potential litigant in respect of such claims.

Public sector agencies

- 23 ACCI notes that the definition of a ‘relevant employer’ for the purposes of subclause 8(3) of the Bill excludes any organisation, however large, that is “a body established for a public purpose by or under a law of the Commonwealth, a State or a Territory”.
- 24 The explanatory statement states this exclusion is intended to capture “departments of state as well as agencies, statutory bodies and other government entities such as government-controlled corporations, regardless of whether the entity is or is not a body corporate”.
- 25 The stated rationale for this is “the proper functioning of representative government relies on an impartial, apolitical public service”, and “to protect the unique qualities of public service”.

- 26 This exclusion in the Bill is problematic for several reasons. These include the fact that in many instances government agencies and entities delivering services are doing so on a for profit basis in direct competition with private sector providers.
- 27 For example Australia Post, the government-owned business established under the *Australian Postal Corporations Act 1989* (APC Act), is very arguably a ‘*body established for a public purpose*’, as the APC Act in section 27 establishes Australia Post’s community service obligations which include the principle purpose of providing a letter postal services, reasonably accessible for all Australians, on an equitable basis, wherever they reside or carry on business.
- 28 Australia Post provides its postal goods and services (with the sole exception of letters up to 250 grams) in fully competitive markets. Its competitors include such large private companies as Fedx, Allied Express, DHL, and Fastway Couriers, all of whom had revenues in excess of \$50 million last financial year.
- 29 With its own revenue in excess of \$6.8 billion in the 2017/2018 financial year, were it not for the exclusion in the definition of relevant employers in clause 5, Australia Post would clearly be deemed a relevant employer subject to the conditions set out in subclause 8(3) alongside many of its major competitors.
- 30 In cases such as Australia Post, where a government corporation is almost entirely operating in fully competitive markets for profit, it seems extremely difficult to establish a need for the public to have faith in the impartiality of Australia Post employees as a justification for why Australia Post should receive a market advantage over other private sector businesses performing the exact same service.
- 31 For this reason ACCI strongly recommends that the exclusion in subclause 8(3) be removed or amended so as to not apply to bodies established for a public purpose under a law of the Commonwealth, State or a Territory where the body is substantially operating in a fully competitive market.

4. INDIRECT DISCRIMINATION –VILIFY

- 32 Under subclause 8(4)(b) of the Bill, a statement of belief that would “vilify” is not protected speech, however the term “vilify” is not defined in the Bill.
- 33 The explanatory statement suggests that the term is intended to allow employers to “legitimately restrict their employees’ religious expression where it may cause harm to a person, group of persons or the community at large”, however without further explanation or definition, the threshold for employers in such instances of potential vilification is decidedly unclear.
- 34 To address this concern we recommend amending the Bill to include a definition of vilify similar to that found in the *Anti-Discrimination Act 1977 (NSW)* which defines vilification as “*a public act to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons*” because of a certain characteristic they possess.

5. TEST FOR DISCRIMINATION – KNOWLEDGE OF PROTECTED ATTRIBUTE

35 Clause 13 of the Bill provides that it is unlawful for an employer to discriminate against an employee or prospective employee ‘on the grounds’ of religious belief or activity. The meaning of ‘grounds’ is defined broadly in clause 6 of the Bill.

36 In other similar federal discrimination laws (such as under the *Disability Discrimination Act 1992*) it has been well established that the expression ‘on the grounds of’ requires a causal connection between the necessary attribute (in this case religious belief or activity) and any less favourable treatment accorded to the aggrieved person. It does not, however, require an intention or motive to discriminate on the part of the accused. As McHugh and Kirby JJ concluded in *Purvis v New South Wales*²:

“While it is necessary to consider the reason why the discriminator acted as he or she did, it is not necessary for the discriminator to have acted with a discriminatory motive. Motive is ordinarily the reason for achieving an object. But one can have a reason for doing something without necessarily having any particular object in mind.”

37 However unlike many other protected attributes in other federal discrimination laws, a person’s religious belief or activity, in many cases, may not be readily apparent to the relevant duty holder (e.g. the employer) either because the person alleging the discrimination has not disclosed to their employer that they possess the necessary religious belief or activity attribute, or because it is not otherwise apparent or obvious to the employer that they possess the religious belief or activity (attribute) which is the subject of the complaint.

38 This is particularly the case in respect of a person’s ‘religious belief or activity’ because of the sheer range and diversity of different and varying types of religions and religious practices which may constitute a person’s ‘religious belief or activity’. Many of which an employer may not only be unaware of but also have no understanding or appreciation of any associated religious practices.

