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Religious Freedoms Bills – Second Exposure Drafts

Submission to the Attorney General's Department

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Australian
Chamber of Commerce
and Industry

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1. INTRODUCTION

1 The Australian Chamber of Commerce and Industry (ACCI) welcomes the opportunity to provide a further submission in response to the Attorney-General's Department public consultation on the second exposure drafts of the proposed religious freedoms legislation.

2 ACCI welcomes the revised versions of the proposed federal religious discrimination legislation. 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 Whilst ACCI encourages the Government to give further consideration to the matters raised in our first submission but not yet addressed, in making this submission on the second exposure draft, ACCI does not intend to comment again on these issues. Instead this further submission is limited to providing comment on the proposed amendments contained in the second exposure draft that may impact on employers, including both their ability to manage their business and their employees and comply with our laws.

2. INDIRECT DISCRIMINATION – EMPLOYER CONDUCT RULES

4 ACCI's first submission of 2 October 2019 highlighted concerns around subclause 8(3) of the Religious Discrimination Bill 2019 (Bill), which prevented large private sector organisations with an annual revenue of $50 million or more from imposing reasonable conditions with respect to statements of belief made by an employee '*other than when the employee was performing work on behalf of the employer*' unless necessary to avoid unjustifiable financial hardship.

5 Our first submission commended the decision to not apply this requirement to small and medium businesses whose revenue does not exceed $50 million. Consistent with this, we again commend the recognition that Federal discrimination law should be sensitive, balanced and proportionate to the size and capacities of businesses by maintaining this position. 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.

6 Maintaining this differentiated approach in the second exposure draft is particularly prudent 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.

7 We note that subclause 8(3) of the Bill has been improved through an amendment in the second exposure draft such that 'relevant employers' (as defined in clause 5 of the Bill) are now prohibited from imposing or proposing to impose conduct rules onto employees that restrict employees from making a statement of religious belief '*other than in the course of the employee's employment*'.

8 This is a sensible amendment which recognises that a number of laws governing the employment relationship, such as in work health and safety law and workers' compensation law, extend obligations beyond the time that an employee is performing work to other related activates such as meal breaks and social functions.

9 However, in order to ensure consistency with workplace relations laws and practice this provision should be further amended so as to apply to statements of belief made by an employee "*other than in connection with an employee's employment*'.

10 Such an amendment would bring the Bill into line with existing workplace relations case law[1] which recognises that employee behaviour, even where it occurs outside the course of an employee's employment, can be so connected to an employee's employment that it can have an impact on an employer's business interests and/or on other employees.

11 As the then Australian Industrial Relations Commission recognised in *Rose v Telstra Corporation*[2] the circumstances in which 'out of hours' conduct might constitute a valid reason for dismissal include cases where the conduct, viewed objectively, is likely to cause serious damage to the relationship between an employer and the employee, is likely to damage the employer's interests, or is incompatible with the employee's duties as an employee.

12 For example, the courts have recognised the following employee behaviour as 'in connection' to an employee's employment:

a. An employee working in the alcohol industry, which has publicly committed to the promotion of responsible drink' being caught drinking/consumption of alcohol driving.[3]

b. An employee working in the banking industry being found guilty of committing fraud offences in their private time.[4]

[1] See Kolodjashnij v J Boag and Son [2010] FWAFB 3258; Hussein v Westpac Banking Corporation (1995) 59 IR 103; Wickham v Commissioner of Police [1997] SASC 6497
[2] [1998] AIRC 1592
[3] Kolodjashnij v J Boag and Son [2010] FWAFB 3258
[4] Hussein v Westpac Banking Corporation (1995) 59 IR 103

c. A member of the police force being disciplined for behaviour in their private time which is "patently inconsistent with the desirable character of a police officer".[5]

13 As Commissioner Deegan observed in the first instance of *Kolodjashnij v J Boag* and Son[6]:

> "*A manufacturer of weapons or fireworks would have a legitimate interest in ensuring that its employees did not use its products in a manner which was contrary to law, might bring the product into disrepute or could contribute to the case for greater restriction on sales or even complete prohibition of the product. In my view the same applies to a manufacturer of alcohol*."

