



# **CCIWA Submission**

Religious Freedom Reforms

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## **We stand for business**

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## Introduction and Recommendation

1. The Chamber of Commerce and Industry of Western Australia (CCIWA) is the leading business association in Western Australia (WA) and has been the voice of business for more than 125 years. CCIWA represents employer members from across all regions and industries in Western Australia, including local chambers of commerce, industry associations and employers, particularly small and medium enterprises, both in the private and government sectors. CCIWA is also a foundation member of the Australian Chamber of Commerce and Industry (Australian Chamber).
2. CCIWA welcomes the opportunity to make a submission on the proposed religious freedom reforms, and in particular the *Religious Discrimination Bill 2019* (**the Bill**).
3. In making this submission, CCIWA does not intend to make comment on the merit of the proposed reforms.
4. The purpose of this submission is to provide comment on specific provisions of the Bill and the potential impact they may have on the ability for employers to effectively manage their businesses. CCIWA believes that with some modifications the intent of the proposed Bill can be achieved without substantially impacting on the operations of employers.

## Uncertainty over what constitutes religious belief or activity

5. The primary purpose of the Bill is to prohibit discrimination on the ground of religious belief or activity in a range of areas of public life. Consequently, what constitute a religious belief or activity has significant implication for the operation of the proposed legislation.
6. In defining this term, section 5 of the Bill defines religious belief or activity to mean:
  - 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. The definition is therefore a circular one and does not assist relevant parties in determining what may constitute a religious belief.
8. This is problematic given both the number of religions, along the variety of beliefs that may be observed within specific doctrines within each of those religions. Consequently, in many circumstances it may not be possible to objectively establish what is, or is not, a religious belief. This may result in unnecessary disputation at the workplace level, particularly where an employer has concerns about whether or not a purported religious belief or activity is legitimate.
9. To address this concern we recommend that the definition of religious belief or activity be further extended to provide that it is an established doctrine, teaching or practice of a religious body as defined by section 10(2) of the Bill.
10. This amendment would:
  - a. provide greater clarity in establishing what constitutes a religion, whilst also allowing for incorporation of new or emerging religions;
  - b. assist respective parties in determining whether particular beliefs or activities are religious beliefs or activities through reference to external material; and
  - c. assist the relevant courts and tribunals with respect to enforcement of these provisions.

## Intention to discriminate

11. The breadth of what constitutes a religious belief or activity creates a situation in which an individual may unintentionally engage in conduct that constitutes either direct or indirect discrimination without being aware that such action may be discriminatory.
12. We acknowledge that the provisions of the Bill are in line with the standards established by the Commonwealth *Age Discrimination Act 2004*, *Disability Discrimination Act 1992* and *Sex Discrimination Act 1984*. However, the nature of those Acts is such that where discrimination occurs, particularly with respect to direct discrimination, the perpetrator is likely to have known, or should have reasonably known, that the action was unlawful.
13. This is less likely to be so in the case of religious beliefs and activities. In modern Australia an individual's religious beliefs are often not readily apparent to an employer. The range of religious beliefs and activities associated within each particular faith also means that an employer is unlikely to know where an otherwise reasonable requirement may infringe on an employee's right. There is therefore a greater potential for an individual to unknowingly engage in a discriminatory action.
14. Paragraph 109 of the *Exposure Draft of the Religious Discrimination Bill 2019 Explanatory Notes (Explanatory Notes)* provides an example of indirect discrimination as occurring where an employer establishes a requirement that employees attend a meeting on Friday afternoon which disadvantages Jewish employees who leave early to observe the sabbath.
15. In this example, the employer may have engaged in indirect discrimination despite not knowing the employee's religion, the religious beliefs associated with that religion, or that the employee observed those beliefs. There are therefore a far greater range of factors in determining whether a person has been discriminated against.
16. To address this concern we recommend that section 7 and 8(1) of the Bill be amended to include an additional requirement that the *"person was aware, or should have reasonably been aware, that the condition, requirement or practice has, or is likely to have, the effect of disadvantaging persons who have or engage in the same religious belief or activity as the other person"*.

