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Religious Discrimination Bill 2021 and related bills

Senate Legal and Constitutional Affairs Committee

ACCI Submission

7 January 2022

Australian
Chamber of Commerce
and Industry

Australian Chamber of Commerce and Industry

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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 make this submission to the Senate Legal and Constitutional Affairs Legislation Committee (**the Committee**) on the Religious Discrimination Bill 2021 (**the Bill**). Any references to the Religious Discrimination (Consequential Amendments) Bill 2021 and Human Rights Legislation Amendment Bill 2021 will be separately identified.

1.1 Interest

2. Employers have a direct interest in the operation, scope and application of anti-discrimination law and associated policies and practices. In addition to widespread efforts to pursue workplace diversity and to implement contemporary organisational values, employers and businesses are the primary respondents to complaints under state, territory and Commonwealth anti-discrimination law.

3. Data from the AHRC reveals that complaints relating to business, whether in employment or in the provision of goods, services and facilities, constitute the majority of discrimination complaints:[1]

    a. Employment:

        i. 36% of Age Discrimination Act complaints.[2]
        ii. 19% of Race Discrimination Act complaints.[3]
        iii. 64% of Sex Discrimination Act complaints.[4]
        iv. 20% of Disability Discrimination Act complaints.[5]

    b. (The provision of) Goods, Services and Facilities:

        i. 38% of Age Discrimination Act complaints.[6]
        ii. 37% of Race Discrimination Act complaints.[7]
        iii. 23% of Sex Discrimination Act complaints.[8]
        iv. 39% of Disability Discrimination Act complaints.[9]

4. Discrimination law has a greater impact on businesses, whether in employment or in the provision of products, than on any specific sector or any non-commercial sphere of social interaction in our community. For instance, discrimination complaints in sport or education are comparatively rare.[10]

5. It is reasonable to anticipate that actions under federal religious discrimination legislation will follow this pattern, primarily arising in employment and in the provision of goods services and facilities by employing entities and the private sector.

[1] Australian Human Rights Commission, *2019-20 Complaint Statistics* <https://humanrights.gov.au/sites/default/files/2020-10/AHRC_AR_2019-20_Complaint_Stats_FINAL.pdf>.
[2] Ibid Table 32, 28.
[3] Ibid Table 26, 23.
[4] Ibid Table 22, 19.
[5] Ibid Table 17, 15.
[6] Ibid, Table 32, 28.
[7] Ibid Table 26, 23.
[8] Ibid Table 22, 19.
[9] Ibid Table 17, 15.
[10] See ibid.

1.2 Guiding Principles

6. ACCI supports consistent, clear, common sense, practical and navigable anti-discrimination laws that appropriately balance:

   a. The protection of individuals from discrimination at odds with societal expectations.

   b. Rights and capacities of individuals.

   c. Capacity to manage employee conduct and maintain enterprise reputation, customer service, respectful and professional workplaces etc.

7. This submission concentrates on the potential ramifications of the proposed legislation on employers, particularly regarding issues of practicality, complexity, liability and compliance. The following core principles have guided ACCI's input on the Bill.

   a. **Clarity** — less complexity improves compliance.

   b. **Practicality and common sense** – ordinary people must be able to understand the legislation without requiring legal knowledge and experience, given its wide application.

   c. **Certainty** — employers need to be able to operate their business with confidence that they are not unexpectedly falling foul of the law.

1.3 Tackle the Ambitious Reform Needed

8. The Australian community has markedly benefitted from moving to a national workplace relations framework, despite the many areas in which further reform is required. Across the past 25 years, thousands of overlapping state and federal awards, and overlapping legislation has been largely replaced with a single national system, fewer acts and far fewer instruments. This experience should be instructive in the future development of Australian anti-discrimination law.

9. Australian governments should be working to ensure that the realm of discrimination law is similarly strengthened through greater harmonisation of state, territory and Commonwealth jurisdictions, and consolidation of federal legislation.

10. There are no inherent differences in risks or exposure to discrimination between states or territories, nor substantial variations in values and community expectations. Differing state and national systems of discrimination law seem unnecessary and able to be dispensed with in favour of a single national system, harmonising law, facilitating national promotion, education, and compliance.

11. There are two substantial opportunities if not imperatives for change that are not addressed in this package of legislation, but that are raised by any proposal to add another ground specific piece of anti-discrimination legislation at the national level:

    a. The separate federal statutes that pertain to single grounds of discrimination — age,[11] disability,[12] race,[13] sex,[14] and now religion — should be consolidated into a single act that applies to multiple grounds, as exists at the state and territory level.[15]

[11] *Age Discrimination Act 2004* (Cth).
[12] *Disability Discrimination Act 1992* (Cth).
[13] *Racial Discrimination Act 1975* (Cth).
[14] *Sex Discrimination Act 1984* (Cth).
[15] *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1977* (NSW); *Anti-Discrimination Act 1996* (NT); *Anti-Discrimination Act 1991* (Qld); *Equal Opportunity Act 1984* (SA); *Anti-Discrimination Act 1998* (Tas); *Equal Opportunity Act 2010* (Vic); *Equal Opportunity Act 1984* (WA).

b. The universal application of a single Commonwealth act should be to the exclusion of any state laws and processes, converting all jurisdictional tribunals and bureaucracies into branches of a single national body and framework, which may be the Australian Human Rights Commission, or a successor to that body.