14 In addition, this amendment would bring the Bill into line with other Federal and State Discrimination Laws[7] which provide that an employer is vicariously liable for conduct outside of working hours which is "in connection" with the employment of an employee, except in circumstances where the employer has taken all reasonable steps to prevent the conduct occurring.

3. STATEMENTS OF BELIEF CONSTITUTING DISCRIMINATION

15 Section 42 of the Bill states that a statement of belief made in good faith in and of itself does not constitute discrimination for the purposes of any anti-discrimination law (within the meaning of the *Fair Work Act 2009*). The accompanying explanatory memorandum suggests that this clause protects statements of belief from the operation of certain anti-discrimination laws by ensuring that a person may express their religious beliefs in good faith regardless of other laws that might have otherwise made that statement unlawful.

16 However the explanatory statement also makes clear that this provision only captures expressions of a person's religious belief, it does not capture any form of behaviour beyond the making of a statement, such as employment decisions and any associated conduct that may constitute discrimination. In addition, it does not affect the ability of a complainant to bring statement of belief forward as evidence in support of a discrimination complaint concerning conduct.[8]

17 Issues of discrimination in relation to employment are typically raised through the general protections provisions of the *Fair Work Act 2009* which prohibit adverse action against an employee or prospective employee because of the person's race, colour, sex, sexual preference, age, physical or mental disability, marital status or carer responsibilities, pregnancy, religion or political opinion, national extraction or social origin. Importantly, the adverse action provisions carry a reverse onus of proof, meaning where an employee

[5] Wickham v Commissioner of Police [1997] SASC 6497
[6] [2009] AIRC 893
[7] See s 106 of the Sex Discrimination Act 1984 (Cth); s 104 Anti-Discrimination Act 1998 (Tas); Equal Opportunity Act 1984 (WA) s 161(1); Anti-Discrimination Act (NT) s 105(1).
[8] See explanatory memorandum paragraphs 533 to 555.

alleges that adverse action has been taken for a prohibited reason or with a particular intent, the courts will presume that this is the case unless the employer can prove otherwise.

18 This potentially creates a serious issue for employers in cases where one of their employees makes a statement of belief outside work that is protected by the Bill, but does not protect the employer against a general protections claim which brings the said statement of belief forward as evidence in support of a discrimination complaint concerning subsequent conduct by that employee.

19 For example, it is entirely foreseeable that an employee may make a statement of belief outside work that expresses views founded in religious beliefs or even through the quoting of religious texts which may convey views about particular genders or sexual preferences. Section 42 of the Bill would protect the employee making such a statement from any discrimination claim. However, if that same employee was subsequently involved in a decision regarding another employee (e.g. a decision regarding promotion, disciplinary action, dismissal, pay and work conditions etc.) that statement made outside of work could be used as evidence in support of a discrimination complaint against the employer. With the reverse onus of proof in the adverse action regime, the usual evidentiary requirements that the employee might otherwise have faced in making out such a claim are absent. Leaving the employer with the burden of proving that the decision made by the employee (who made the religious belief statement outside of work) was not (in whole or in part) based upon the employee's sex or sexual preference.

20 This places employers in a potentially perilous, invidious and very expensive position. They are unable to restrict the public comments made by the employee but potentially become liable because of those comments due to actions subsequently taken within the workplace by the same employee. Problematically, any risk mitigation steps taken by the employer to remove the employee who made the statement of belief outside of work from the decision making process would also potentially see the employer facing an adverse action claim for altering the position of the employee to his or her prejudice because of their religious beliefs.