## Multiple causes of action

17. Section 9 of the Bill provides that if conduct occurs for two or more reasons and one of those reasons is due to a person's religious belief or activity, then the conduct is taken to be engaged for that reason. The Bill also states that this is irrespective as to whether the discriminatory reason was a dominant or substantial reason for the conduct.
18. CCIWA believes that this provision should be modified to provide that where there are multiple causes for a specific conduct, then discrimination occurs where a discriminatory reason(s) is the dominant or substantial reason for the conduct.
19. The Explanatory Note specifies that this provision recognises that it would be difficult for the complainant to prove that the discriminatory reason was a dominant or substantial reason.<sup>1</sup>
20. We do not believe that this is an accurate statement. It is our experience the General Protection provisions of the *Fair Work Act 2009 (Cth)* (**FW Act**)<sup>2</sup> are commonly utilised with respect to employment related discrimination claims. These provisions establish a reverse onus of proof, in which the employer is required to demonstrate that the conduct did not occur for a prohibited reason. Consequently, the difficulty that will exist is for the employer to demonstrate that a person's religious belief or activity did not form part of the reason for the conduct, irrespective of how minor.
21. The disadvantage therefore sits with the employer.

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<sup>1</sup> Paragraph 156.

<sup>2</sup> Chapter 3, Part 3-1.

## Indirect discrimination

22. Section 8(1) of the Bill provides that indirect discrimination occurs where:
- A person discriminates against another person on the ground of the other person's religious belief or activity if:
- a the person imposes, or proposes to impose, a condition, requirement or practice; and
  - b the condition, requirement or practice has, or is likely to have, the effect of disadvantaging persons who have or engage in the same religious belief or activity as the other person; and
  - c the condition, requirement or practice is not reasonable
23. Section 8(2) establishes broad criteria for determining whether a condition, requirement or practice is reasonable.
24. In CCIWA's experience providing advice and assistance to employers in managing and promoting a diverse workforce, employers will generally seek to accommodate employee's needs with respect to observance of religious belief and activities where it is reasonably practical to do so.
25. However, the nature of employment is such that it may not always be practical for employer to facilitate arrangements to either accommodate these beliefs and activities, or accommodate them in the manner in which an employee prefers.
26. For example, an employee engaged as a cook in an aged care facility may request additional unpaid breaks in order to observe prayer times during Ramadan. Given the nature of the employee's role it may not be operationally viable for the employer to accommodate the employee's request to observe midday prayers at the prescribed time as it correlates with the resident's meal times. In this situation the employee and employer would normally discuss alternative arrangements that would allow the employee to observe his/her religious practices at a time that minimises the impact on operational requirements. In practice these discussions frequently result in an arrangement that meets the needs of both parties. This is not always the situation, in which case it is both necessary and reasonable for the employers to refuse the request.
27. We therefore support the establishment of a provision that allow for a reasonable condition to be applied to an employee's rights under the proposed Bill. However, we note that the grounds for considering whether a requirement is reasonable, whilst broad, are focused on the impact on the individual and does not appear to balance this with the operational needs of the employer. We are concerned that in the case of an arbitrated outcome this may result in situations where the employee's rights given disproportionately greater priority over the operational needs of the business and the impact it may have on other workers, clients or the broader community.



28. CCIWA therefore recommends that it is appropriate to expand this list to create greater balance by explicitly including the following matters with respect to indirect discrimination in the workplace:
- a. whether the employee discussed the disadvantage with the employer;
  - b. risk to health and safety;
  - c. the needs of the workplace or enterprise;
  - d. the detriment caused to the employer;
  - e. the employer's obligation under another state or federal law;
  - f. the employer's obligations to other employees;
  - g. the nature of the employee's role and their seniority.
29. We recognise that the Explanatory Note provides an example where health and safety considerations constitute a reasonable ground for discrimination<sup>3</sup>. However, the importance of health and safety in the workplace is such that we believe that specific reference should be made within the Bill. It is also our view that where an employee's religious beliefs or activities impact upon an employee's ability to work in a safe manner, that this should also be deemed an inability to meet the inherent requirements of the role.
30. The Explanatory Note also states that the list of factors in subclause 8(2) of the Bill is not intended to be exhaustive and that the courts may take into account other matters deemed relevant.<sup>4</sup> To ensure that the Bill is interpreted in this fashion CCIWA recommends that the subclause should be modified to include an additional paragraph at the end of 8(2) which specifies *"any other relevant matter"*.

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<sup>3</sup> Paragraph 115

<sup>4</sup> Paragraph 114

## Statement of beliefs

31. A key premise of the Bill is the right for individuals to make statements of beliefs based on religious grounds.
32. CCIWA believes that it is important to recognise that there is potential for statements of beliefs made by an employee to negatively impact upon the employer, the workplace, or other employees.
33. In these situations, we believe that it is appropriate for employees to be subject to reasonable conditions by their employer.
34. The Bill appears to recognise this right via subclauses 8(1) and 8(2).
35. We note that subclauses 8(1), when read in conjunction with subclause 8(3), would appear to allow an employer to impose a reasonable condition regarding employees making statement of beliefs:
  - a. when made during the performance of work; and
  - b. when made outside of the performance of work, except in the case of private sector organisations with annual revenue of \$50 million or more<sup>5</sup>.