12. The legal means to facilitate such comprehensive and exclusive national legislation and bodies can be addressed separately. However, if Australia can successfully resolve the constitutional artifices and Byzantine complexities of different federal and state coverage of awards or deliver model WHS legislation, as a nation we are capable of doing so in the realm of anti-discrimination law. Australia does not need seven or more separate anti-discrimination acts, tribunals, and bureaucracies to deliver what is a largely agreed upon set of societal values and prohibited grounds for discrimination.

13. We appreciate that such ambitious reform is not the focus of this legislative package and the political challenges of enacting legislation that relates to just a single ground of discrimination, let alone all of them, but would be remiss to participate in any discussion on anti-discrimination legislation without raising the imperative for broader and more fundamental reform.

Recommendation 1

That the Attorney-General bring to the Meeting of Attorneys General (MAG) an agenda item for discussion on options to cooperatively progress towards a single national framework of anti-discrimination law in Australia.

1.4 Summary of Recommendations

14. In summary, ACCI proposes amendments to the Bill to:

a. Clarify the inherent requirements exemption. (Section 2)

b. Simplify vicarious liability. (Section 3)

c. Expand the list of factors available for consideration when determining whether a condition, requirement or practice is reasonable and therefore exempt from constituting indirect discrimination. (Section 4)

d. Ensure that employers are only liable for discrimination when a discriminatory reason was the actual cause of the conduct. (Section 5)

e. Exclude acts undertaken in direct compliance with state and territory awards, agreements, and industrial instruments from constituting discrimination. (Section 6)

f. Introduce a statutory definition of 'religion' for the purposes of discrimination law to provide greater certainty for employers. (Section 7)

g. Add an exemption to indirect discrimination for circumstances where the perpetrator lacks knowledge of the religious belief or activity. (Section 8)

h. Harmonise the penalties for victimisation offences and other provisions with existing anti-discrimination laws in Australia. (Section 9)

2. INHERENT REQUIREMENTS EXEMPTION

2.1. Clarity and Compliance

15. ACCI supports the proposed exemption to unlawful discrimination in subclause 39(2) for circumstances in which a religious belief or activity prevents the person from being able to carry out the inherent requirements of the job or position.

16. This exemption reflects those already provided by:

    a. Subsections 772(2), 153(2), 195(2), 351(2) of the *Fair Work Act 2009*,[16] relating to discriminatory termination, discriminatory award terms, discriminatory enterprise agreement terms and adverse actions respectively.

    b. Section 21A of the *Disability Discrimination Act 1992* (Cth).

    c. Section 18 of the *Age Discrimination Act 2004* (Cth).

    d. Section 9 of the *Racial Discrimination Act 1975* (Cth).

    e. Section 7B of the *Sex Discrimination Act 1984* (Cth).

17. However, ACCI is concerned at the complexity of the proposed exemption for employers.

18. While the *Fair Work Act* clearly prohibits unlawful discrimination and then exempts certain circumstances, the Bill prohibits an action in clause 19, then an exemption to the prohibition appears 20 clauses later in subclause 39(2), an exception to the exemption in the beginning of subclause 39(3) and an exception to that exception in the words succeeding the comma, for promotion and transfer.

> (3) Subsection (2) does not apply in relation to discrimination referred to in paragraph 19(2)(b) or (d) or 20(3)(a) or (c), **other than discrimination in determining who should be offered promotion or transfer.**[17]

19. Clarity and avoiding unnecessary complexity in statutes improves and supports compliance for employers and employees. Where the matter being addressed is inherently complex, subjective, and personal (in this instance theology and religious belief), it is even more important that the mechanics of anti-discrimination legislation be as simple and straightforward as possible.

20. Confusion over the scope and application of requirements can lead to paralysis, avoidance or non-compliance, directly contrary to the overall legislative intent and purpose. In an area of such broad application such as laws that relate to discrimination in employment, unnecessarily complex provisions that seek to mitigate discriminatory behaviour risk being counter effective.

21. Terminology that is used in anti-discrimination laws such as 'inherent requirement' is already not well understood by many laypersons who operate businesses, magnifying the complexity of these provisions. We urge the Parliament to avoid further complicating these concepts by not consolidating or effectively and clearly ordering and organising their application in legislation.

[16] *Fair Work Act 2009* (Cth) ('*Fair Work Act*').
[17] Religious Discrimination Bill 2021 (Cth) cl 39(3) (emphasis added).

22. Given that employers from most sectors and of all sizes would be subject to this legislation, improved clarity in this exemption is merited.

Recommendation 2

Noting that exemptions customarily appear in a later separate division in federal anti-discrimination statutes,[18] the inherent requirements exemption in subclauses 39(2)-(6) should be clarified to specifically denote which conduct referred to in clause 19 is lawful and unlawful.

2.2 The Inherent Requirements of What?

Language of the exemption

23. ACCI also has concerns about the difference in language in the exemption in subclause 39(2) compared with provisions in the *Fair Work Act*.

24. The exemption in subclause 39(2) would make it lawful for an employer to discriminate against another person on the ground of the other person's religious belief or activity if, inter alia, the person is unable to carry out 'the inherent requirements of the employment' because of that religious belief or activity.