39 As a result it is highly foreseeable that an employer may unintentionally engage in an activity which may constitute either direct or indirect religious discrimination under clause 13 of the Bill, without any awareness or understanding as to why and how they have breached the anti-discrimination laws.

40 It is unfair to impose legal liability on a person in such circumstances where they honestly do not know that another person possesses a religious belief or is engaging in a religious activity, or how particular conduct may offend against such beliefs.

² (2003) 217 CLR 92

- 41 To address this issue of causation in the context of employment, we suggest that either a defence or exemption be provided where an alleged wrongdoing employer did not know or could not have possibly known that an employee possessed the necessary religious belief or activity attribute, at the time of the contravention.
- 42 The onus of establishing this would lie with any defendant, meaning that they would still need to be able to satisfy a court to the requisite evidentiary standard that they did not possess the relevant mental state in order to rely upon this defence or exception.

6. ORDERS, DETERMINATIONS AND INDUSTRIAL INSTRUMENTS

- 43 Clause 30 of the Bill provides a general exemption from the prohibition on discrimination for conduct “necessary to comply with” a fair work instrument, amongst other things.
- 44 As the explanatory statement suggests the exemptions provided in this clause are broadly consist with existing exemptions in the *Age Discrimination Act 2004* (Cth), the *Disability Discrimination Act 1992* (Cth) and the *Sex Discrimination Act 1984* (Cth).
- 45 The explanatory statement provides an example of such an exemption where an employer relying on an award provision directs employees to take annual leave over the Christmas period for non-public holidays.
- 46 Whilst ACCI supports the intention of this clause, the example provided and comments in the explanatory statement regarding comparable Acts highlights a possible flaw in the wording currently proposed in the Bill, which suggests that it currently may not reflect the intention of the clause.
- 47 This is due largely to the inclusion of the word ‘necessary’ which has replaced the words “in direct compliance with” which currently appear in each of the other federal discrimination Acts which the clause is broadly based upon.
- 48 The effect of this change is best explained by reference to the example provided in the explanatory statement. Whilst many fair work instruments confer a right on employers to direct employees in certain circumstances to take annual leave, the option is typically a choice to make such a direction, at the discretion of the employer. Therefore not an action that can be described as in fact ‘necessary’ in order for an employer to be compliant with the fair work instrument.
- 49 As a result, the current wording of clause 30 may in certain circumstances lead to an anomaly in the application of the Bill that does not currently exist in the application of all other federal discrimination laws with comparable exemptions.
- 50 ACCI therefore recommends that this clause of the Bill be amended in order to either reflect the current wording in other existing federal anti-discrimination acts, such that “necessary to comply with” be replaced with “in direct compliance with” or that the word ‘necessary’ be removed from the clause so that it may read “if the conduct constituting the discrimination is in compliance with any of the following”.

7. OFFENCES

- 51 Clause 43 sets out two offences in respect of victimisation, both of which are punishable by a penalty of imprisonment for up to 6 months or 30 penalty units, or both.
- 52 The explanatory statement suggests that these penalties are consistent with analogous offences under existing anti-discrimination legislation, however as the following table indicates, the penalties under the Bill are the highest of all penalties when compared with analogous conduct under existing federal anti-discrimination legislation.

ACT	OFFENCE	SECTION	PENALTY
Religious Discrimination Bill 2019	Victimisation	Clause 43	Imprisonment for 6 months or 30 penalty units, or both.
Disability Discrimination Act 1992	Victimisation	Section 42	Imprisonment for 6 months
Age Discrimination Act 2004	Victimisation	Section 51	Imprisonment for 6 months
Sex Discrimination Act 1984	Victimisation	Section 94	25 penalty units or imprisonment for 3 months, or both (for a person) 100 penalty units (for a body corporate)

- 53 Absent any prevailing reasons why the present Bill should attract the highest penalty of all the federal anti-discrimination laws, ACCI recommends aligning the penalty under clause 43 with existing federal anti-discrimination legislation.