21 This issue could in part be addressed by adopting the recommendation set out in Part 2 of this submission, with respect to amending the Bill so that it adequately addresses employer statements made in connection with an employee's employment.

4. DEFINITION OF 'VILIFY'

22 ACCI welcomes the amendment made to section 5 of the Bill to define the term "vilify" to mean "incite hatred or violence".

23 Whilst the Bill has been improved with the inclusion of this definition, ACCI considers the Bill could be even further improved by adopting a 'vilify' definition which is more closely aligned with the vilification provisions already contained in various state discrimination laws

that include conduct that incites 'serious contempt' and 'severe ridicule', as well as acts which incite hatred or violence'.[9]

24 It is well accepted that better understanding the law has a positive impact on compliance. Better aligning the definition of vilify with existing state law definitions would provide improved clarity for employers of the applicable threshold in instances of potential vilification through the harmonisation of terminology across state and federal legislation. This will not only reduce the regulatory burden for those employers and employees who must comply with the Bills changes, but will also aid in driving great efficiencies and improved productivity outcomes by reducing compliance costs for individuals and businesses, particularly small businesses.

25 We note that harmonisation of terminology has been a recent goal of discrimination laws. For example, in October last year the Australian Human Rights Commission Regulations 2019 were amended to replace the three disability-related grounds (impairment, mental, intellectual or psychiatric disability, and physical disability) with a single ground of 'disability', as defined in the Disability Discrimination Act 1992 (Cth), intended to align the concept of disability discrimination with the terminology adopted in the Disability Discrimination Act 1992 (Cth).[10] ACCI commends this approach and recommends it also be taken in relation to the definition of "vilify" in this Bill.

5. OBJECT CLAUSE

26 Amended Clause 3 of the Bill provides for "the indivisibility and universality of human rights, and their equal status in international law" and a recognition that "every person is free and equal in dignity and rights".

27 This change is consistent with international instruments that do not recognise a hierarchy of rights, as well as with the Siracusa Principles[11] which established that when drafting laws that would limit the right to freedom of religion consideration should be given to the use of objects, purposes or other interpretive clauses in anti-discrimination legislation to reflect the equal status in international law of all human rights, including freedom of religion.

28 Given this change also reflects Recommendation 3 of the Expert Panel Report on Religious Freedom led by Chair the Hon Phillip Ruddock we believe this is an appropriate amendment to the Bill.

[9] Anti-Discrimination Act 1977 (NSW), ss 20C(1) and 20D(1). See also Discrimination Act 1991 (ACT), ss 66(1) and 67(1); Anti Discrimination Act 1991 (Qld), ss 124A and 131A; Racial Vilification Act 1996 (SA), s 4; Civil Liability Act 1936 (SA), s 73; Anti Discrimination Act 1998 (Tas), s 19; and, Racial and Religious Intolerance Act 2001 (Vic), s 7(1).
[10] Explanatory Memorandum, Australian Human Rights Commission Regulations 2019
[11] United Nations Commission on Human Rights, Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, UN Doc E/CN.4/1985/4 (28 September 1984) A.1, A.3.

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6. COURTS' ROLE IN MATTERS OF FAITH - RELIGIOUS BELIEF OR ACTIVITY

29 The revised Bill makes clear that the courts, in considering whether a person or body is covered by the religious discrimination protections in the Bill, will need to consider whether a person of the same religion as the religious body or person "*could reasonably consider the act to be in accordance with the doctrines, tenets, beliefs or teachings of that religion*".

30 The summary of amendments to the Bill since the first exposure draft states that the addition of a person of the same religion is in recognition of the fact that "*religious bodies have a wide margin of appreciation about how they conduct themselves in accordance with their faith, which is not well-suited to judgment by a court. The objective test in this amendment means courts will not be involved in deciding what the doctrines of a particular religion require*."

31 What constitutes the doctrines of a particular religion otherwise known in the Bill as a person's 'religious belief or activity' has significant implications for not only those who receives protections under the Bill, but also for 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 our anti-discrimination laws.