25. Although paragraph (a) in the subclause refers to discrimination 'in connection with a position', in paragraph (b), the inherent requirements in the subclause relate specifically to 'the employment.'

26. In the *Fair Work Act*, the sub-provisions refer to 'the inherent requirements of the particular position.'

27. While this difference may initially seem minor or oblique, we are very concerned at potential unintended ramifications outlined below and clear risks of confusion, workplace disputation, unnecessary litigation and unnecessary damage to both employers and employees. We note below that the High Court has found treating such wording differences as insignificant would be a mistake.

Consistency with international law

28. The concept of inherent requirements comes from Article 1(2) of the International Labour Organisation's (ILO) *Discrimination (Employment and Occupation) Convention, 1958 (No. 111)*, which is very clear on which wording applies to exempt some acts from actionable discrimination:

> Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.[19]

29. This remains a treaty obligation on Australia, having ratified Convention 111 on 15 June 1973.

30. Where possible, ACCI believes we should minimise departure from the established international wording, which requires:

[18] *Age Discrimination Act 2004* (Cth) pt 4 div 4; *Disability Discrimination Act 1992* (Cth) pt 2 div 5.
[19] *Discrimination (Employment and Occupation) Convention, 1958 (No. 111)*, 362 UNTS 31 (entered into force 15 June 1960) art 1(2) ('Convention 111').

a. Distinctions or differences in treatment or conduct being based on 'inherent requirements' not on any looser or less proximate connection to work.

b. The inherent requirements being those of, or those in respect of, a particular job. We note the specific wording in the Bill and the omission of the word 'particular'. As set out below, this should be corrected.

Consistency with established statutory application

31. Above at Paragraph 16, we list various the various existing pieces of Commonwealth anti-discrimination legislation and their references to inherent requirements of particular jobs not constituting discrimination. Looking at these Acts in relation to the wording of requirements we see:

a. Section 21A of the *Disability Discrimination Act 1992* (Cth), refers to "the inherent requirements of the particular work".

b. Section 18 of the *Age Discrimination Act 2004* (Cth), as "the inherent requirements of the particular employment".

32. We note the inclusion of the word 'particular' in both Commonwealth anti-discrimination acts, consistent with the international treaty from which this concept (and the wider basis for legislation) arose, ILO Convention 111.

Risks of unintended consequences, contested litigation and unnecessary redefinition

33. We are concerned that this distinction may have unintended consequences on its application.

34. In *Qantas Airways Ltd v Christie*,[20] the High Court compared the language contained in Article 1(2) of Convention 111, which refers to the inherent requirements of 'a particular job', with the language contained in section 170DF of the former *Industrial Relations Act 1988*, which referred to 'the particular position'.[21]

35. In the Court's judgment, Justice McHugh stated:

> In most cases, the distinction between the requirements of a position and the requirements of a job will be of little significance. But it is a mistake to think that there is no distinction between "a particular position" and "a particular job". In some cases the distinction between the inherent requirements of a particular position and those of a particular job, although subtle, may be material.[22]

36. As a useful example, Justice McHugh proceeds to propose that 'to be an American born citizen is an inherent requirement of the position of President of the United States, but it is not an inherent requirement of the "job" of President if that term refers to the work done by the President.'[23]

37. If Justice McHugh's proposition prevails, the 'inherent requirements of the employment' expressed in paragraph (b) of subclause 39(2) may similarly exclude certain prerequisites of particular positions if they are requirements of candidacy for hiring or appointment but technically not of the actual performance of an employment contract.

[20] (1998) 193 CLR 280.
[21] *Industrial Relations Act 1988* (Cth) s 170DF(2), repealed.
[22] *Qantas Airways Ltd v Christie* (1998) 193 CLR 280, 304.
[23] Ibid, 305.

38. Additionally, the language in the Bill presents a potential risk for the sub-provision to be interpreted correspondingly, pertaining to 'the tasks that he or she is required to perform' at the exclusion of characteristics such as 'the level or rank from which he or she performs those tasks'.[24]

39. ACCI is concerned about the possibility of the inherent requirements of a particular position diverging from and extending beyond the inherent requirements of employment, potentially including not only contractual rights and duties but also prerequisites, status, seniority, location, additional obligations, the idiosyncrasies of the role etc.

40. Hence, the existing exemption for the circumstances in question under the *Fair Work Act* should not be abrogated by later contrary law, by way of the divergent language in the Bill.

Proposed rewording

41. Improved clarity, certainty and predictability should be provided to by replicating the language in the existing provisions of the *Fair Work Act* as follows:

> *Exception—inherent requirements*
>
> (2) Sections 19 (about employment) and 20 (about partnerships) do not make it unlawful for a person (the ***first person***) to discriminate against another person, on the ground of the other person's religious belief or activity, if:
>
> (a) the discrimination is in connection with a position as an employee or partner; and
>
> (b) because of the other person's religious belief or activity, the other person is unable to carry out the inherent requirements of the particular position ~~employment~~ or partnership.

Recommendation 3

The word 'employment' in paragraph 39(2)(b) should be replaced with 'particular position'.

