



Religious Freedom Reforms – Second Exposure Draft

Submission by the Chamber of Commerce and Industry WA

31 January 2020

We believe in good business

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Introduction

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 130 years. CCIWA represents employer members from across all regions and industries in Western Australia, particularly small and medium enterprises. CCIWA is also a foundation member of the Australian Chamber of Commerce and Industry.
2. CCIWA welcomes the opportunity to make a submission on the second exposure draft for the proposed *Religious Discrimination Bill 2019* (**the Bill**).
3. CCIWA notes that the Government has proposed a number of changes to the Bill, of which a small proportion address the issues raised by employers regarding the practical operation of the Bill. In particular, we note the amendments regarding acts done in compliance with industrial instruments and expanding what constitutes work for the purpose of employer conduct rules.
4. CCIWA recognises the Government's comments that "*any form of discrimination cannot and will not be tolerated by our Government*" and that "*we also understand that this process is about striking a balance*".¹
5. CCIWA believes that there is a need to have appropriate legislation aimed at preventing discrimination in the workplace. The following recommendations recognise this and are intended to ensure that the operation of the Bill is balanced against the need for employers to comply with their existing legislative obligations and effectively manage their business.

All rights must be treated equally

6. Subclause 3(2) of the Bill provides that regard is to be had to "*the indivisibility and universality of human rights*" and that "*every person is free and equal in dignity and rights*".
7. This provision affirms that the protection from religious discrimination sits equal to other legislative protections from discrimination, and that none of these protections takes precedent over another.
8. In the workplace, it is the responsibility of employers to ensure that the protections established by various Federal and State discrimination laws are equally complied with. In addition to being responsible for its own actions, the employer is also generally vicariously liable for the actions of its employees.

¹ Media Release, 10 November 2019. [*Protecting religious freedom remains high priority for Government.*](#)

9. Consequently, employers invest heavily in developing policies, procedures, practices, and training to ensure that the workplace is compliant with these obligations. These practices also take into consideration that the employer's responsibility is not limited to what occurs during working hours, but also any adverse action that occurs outside of the workplace where there is a connection with the employment relationship.
10. Given the extended responsibilities of employers it is therefore appropriate and necessary for employers to establish reasonable conditions on the activities of employees outside of working hours.

Reasonable conditions on statement of beliefs

11. CCIWA refers to our submission of 2 October 2019 regarding the proposed restriction on large private sector employers² from establishing reasonable conditions on employees making statements of belief outside of working hours.³
12. This provision should be removed to allow all employers to establish reasonable restrictions. In particular, we believe that it is hard to reconcile the Government's position on limiting the well-established right for employers to require employees to comply with lawful and reasonable directions when it has chosen not to impose the same restriction on Government-owned corporations, which have the same issues and challenges as their private sector competitors.
13. We note that the revised Bill has amended subclause 8(3)(b) which previously provided that relevant employers could not reasonably restrict an employee's statement of beliefs "*other than when the employee is performing work on behalf of the employer*". The revised bill now provides "*other than in the course of the employee's employment*".
14. The summary of amendments identifies that this change is to ensure that the provision does not transverse employers work health and safety obligations regarding conduct outside of work hours such as meal breaks and social functions.⁴
15. We welcome the Government's recognition that the operation of this provision needs to be consistent with other legislative obligations imposed on employers.

² Whose revenue is at least \$50 million per annum.

³ [Paragraph 36 - 45](#)

⁴ [Summary of amendments to the bill since the first exposure draft, p2](#)

16. However, in order to achieve this, CCIWA believes that this provision should be further amended to read “other than *in connection with the employee’s employment*”. This would bring the Bill into line with relevant Federal discrimination legislation which provides that an employer is vicariously liable for any acts which are done “*in connection*” with the employment of the employee unless the employer took all reasonable steps to prevent the employee from taking such action.⁵
17. Whilst section 42 of the Bill provides that a statement of belief does not in and of itself constitute discrimination, paragraph 551 of the revised explanatory memorandum identifies that a statement of belief may be used as evidence to support a discrimination complaint. Discrimination claims against employers are commonly raised through the General Protection provisions of the *Fair Work Act 2009 (Cth)* (**FW Act**) which establishes a reverse onus of proof in determining discrimination claims.⁶ Consequently, a statement of belief that indicates a breach of these provisions will provide prima facie proof of the claim unless the employer can prove otherwise.
18. To the extent that the Government maintains the proposed restriction, CCIWA believes that the amendment referred to in paragraph 16 of this submission is necessary in order to allow employers to comply with the vicarious liability obligations imposed by other Federal discrimination laws.

Example

Outside of working hours, a line manager within a large business makes a statement of belief on his personal Facebook page in which he expresses views, based on his religious beliefs, about the role of women in leadership positions.

Several of his co-workers shared the post with others in the workplace. This included a female employee who the manager recently turned down for promotion, which was awarded to a male colleague.

The employee makes a General Protection claim alleging adverse action based on her gender and submits the Facebook post into evidence. Under the reverse onus of proof, the employer must prove that the decision was not, in whole or part, based on the employee’s gender. Despite a transparent selection process, the statement of belief demonstrates bias and the employer is unable to prove that the decision was not due in part to the manager’s beliefs.