### Exclusion for large private sector employers

36. CCIWA is concerned regarding the exclusion prescribed in subclause 8(3) of the Bill which prevents large private sector organisations, with annual revenue of \$50 million or more, from imposing reasonable conditions with respect to statement of belief made by an employee outside of the performance of work.
37. We also note that subclause 8(3) does not apply to public sector employers, with the Explanatory Note specifying that there is a legitimate need to impose codes of conduct on public sector employees to protect the unique qualities of public service, in particular that the proper function of Government relies on impartial, apolitical public service.<sup>6</sup>
38. In considering the above explanation it is important to note that many large private sector organisations provide services where the public also need to have faith in the impartiality of service delivery.
39. For example, it is difficult to establish the distinction between the need for the public to have faith in the impartiality and inclusiveness of a privately-owned passage transport provider compared to a state-owned provider.

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<sup>5</sup> We note that the test for what constitutes a reasonable condition is likely to differ with respect to statements made during the performance of work compared to those made outside of it.

<sup>6</sup> Paragraph 128.

40. Further, the definition of public sector proposed by the Bill includes Government owned corporations<sup>7</sup>. In many cases these organisations deliver services on a for profit basis in direct competition with private sector providers.
41. It is therefore unclear as to why the distinction exists. CCIWA recommends that subclause 8(3) be removed.
42. In doing so it is important to recognise that an employer's ability to impose conditions would be limited to those which are reasonable in nature and that what constitutes a reasonable condition is likely to differ with respect to statements made during the performance of work compared to those made outside of it. This will further limit what conditions can be imposed by an employer to statements made outside of work.
43. If the Government retains subclause 8(3), then consideration should be given to modifying the definition of "*relevant employer*" to exclude private sector organisations providing outsourced Government services. When outsourcing services, many agencies establish requirements on the private sector provider that require its employees to maintain the same, or similar, standards expected of public sector employees. Consequently, it is appropriate to extend this exclusion with respect to employees performing work in connection with such services.

### **Unjustifiable Financial Hardship**

44. Subsection 8(3) provides that an employer rule governing a statement of beliefs made outside of the performance of work is unreasonable if it is necessary to avoid unjustifiable financial hardship. CCIWA believes that unjustifiable financial hardship imposes an unrealistically high test, that practicality is unlikely to be met. It is difficult to foresee a situation in which an employer will be able to substantiate that the action of a single employee is likely to cause unjustifiable financial hardship to the organisation. However, there are numerous examples in which the actions of an employee may cause significant risk of reputational harm or financial loss.
45. We recommend that the test be changed to "*avoid significant risk of reputation harm or financial loss*". This would allow an employer to establish appropriate conditions to protect the operation and reputation of the organisations whilst still maintaining a high threshold for such action.

### **Statement of Beliefs do not constitute discrimination**

46. Section 41 of the Bill provides that statements of belief do not constitute discrimination, subject to limited exceptions. This protection appears to apply solely to the person who has made the statement. However, the Bill does not address the potential for an employer to be held vicariously liable for the actions of its employees, including with respect to conduct which occurs outside of the performance of work.

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<sup>7</sup> It is noted that employees of Government owned corporation may not be classified as public servants. In the case of Western Australia, employees of State Government owned corporations, such as Synergy and Water Corporation are not public servants for the purpose of the Public Sector Management Act 1994 (WA) and as such their standing is akin to private sector employees.

47. For example, a manager within a business makes a public statement of belief outside of the performance of work in which he expresses views, based on his religious beliefs, about the role of women in leadership positions. As a function of his role the manager has responsibility for the recruitment and promotion of staff. In undertaking this function the manager chooses to promote a male employee over a female colleague into a supervisory role. The female employee subsequently makes a General Protections claim under the FW Act claiming adverse action based on her gender. Under the reverse onus of proof requirements<sup>8</sup> the employer must prove that the decision was not, in whole or part, based on the employee's gender. Based on the manager's public statement of belief it would be difficult for the employer to substantiate that his views did not influence, at least in part, the decision. Consequently, the employer is likely to have been found to have acted unlawfully.
48. To address such situations, CCIWA recommend amending the Bill to either:
- a. Allow all employers, irrespective of size, to impose reasonable conditions on employees regarding statement of beliefs such as:
    - i. The nature of the employee's role and their seniority;
    - ii. The employer's obligation under another state or federal law; and
    - iii. The employer's obligations to another employee(s).
  - b. Modify subclause 8(4) to indemnify an employer from any claim arising, in whole or in part, from a statement of belief made under this provision.