3. VICARIOUS LIABILITY

3.1 Risk Creation and Indirect Discrimination

42. ACCI is concerned about the vicarious liability clause for religious discrimination (clause 71).

43. ACCI recognises the basis on which vicarious liability provisions have been included in a number of areas of law but has reservations about their applicability to religious discrimination. More generally, employers confront increasing difficulty in reconciling our vicarious responsibilities with limitations on our capacities to direct conduct and enforce values and expectations.

44. The primary argument which underpins the doctrine of vicarious liability is not necessarily applicable for the situations which this Bill intends to proscribe. The assumption that employers contribute to the creation of a risk of religious discrimination by employing representatives to carry on activities in which the discriminatory conduct occurs, cannot be readily or practically applied in this context.

[24] *Qantas Airways Ltd v Christie* (1998) 193 CLR 280, 304.

45. For instance, where the hiring process has been delegated to a senior employee who proceeds to engage in indirectly discriminatory behaviour on the basis of religious belief or activity (knowingly or unknowingly), it cannot be fairly argued that the employer contributed to a risk of that situation, even in the absence of any precautions taken by the employer to avoid the conduct (and as we note below, such liabilities may arise from actions motivated by common sense and good intent where someone is unfamiliar with the beliefs and tenets of a religion or non-religion).

46. This can be distinguished from cases of sexual harassment where vicarious liability claims are more common, as in those instances, it could be argued that through the absence of precautions the employer contributed to the creation of a workplace environment where those actions were perceived as acceptable.

47. On the contrary, the lack of a requisite discriminatory motive for indirect discrimination claims essentially means that to absolve themselves of vicarious liability, the necessary precautions that employers need to take may extend beyond the creation of an inclusive workplace environment and venture into educational obligations, which may be highly contentious and contested. It is also far from clear given the inherent complexity of the beliefs affected by the Bill that any organisation could effectively educate or train against any risk of religious discrimination.

48. In order to ensure that staff do not impose practices that disadvantage certain groups, they would need to be made aware of the characteristics of religious beliefs and activities that may lead to such disadvantage. Given the extraordinary variation in religious beliefs and activities, this is a significant (perhaps impossible) burden to place on employers. Common-sense, empathy and good intent seems insufficient protection against unintentional religious discrimination given the diversity and complexity of religious values, beliefs and practices.

49. Employers can introduce workplace policies designed to combat and prevent sexual harassment with comparative ease. Workplaces can prohibit certain language and behaviours, provide mechanisms for reporting incidents, and make clear statements of zero tolerance to such behaviour, to name a few.

50. For indirect religious discrimination, such policies are not as useful, and alternative measures are far from obvious. Indirect religious discrimination can only be prevented through awareness of religious beliefs and activity, which can only be produced by education. This is not and should not become the role of employers.

51. With great diversity of contemporary religious belief (driven by both new religions and greater likelihood of encountering religions from diverse national traditions), and a greater proportion of Australians identifying as 'no religion', even education is difficult for indirect discrimination.

52. Are employers able to ensure that their employees are across compliance considerations raised by:

    a. Whether Scientology is a religion, and the scope for indirect discrimination?

    b. Differences between Jainism and Hinduism, and the scope for indirect discrimination?

    c. Differences between Sunni and Shia Islam, and the scope for indirect discrimination?

    d. Differences between denominations within various religions, and the scope for indirect discrimination?

e. Arguments within a religion on its tenets and requirements regarding faith and practice?

f. How to approach those who profess to be 'spiritual but not religious' and the consequences on indirect discrimination?

g. Organisations that purport to be religious and blur a line between community interest in wellness, spirituality and religious belief.

h. Distinguishing between discrimination and taking a positive interest in co-workers' lives, faiths and cultures?

i. Understanding and respecting both passive and active atheism, and its potential collisions with religiosity? We note that some contend there are as many as seven different forms of non-belief, which illustrates the complexity in this sub-area alone.[25]

j. In the current period, the potential for religious discrimination, or employees thinking they have been discriminating against, in employers following vaccination mandates.

53. The consequence of the difficulty in implementing effective precautionary policies against indirect religious discrimination should be that the bar for what constitutes a 'reasonable precaution' needs to be comparatively low.

54. ACCI does not make the claim that without thorough religious education programs for employees, employers will be heavily litigated for a lack of taking reasonable precautions, rather that the shoehorning in of a vicarious liability clause that also applies to indirect discrimination will leave employers in the dark as to how to escape or discharge such liability.

55. Employers require certainty in how to comply with their legal obligations (and employees benefit from the effective measures and communication that clear law supports). To some extent, this has been achieved in other domains such as sexual harassment. This will be significantly more difficult, impractical and unclear for religious discrimination, and this will be even more difficult if the law is unclear.

56. For the above reasons, ACCI questions whether it is fair and reasonable to impose extensive vicarious liability on employers for all conduct by employees that may constitute religious discrimination.

Recommendation 4

The vicarious liability provision in clause 71 should be amended from relating to 'any conduct' to only relate to conduct that constitutes direct discrimination.

[25] Valerie Tarico, '7 different types of non-believers', *Salon* (online, 25 September 2014) <https://www.salon.com/2014/09/25/7_different_types_of_non_believers>

3.2 Language of the Provision

57. Clause 71 appears to have replicated the language used in the last major federal anti-discrimination statute, the *Age Discrimination Act 2004*, by creating an exception to vicarious liability for circumstances in which employers 'took reasonable precautions and exercised due diligence to avoid the conduct'.[26]

58. Therefore, whilst the language in clause 71 is not technically anomalous in anti-discrimination law, it can be improved. Clear language that is easily comprehensible to laypersons should always be pursued, which is particularly necessary given the current Bill's wide application and comparatively unclear sphere of targeted discrimination.