32 This amendment recognises and addresses the difficulty faced by courts in making judgements about whether a particular act is in accordance with the doctrines, tenets, beliefs or teachings of a particular religion. Given this, we strongly recommend that a similar amendment be made to the Bill which recognises and addresses the analogous dilemma faced by employers in ensuring that they do not directly or indirectly engage in conduct or behaviour which may be deemed discriminatory on the basis of religion because of a lack of understanding about a particular employee's religious tenant, belief or teaching.

33 Without such an amendment, the burden of trying 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 will continue to rest with an employer, despite the Bill now expressly recognising that such an objective consideration is "*not well-suited to judgment by a court*".

34 This is particularly important in light of the ongoing lack of definition of 'religion' itself and the circular nature of the definition of 'religious belief and activity' which is likely to 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".

35 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.

36 This is particularly an issue in respect of religious discrimination laws, as unlike many other protected attributes a person's religious belief or activity, in many cases, may not be readily apparent to their employer either because the person has not disclosed to their employer that they are or are not of a certain faith, because it is not otherwise apparent or obvious to the employer that they possess or engage in the religious belief or activity or because an employer does not have any understanding of associated religious practices.

37 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 the Bill, without any awareness or understanding as to why and how they have breached the anti-discrimination laws.

38 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 this issue ACCI suggests that the definition in Section 5 part (b) be expanded to provide for the following additional words to the definition of religious belief or activity (underlined):

(a) holding a religious belief; or

(b) engaging in lawful religious activity <u>that could reasonably be considered to be in accordance with the doctrines, tenants, beliefs or teaching of an established or accepted religion</u>; or

(c) not holding a religious belief; or

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

39 In addition, and in line with ACCI's submission on the first exposure draft, we continue to see a clear need for either a defence or exemption to be provided in employment situations where an alleged wrongdoing employer did not know or could not have possibly known than an employee possessed the necessary religious belief or activity attribute, at the time of the contravention. Similarly this defence or exemption should cover any vicarious liability obligations imposed on an employer with respect to actions by employees.

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

41 Making these changes will greatly assist both employers and employees in objectively 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 still not 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.

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7. CONSOLIDATION OF RELIGIOUS DISCRIMINATION LAWS

42 ACCI refers to the comments in our submission on the first exposure draft of the Bill and continues to encourage the Government to give further consideration to the complexity caused by differing jurisdictions, laws and obligations.

43 Each of Australia's differing state, territory and federal jurisdictions have anti-discrimination legislation regimes with different names, different structures, different grounds, different procedures, and different decision-making bodies. This current overlap is complex and confusing, particularly for those running and working in small businesses.

44 Overlap also occurs as a result of anti-discrimination matters being able to be separately / additionally pursued under common law, contract, tort, equity and general protection laws.

45 Effective anti-discrimination legislation is an important element in removing barriers to greater inclusion and participation in society. However, there can be no justice when those subject to the law cannot understand their obligations or what is required of them, and the law fails to be effective, directed and consistent (as an overlap of federal and state laws, and inconsistency between laws, clearly risks).

46 Anti-discrimination law across the country should be clearer and easier to understand because a person should not require expensive legal advice or numerous in-house lawyers to know their rights and obligations. In inherently complex and subjective factual circumstances, the law should be as clear and straightforward as possible.

47 Existing concerns, ambiguities and inconsistencies will likely only be multiplied if another federal law is placed on top of 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.

48 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.

49 ACCI therefore strongly continues to call for federal, state and territory governments to move to harmonise anti-discrimination laws, to not only reduce the regulatory burden but also to drive greater efficiencies and improved productivity outcomes by reducing compliance costs for individuals and businesses, particularly small businesses. Clarity and consistency will also send clearer signals to employers and employees on expected standards of conduct and behaviour.

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