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<sup>8</sup> Section 361 of the FW Act.

# Exemptions

## Law enforcement, national security and intelligence functions

49. Subclause 29(2) of the Bill provides that it is not unlawful to discriminate against another based on religious belief or activity if the person is performing a function relating to law enforcement, national security or intelligence under a law or program of the Commonwealth.
50. We believe that this provision should be extended to include a law or program of a state or territory Government in order to appropriately capture the range of law enforcement and associated activities.

## Compliance with Industrial Instruments

51. Section 30 of the Bill provides an exemption in relation to conduct that is necessary to comply with an order of a court/tribunal or an industrial instrument under the FW Act.
52. By way of example, the Explanatory Note provides an example of an employer relying on award provisions to direct employees to take annual leave over the Christmas period.<sup>9</sup>
53. CCIWA supports the intention of this provision as demonstrated in the above example. However, the example demonstrates that the intent of the Bill may not be reflected within the wording contained in section 30.
54. Most industrial instruments confer a right on the employer to direct employees in specific circumstances to take annual leave. For example the *Manufacturing and Associated Industries and Occupations Award 2010* provides that “an employer **may** close down an enterprise or part of it for the purpose of allowing annual leave to all or the majority of the employees in the enterprise or part concerned...” (emphasis added).<sup>10</sup>
55. The reference in the above clause to “may” is an important one in that it means that the employer has a choice not to make such a direction and as such the action is not “necessary” for compliance with the industrial instrument. In this regard there is a distinction between what is necessary for compliance with the industrial instrument and what is necessary for the effective performance of work.
56. CCIWA therefore recommends that the word “necessary” be removed from section 30 of the Bill so that the relevant provisions reads “...if the conduct constituting the discrimination is **in compliance** with any of the following:”.
57. CCIWA also recommends that subclause 30(c) of the Bill be expanded to include an industrial instrument made under a relevant state law. This would recognise that the relevant state industrial relations systems continue to cover:
  - a. with the exception of Victoria, state and/or local Government employees; and

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<sup>9</sup> Paragraph 336

<sup>10</sup> Clause 41.10

b. in the case of Western Australia, some private sector employers.

58. It is our view that employers covered by a relevant state industrial relations framework should be able to rely upon the same exemption as that provided to employers covered by the national industrial relations system.<sup>11</sup>

### Domestic Duties

59. Subclause 31(1) of the Bill provides that it is not unlawful for a person (the first person) to discriminate against another person in relation to provision of domestic duties performed on the premises on which the first person resides.

60. This provision is aimed at protecting an individual's right to choose who performs work in their home. The Explanatory Note also identifies that domestic duties may also include core and capacity building supports to people with a disability.<sup>12</sup> We take this to mean that an individual has a right to discriminate on the basis of religious belief or activity where the person is providing direct care to them in their home.

61. We note that the term "*domestic duties*" is not defined in the Bill and believe that it may be appropriate for this to occur given that it is not a term that has a precise legal definition.

62. CCIWA believes that greater clarity around the operation of this exemption is required with respect to the provision of in-home care by aged and disability service providers. In these situations, the worker is an employee of the service provider and not the direct employee of the person receiving the service.<sup>13</sup>

63. In the first instance, clarity is needed as to whether the proposed exemption would apply where the person who may be discriminated against is an employee of a service provider.

64. In the event that the exemption will apply in these circumstances, it raises concerns that notwithstanding that the first person actions are not unlawful, where the worker is employed by a service provider, the service provider may be held responsible for the consequences of the first person's action. For example, where a client refuses to have a casual employee provide in-home care as a result of the employee's religion and the employer is unable to find alternative work, the employee may then have grounds for a claim against the employer for damages arising from lost income.

65. This concern is particularly relevant given the potential for the reason for the failure to provide work being deemed to be, either in whole or in part, because of their religious beliefs.

66. To address this concern, CCIWA recommends clarifying that where the person being discriminated against is employed by a third party, that the third party is not liable for any actions arising out of the decision of the first person.

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<sup>11</sup> It is noted that the reference in subclause 30(a) to an order of a court or tribunal may be sufficient to cover relevant state industrial relations instruments. However, we believe that greater clarity is required given that this view could also apply to instruments made under the FW Act.

<sup>12</sup> Paragraph 343.

<sup>13</sup> It is noted that the definition of employee contained in the Bill is broad.