59. Additionally, greater efforts should be made to harmonise vicarious liability provisions across jurisdictions so that employers have a stronger understanding of their responsibilities for the actions of their employees.

60. ACCI submits that the language used in state discrimination statutes, the *Equal Opportunity Act 2010* (Vic),[27] *Equal Opportunity Act 1984* (SA)[28] and *Anti-Discrimination Act 1991* (Qld),[29] would provide the most certainty and clarity for employers.

61. In those jurisdictions, employers are exempted from vicarious liability if they 'took reasonable precautions' or 'took reasonable steps'.

LEGISLATION	SECTION	LANGUAGE
Religious Discrimination Bill 2021	cl 71	… unless the person establishes that the person **took reasonable precautions and exercised due diligence** to avoid the conduct.
Equal Opportunity Act 2010 (Vic)	s 110	An employer or principal is not vicariously liable … if ... the employer or principal **took reasonable precautions** …
Equal Opportunity Act 1984 (SA)	s 91	… it is a defence to prove that the person **took reasonable steps** …
Anti-Discrimination Act 1991 (Qld)	s 133	It is a defence … if ... the respondent **took reasonable steps** …

62. The simplicity of these provisions gives certainty to all concerned and supports compliance and effective protections against discrimination. Dispensing with a requirement to exercise due diligence appropriately aids comprehension and intelligibility, given the phrase's legal connotations which are not widely understood or able to be readily applied, particularly by laypersons who operate small businesses.

[26] *Age Discrimination Act 2004* (Cth) s 57(2).
[27] *Equal Opportunity Act 2010* (Vic) s 110.
[28] *Equal Opportunity Act 1984* (SA) s 91.
[29] *Anti-Discrimination Act 1991* (Qld) s 133.

63. There is nothing that suggests that the comparable state provisions are weak in their application due to an absence of the additional phrase included in the Bill to date. However, they are unquestionably more straightforward, comprehensible and able to be practically applied.

64. ACCI notes other alternative phrases are used with the same or similar intended effect in the other jurisdictions. We submit that the Bill's current omission of the word 'all' before reasonable, as appears in other federal and state anti-discrimination acts,[30] is ideal for religious discrimination given its complexity and difficulty in taking effective precautions, as outline above in 3.1.

65. ACCI proposes that clause 71 appears as follows, in accordance with the below recommendation:

> **71 Conduct by representatives**
>
> (1) Any conduct engaged in on behalf of a person by a representative of the person within the scope of actual or apparent authority is taken to have been engaged in also by the person, unless the person establishes that the person took reasonable precautions ~~and exercised due diligence~~ to avoid the conduct.

Recommendation 5

The phrase 'and exercised due diligence' should be omitted from subclause 71(1).

4. REASONABLE CONDITIONS, REQUIREMENTS AND PRACTICES

66. In proposed clause 14, the imposition and proposed imposition of unreasonable conditions, requirements and practices that are likely to disadvantage persons of a certain religious belief or activity, constitutes indirect discrimination.

67. In s 14(2), the Bill provides a non-exhaustive list of factors which may assist in determining the reasonableness of the relevant condition, requirement or practice.

68. The list of factors is too focused on the impact of the imposition on the impacted individual and neglects consideration of the necessity of the imposition, or the basis on which an employer moved to 'impose' the 'condition, requirement or practice'.

69. It is vital that where the provision applies to circumstances regarding employment, the employee's rights are not given primacy or disproportionate weight over the operational needs of the business, nor evaluated without sufficient regard to why an employer may have put in place a 'condition, requirement or practice'.

70. We note that a particular practice, rule or policy may have been imposed with good intentions to avoid discrimination or conduct contrary to an organisation's commitments to diversity.

[30] *Racial Discrimination Act 1975* (Cth) s 18A; *Sex Discrimination Act 1984* (Cth) s 106; *Anti-Discrimination Act 1977* (NSW) s 53; *Equal Opportunity Act 1984* (WA) s 161.

71. ACCI proposes an expansion of the list of factors clause 14(2) to address this concern, as outlined in the following recommendation:

Recommendation 6

Subclause 14(2) should be expanded to include express consideration of the following:

a. the necessity of the condition, requirement or practice;

b. risks to health and safety;

c. the legal duties of the person making the imposition (under laws of the Commonwealth, a state or territory);

d. the particular position of the disadvantaged or impacted person;

e. the gravity and seriousness of any adverse impacts on the person; and

f. any consultation between the person making the imposition and the disadvantaged person, or consultation with employees prior to the relevant condition, requirement or practice coming into effect.

5. CONDUCT ENGAGED IN FOR MULTIPLE REASONS

72. Clause 17 of the Bill provides that where conduct is engaged in for multiple reasons, if one of those reasons is a person's religious belief or activity, then the conduct is taken to be engaged in for that reason, irrespective of whether or not it was the dominant or substantial reason for the conduct.