8. OVERLAPPING REGULATION

- 54 Federal anti-discrimination law should be clear and avoid complexity and be readily understandable by the community. This is important not only for those who receive protections under the laws, but importantly, for those who the legislation imposes obligations on. Anti-discrimination law must be clearly expressed so that employers can readily identify and comply with their obligations.
- 55 As the Australian Human Rights Commission recently acknowledged in their Discussion Paper on the Priorities for Federal Discrimination Law “the mix of discrimination laws is complex and similar concepts operate differently across the laws” and “there is an unnecessary level of difference and complexity between federal, state and territory laws”.
- 56 Further as the explanatory statement to the exposure draft of the Religious Discrimination Bill 2019 also notes “current protections in Commonwealth, state and territory laws for discrimination on the basis of a person’s religious belief or activity are piecemeal, have limited application and are inconsistent across jurisdictions.”
- 57 ACCI agrees with both these assessments - the current overlap of various federal, state and territory anti-discrimination legislation regimes in this country is complex and confusing.
- 58 Each of the jurisdictions have laws with different names, a different structure, different grounds, different procedures, and different decision-making bodies.
- 59 At the federal level, in addition to the current five discrimination statutes, there is significant duplication in anti-discrimination legislation through workplace laws such as the general protection regime in Part 3-1 of the Fair Work Act which prevents an employer from taking adverse action against an employee or prospective employee on the basis of a number of protected attributes which include ground like a person’s religion, race, age, sex etc.
- 60 Overlap also occurs as a result of anti-discrimination matters being able to be pursued under common law, contract, tort, equity and unfair dismissal laws.
- 61 The complexity of the relationship between these differing jurisdictions, laws and subsequent obligations is extremely daunting and overwhelming for employers, particularly those running small businesses. This is exacerbated because applying a general understanding of common sense and good intentions is not sufficient to ensure employers will not fall foul of the law.
- 62 Effective anti-discrimination legislation is an important element in removing barriers to greater inclusion and participation in society. However, there can be no justice where those subject to the law cannot understand their obligations or what is required of them.
- 63 Anti-discrimination law across the country should be clear and easy to understand because a person should not require expensive legal advice to know their rights and obligations.

- 64 Existing issues however will likely only be multiplied if another Federal law is placed on top of the current state and territory legislation without any attempt to address the duplication of laws and complexity in the broader anti-discrimination system. This is particularly the case under the current Bill as clause 60 makes clear that it is not intended to exclude or limit the operation of a law of a state or territory anti-discrimination law to the extent that it can operate concurrently with the Bill.
- 65 It is possible that enacting the final form of the Bill may give impetus to state and territory jurisdictions to amend their various pieces of anti-discrimination legislation, but it is also possible that some jurisdictions might seek to raise the bar to restore or gain some form of misplaced 'competitive advantage' over the national system. The reality is that where there are multiple systems of redress there will be forum shopping. Complainants are naturally going to assess which system is best for their chances.
- 66 It is well accepted that better understanding of the law has a positive impact on compliance. ACCI therefore recommends that strong consideration be given to ways to promote greater consistency and harmonisation between the Federal and State and Territory jurisdiction and to timing such moves to coincide with the commencement of the enacted version of the Bill.
- 67 ACCI strongly suggests that federal, state and territory governments move to harmonise anti-discrimination laws, as it would not only reduce the regulatory burden but drive greater efficiencies and improved productivity outcomes by reducing compliance costs for individuals and businesses, particularly small businesses.
- 68 We recommend that in light of considerations raised by this legislative exercise, a positive harmonisation of state and national anti-discrimination law be placed on the agenda of the Council of Attorneys General and / or that this be referred to the Australian Law Reform Commission for report and recommendations.

9. ABOUT THE AUSTRALIAN CHAMBER

The Australian Chamber of Commerce and Industry is the largest and most representative business advocacy network in Australia. We speak on behalf of Australian business at home and abroad.

Our membership comprises all state and territory chambers of commerce and dozens of national industry associations. Individual businesses are also able to be members of our Business Leaders Council.

We represent more than 300,000 businesses of all sizes, across all industries and all parts of the country, employing over 4 million Australian workers.

The Australian Chamber strives to make Australia the best place in the world to do business – so that Australians have the jobs, living standards and opportunities to which they aspire.

We seek to create an environment in which businesspeople, employees and independent contractors can achieve their potential as part of a dynamic private sector. We encourage entrepreneurship and innovation to achieve prosperity, economic growth and jobs.

We focus on issues that impact on business, including economics, trade, workplace relations, work health and safety, and employment, education and training.

We advocate for Australian business in public debate and to policy decision-makers, including ministers, shadow ministers, other members of parliament, ministerial policy advisors, public servants, regulators and other national agencies. We represent Australian business in international forums.

We represent the broad interests of the private sector rather than individual clients or a narrow sectional interest.

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CHAMBER



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