73. The Explanatory Memorandum states that the purpose of the explicit proscription of any consideration of the reason's dominance is because 'it would be very difficult for a complainant to prove that a discriminatory reason was the dominant or a substantial reason for the conduct.'[31]

74. ACCI opposes the notion that essential evaluations of what reasons were determinative, and their extent and weight in leading to certain conduct should be dispensed with outright to lessen the evidentiary burden for complainants.

75. There are well established legal tests that can be and are widely utilised to determine whether the discriminatory reason was substantial or dominant, such as the 'but for' test of causation,[32] 'material contribution'[33] to harm and the 'common sense' approach.[34] Many of the legal tests have been criticised for various and different reasons, but this rarely leads to calls for the outright dispensation of factual causation requirements entirely.

76. Under the provision as proposed, there is a concern that employers may be subject to costly litigation by complainants who manage to prove that conduct was engaged in for a tangential, inconsequential and irrelevant reason that is argued to be discriminatory. This seems to present an undue risk of poor and damaging outcomes.

[31] Explanatory Memorandum, Religious Discrimination Bill 2021 (Cth) 67 [258].
[32] *Strong v Woolworths Limited* (2012) 246 CLR 182, 183.
[33] *Wakelin v London and South Western Railway Co* (1886) 12 App Cas 41.
[34] *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506, 515.

77. However, ACCI recognises that similar provisions appear in each of the other existing federal anti-discrimination statutes.[35] Given our advocacy for harmonisation, it would be inconsistent to then contend that a special exception should be made in these circumstances.

78. Instead, ACCI recommends as follows:

Recommendation 7

With reference to proposed clause 17, the Committee should examine the impact of comparable existing provisions in federal discrimination statutes and consider whether lines 5 and 6 should be omitted from the Bill and recommendations made for similar changes made to the existing acts.

This would amend clause 17 as follows:

> **17 Conduct engaged in for 2 or more reasons**
>
> If:
> (a) conduct is engaged in for 2 or more reasons; and
> (b) one of the reasons is a person's religious belief or activity
> ~~(whether or not it is the dominant or a substantial reason for the conduct);~~
> then, for the purposes of this Act, the conduct is taken to be engaged in for that reason.

6. COMPLIANCE WITH STATE INDUSTRIAL INSTRUMENTS

79. ACCI welcomes the inclusion of subclause 38(c) in the Bill to exempt conduct from constituting discrimination if it is undertaken in direct compliance with federal industrial instruments (modern awards or enterprise agreements).

80. Australia now has a hybrid industrial relations system in which most employers and employees are covered by federal awards and agreements, and some remainder by those at the state level. The coverage of the national system — the *Fair Work Act*, modern awards and federal enterprise agreements — is as follows:

a. Victoria, Australian Capital Territory and Northern Territory – all employers, including state and territory government agencies.

b. New South Wales, Queensland and South Australia – all employers, other than state and local government employers.

c. Tasmania – all employers, other than state government agencies.

d. Western Australia – trading, financial and foreign corporations, and Commonwealth agencies.[36]

81. Thus, in WA, there remains state award and agreement coverage in some areas of employment for non-corporations, including areas of agriculture, pharmacy and some financial and property services etc (e.g. employment by a trust or partnership rather than a corporation).

[35] *Age Discrimination Act 2004* (Cth) s 16; *Disability Discrimination Act 1992* (Cth) s 10; *Racial Discrimination Act 1975* (Cth) s 18; *Sex Discrimination Act 1984* (Cth) s 8.
[36] Government of Western Australia, *Ministerial Review of the State Industrial Relations System* (Interim Report, March 2018) 55 [43].

82. The WA Department of Mines, Industry Regulation and Safety website offers some useful clarification:[37]

> Generally, the state system includes businesses (and their employees) that operate as:
>
> - sole traders (e.g. Jane Smith trading as Jane's Café)
> - unincorporated partnerships (e.g. Jane and Bob Smith trading as Jane's Café)
> - unincorporated trust arrangements (e.g. Jane and Bob Smith as trustees for the Smith Family Trust trading as Jane's Café)
> - incorporated associations that are not trading or financial corporations and other not-for-profit organisations that are not trading or financial corporations

83. The scenario addressed in subclause 38(c) can arise equally in relation to state industrial instruments, as well as federal. State awards and enterprise agreements can also conflict with anti-discrimination law.

84. In fact, given the repeated modernisations and simplifications of federal awards across the past 20 years, under expressly anti-discriminatory precepts,[38] they are arguably less likely conflict with discrimination law than state awards, and state agreements based on state awards.

6.1 Proposed Amendment to subclause 38(c)

85. To adequately fulfil the intended purpose of the provision in the Bill, conduct that is in direct compliance with state industrial instruments should also be exempted, through an amendment to subclause 38(c).

86. ACCI requests the following straightforward and uncontroversial amendment be made to clause 38:

> **38 Orders, determinations and industrial instruments**
>
> Nothing in Division 2 or 3 makes it unlawful for a person to discriminate against another person, on the ground of the other person's religious belief or activity, if the conduct constituting the discrimination is in direct compliance with any of the following:
>
> (a) an order of a court or tribunal;
>
> (b) without limiting paragraph (a)—an order, determination or award of a court or tribunal that has power to fix minimum wages or other terms and conditions of employment;
>
> (c) an instrument that is:
>
> (i) a fair work instrument (within the meaning of the *Fair Work Act 2009*); or
>
> (ii) a transitional instrument or Division 2B State instrument (within the meaning of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009)*.
>
> (d) a state or territory industrial law within the meaning of s 26 of the *Fair Work Act 2009*.

87. This would see conduct that complies with instruments (awards and agreements) in force under such state legislation similarly and consistently exempt from constituting discrimination under the statute.

[37] 'Guide to who is in the WA state system', *Government of Western Australia* (Web Page, 23 December 2021) <https://www.commerce.wa.gov.au/labour-relations/guide-who-wa-state-system>.
[38] For example, *Fair Work Act 2009* (Cth) s 153 provides that modern awards must not include discriminatory terms, including on the basis of religion.

Recommendation 8

Amend proposed s 38 to also exclude from unlawful religious discrimination acts undertaken in direct compliance with state and territory awards, agreements and industrial instruments as already defined in the *Fair Work Act*.

7. DEFINITION OF RELIGIOUS BELIEF OR ACTIVITY

88. The definition of 'religious belief or activity' is fundamental to nearly every clause in Parts 3 and 4 and is central to the Bill as a whole.

89. ACCI is concerned about that the circular nature of the definition and the lack of clarity it provides to business owners, when taking precautions to avoid conduct deemed discriminatory.

90. In clause 5, the phrase 'religious belief or activity' is defined as 'holding a religious belief', 'engaging in religious activity' or the opposite of those attributes.

91. This definition does little to inform and assist employers with determining whether certain characteristics or behaviour constitute a religious belief or activity.

92. Due to the tautological definition, employers may be forced to rely on the High Court decision in *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)*[39] ('the Scientology case') to determine what constitutes a 'religion' and thereby whether certain beliefs or activities are religious in nature.

93. First, small business owners who will be subject to these laws cannot be expected to rely on authority from case law that is largely unfamiliar. Legislation that imposes obligations on employers needs to be written with clarity and precision, avoiding or minimising such ambiguity.

94. However, ACCI does acknowledge the difficulty in exhaustively capturing the meaning of 'religion' in a statutory definition due to the variety of forms, practices, and theological beliefs (as set out in Section 3 of this submission).

95. Nevertheless, greater clarity is crucial for a definition which is an operative component of the major parts of the Bill, given its wide application, especially on small business owners, most of whom are unlikely to have any legal expertise (nor many doctorates in divinity).

96. Second, the Scientology case broadly provides that for a belief system to constitute a 'religion' it must possess both a belief in a supernatural being and accepted canons of conduct. Consequently, this definition when used for religious discrimination laws may peculiarly exclude systems of spirituality such as those of Indigenous Australians but include esoteric and emerging religions that lack widespread recognition or awareness in our society.

[39] (1983) 154 CLR 120 ('the Scientology case').

97. ACCI is deliberately not making an argument about which faiths or beliefs deserve legal protection but rather highlights to the Committee the complexity and unpredictability of reverting to such a circular definition, instead of effectively defining the phrase in statute.

98. Third, the vague definition in the Bill leaves open the door to potential controversy and conflict in workplaces due to the burden placed on employers to discern whether purported beliefs or activities are legitimately religious in nature.

99. To minimise workplace conflict, which harms productivity, job security and both employers and employees, employers should not be forced into theological debates over the legitimacy of religious beliefs or activities but instead supported by having an ability to clarify whether or not a particular belief, conduct, request or expectation falls under a statutory definition. This would enable employers to inform individuals about the application of the relevant legislation, irrespective of any personal views of whether certain beliefs or activities are religious in nature, which may be more inflammatory, contentious and risky.

Recommendation 9

The Bill should be amended to introduce a statutory definition of 'religion' (solely for the purposes of the Bill) to provide greater certainty for employers and employees, and potential applicants and respondents more generally.

8. KNOWLEDGE OF RELIGIOUS BELIEF OR ACTIVITY

100. Religious beliefs and activities are of a different nature to other protected attributes under discrimination law.

101. One of the key distinctions is that often the attribute is not readily apparent to a relevant duty holder, due to non-disclosure on behalf of the possessor of the attribute or its imperceptibility (and indeed it simply not coming up for discussion). Religious beliefs are not obvious, or immediately knowable to duty holders unless they are expressed, and the activities that accompany beliefs are often or mostly done in private or outside workplaces. The dangers of making assumptions of religiosity based on someone's appearance are well established.

102. This is problematic when considered in light of the indirect discrimination clauses in the Bill and the absence of a motive requirement for actionable discrimination.

103. In *Purvis v New South Wales*,[40] McHugh and Kirby JJ outlined the enduring position of the High Court:

> … 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.[41]

[40] (2003) 217 CLR 92.
[41] Ibid, 142-143.

104. The basis for indirect discrimination laws for known attributes is clearer; the implementation of policies should entail a consideration of whether certain individuals or groups to whom they apply will be disadvantaged.

105. This consideration cannot be undertaken, however, if the attributes which may lead to individuals or groups being disadvantaged, are not known or readily knowable, in particular in a workplace which maintains a culture of respect for employee privacy, particularly for activities outside the workplace.

106. Nevertheless, ACCI supports harmonisation and consistency in discrimination law and recognises that indirect discrimination against religious beliefs or activities should not be permissible when this is not the case for other attributes or for religious protections in other jurisdictions.

107. However, the highly foreseeable scenarios where employers may unintentionally engage in an activity which constitutes indirect discrimination without any knowledge of the relevant religious belief or activity, can be resolved by including an exemption or a defence in the Bill.

108. Employers should be exempt from liability for indirect discrimination where they did not know or could not reasonably have known that an employee possessed the relevant religious belief or activity at the time of contravention.

109. This legislation should not impose a legal liability on employers for circumstances where they honestly did not know that another person possesses a religious belief or engages in a religious activity.

110. For instance, an employer may impose a work requirement that impedes the observance of Shabbat, without knowing that a specific employee is an adherent of the Jewish faith.

111. Without exemption for these circumstances, the duty imposed on employers may have undesirable ramifications such as leading to greater intrusion by employers into employees' private beliefs and activities in an attempt to avoid indirect discrimination complaints (creating workplace conflict).

112. Workers should not be expected to divulge all their religious beliefs and practices which they hold or perform in private, and employers should not be expected to investigate them in order to adhere with the law. The law should support reasonable and realistic communication and only attach liabilities legitimately, practically and proportionately to knowledge.

Recommendation 10

Amend proposed s 38 to include an exemption for conduct that constitutes indirect discrimination in circumstances where employers did not know or could not have reasonably known that an employee possessed the relevant religious belief or activity at the time of the contravention.

9. JURISDICTIONAL AND STATUTE HARMONISATION

113. Compliance of employers with discrimination law is not only improved by clarity within statutes but also between them, through harmonisation across state, territory, and Commonwealth jurisdictions.

114. This Bill presents an opportunity to enhance harmonisation in the protection of religious beliefs across Australian jurisdictions.

115. For instance, the definition of 'vilify' could more closely align with the definition in various state anti-discrimination laws, particularly given the significance of the offence to which it relates.

116. ACCI welcomes the acceptance of our recommendation made during the exposure drafts of the Bill to include a definition of 'vilify'.

117. However, the proposed definition excludes conduct that incites 'serious contempt' or 'severe ridicule' from constituting vilification, as is included in state discrimination law.[42]

118. ACCI does not necessarily have a position on which definition is preferable but merely highlights this as an example of avoidable dissimilarity between jurisdictions. The best time to avoid ambiguous inconsistency is as legislation is made, not the more difficult process of amending legislation once in place.

119. Employers should be able easily grasp their duties under anti-discrimination law without having a comprehensive awareness of varying definitions between state and federal statutes. This supports our contention in Section 1.3 that we should be having a broader and more substantive conversation about legislative consolidation and harmonisation in this area, if not a single federal anti-discrimination system.

120. Further, the penalties for victimisation should be harmonised across jurisdictions and anti-discrimination statutes.

121. The penalty for both victimisation offences in clause 50 is 'imprisonment for 6 months or 30 penalty units, or both.'

122. Paragraph 503 of the Explanatory Notes provides:

> This penalty is consistent with analogous offences under existing anti-discrimination legislation.[43]

123. However, the operation of the words 'or both' in these offences means that this penalty exceeds those for victimisation offences in other federal discrimination laws, as is outlined in the below table.

[42] *Anti-Discrimination Act 1977* (NSW) s 20C(1); *Anti-Discrimination Act 1991* (Qld) s 124A(1); *Racial Vilification Act 1996* (SA) s 4; *Anti-Discrimination Act 1998* (Tas) s 19; *Racial and Religious Intolerance Act 2001* (Vic) ss 7(1), 8(1).
[43] Explanatory Memorandum, Religious Discrimination Bill 2021 (Cth) 98 [503].

LEGISLATION	OFFENCE	SECTION	PENALTY
Religious Discrimination Bill 2021	Victimisation	cl 50	Imprisonment for 6 months or 30 penalty units, or both.
Disability Discrimination Act 1992	Victimisation	s 42	Imprisonment for 6 months.
Age Discrimination Act 2004	Victimisation	s 51	Imprisonment for 6 months.
Sex Discrimination Act 1984	Victimisation	s 94	Imprisonment for 3 months or 25 penalty units, or both (for a natural person).

124. These are just a few of the many areas in which the Bill should be harmonised with existing anti-discrimination legislation at both the state and federal level.

125. However, ACCI does recognise that even across the existing laws, there is so much variation, making harmonisation difficult. This confirms our view that that broader and more significant reforms are required in this area, as outlined in 1.3.

Recommendation 10

The penalty for victimisation should be equivalent to those under the *Disability Discrimination Act 1992* (Cth) and *Age Discrimination Act 2004* (Cth) by omitting the words 'or both', and further changes be made to the Bill to harmonise with existing anti-discrimination laws at both state and federal level.

ABOUT ACCI

The Australian Chamber of Commerce and Industry (ACCI) 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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AMMA Australian Resources & Energy Group

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ATIC Australian Tourism Industry Council

ATA Australian Trucking Association

AVA Australian Veterinary Association

BIC Bus Industry Confederation moving people

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CAA

CMAA

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COPHE Council Of Private Higher Education

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CLIK Australasia

Customer Owned Banking Association

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Exhibition & Event Association of Australasia

Fitness Australia

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HIA

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