Because the statement of belief was not made in the course of employment, the employer was unable to impose reasonable restriction to prevent the employee’s offending actions.

⁵ For example see s106 of the *Sex Discrimination Act 1984 (Cth)* and s18A of the *Racial Discrimination Act 1975 (Cth)*.

⁶ See s361 of the *Fair Work Act 2009 (Cth)* which provides that in the case of an application under the General Protection provisions it is presumed that the action was taken for an unlawful reason unless the person proves otherwise.

Definition of religion

19. We note that the revised explanatory memorandum identifies the Government's reason for not clearly defining what constitutes a religious belief or activity in section 5 of the Bill is due to its concern that any resulting definition may be too rigid or easily outdated.
20. The practical difficulty with not establishing a workable definition is that it creates significant uncertainty for the parties expected to comply with the Bill, as well as the bodies required to enforce it, in determining whether or not a belief or activity is one based on religion.
21. Given that this term is essential in determining rights and responsibilities, the failure to establish a workable definition under the Bill will require the relevant courts to establish principle-based criteria for determining its meaning in order to address claims brought before them. This could take years, creating significant uncertainty for all parties over the intervening period.
22. To address this concern, we recommend that the definition of religious belief and activity be further extended to provide that it is *"an established or accepted doctrine, teaching or practice of a religious body as defined by subclause 11(5)"* of the Bill.
23. In the alternative we recommend amending the definition in line with the revised definition of a statement of belief⁷, to include that *"it means an activity or belief that a person of the same religion could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of that religion"*.
24. We believe that either of the above options would provide enough flexibility to accommodate the changing nature of religious beliefs and activities, whilst providing some ability to objectively determine whether a belief or activity is one based on religion.

Exemption for compliance with industrial instruments

25. CCIWA welcomes the amendment made to section 31 of the Bill to exempt conduct that is in direct compliance with an order of a court/tribunal, or an industrial instrument under the FW Act, from constituting discrimination. We believe that this amendment will bring the Bill in line with its intended operation.
26. However, it is important to note that despite the extensive coverage of the FW Act, Australia does not have a single industrial relations system. In particular, Western Australia retains a separate industrial relations system covering part of the private

⁷ see section 5 of the Bill.

sector, resulting in a proportion of WA small businesses and not for profit organisations being regulated by state-based industrial instruments.

27. Employers covered by a state industrial relations system should be able to rely upon the same exemption as that provided to national system employers. We therefore recommend that subclause 31(c) of the Bill be amended to include *“(iii) an award, industrial agreement, workplace determination or order made in accordance with a relevant state industrial relations law”*.

Additional Matters

28. CCIWA refers to our submission of October 2019 and encourages the Government to give further consideration to the following matters, which have not been addressed in the revised Bill.
29. These proposed amendments do not detract from the intended objectives of the Bill and will help ensure employers can effectively comply with its provisions.

Intention to discriminate

30. Given the breadth of religious practices and beliefs there is considerable scope for employers to unintentionally engage in indirect discrimination. Unless the employer is specifically made aware of an individual employee’s religious beliefs it is not possible for an employer to determine whether a condition, requirement or practice may disadvantage the employee on those grounds.
31. The potential for an employer to unintentionally breach these obligations is highlighted in the example provided at paragraph 116 of the revised explanatory memorandum. The example identifies that a requirement for staff to attend a meeting on Friday afternoons may disadvantage Jewish employees who leave early to attend the sabbath. There is nothing uncommon in staff meetings being held on a Friday, which is frequently chosen to suit operational requirements. Hence the hypothetical employer cited in the example is unlikely to have understood that it could have resulted in discrimination unless it was aware of the employee’s religion, the religious beliefs and activities associated with that religion, and whether the employee observed those beliefs. In Australian workplaces employees rarely discuss their religious beliefs or practices, meaning that employers will often be unaware of the potential for indirect discrimination to occur.
32. To address this matter subclause 8(1) of the Bill should be amended to include an additional requirement that indirect discrimination occurs if a *“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”*.

33. If the above recommendation is not adopted, we would propose that the Bill, or accompanying Regulation, require that prior to any claim of indirect discrimination being made that the applicant must have first raised their concerns with the employer and attempted to resolve the matter. Not only would this measure provide the employer with an opportunity to address the issue, it will also reduce the costs to the taxpayer associated with relevant courts / tribunals dealing with complaints that could have been resolved at the workplace level.

Reasonable condition, requirement of practice

34. Subclause 8(2) of the Bill identifies a range of considerations relating to determining whether a condition, requirement or practice is reasonable for the purpose of determining indirect discrimination.
35. However, these grounds are focused on the impact on the individual and do not explicitly balance this with the operational needs of employers. We are concerned that in the case of an arbitrated outcome this may result in situations where the employee's rights are 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.
36. To address this CCIWA recommends that subclause 8(2)(d) of the Bill be amended to include the following matters in determining whether an employer conduct rule is reasonable:
- 36.1. whether the employee discussed the disadvantage, or potential disadvantage, with the employer;
 - 36.2. risk to health and safety;
 - 36.3. the needs of the workplace or enterprise;
 - 36.4. the detriment caused to the employer;
 - 36.5. the employer's obligation under another state or federal law;
 - 36.6. the employer's obligations to other employees;
 - 36.7. the nature of the employee's role and their seniority.

Unjustifiable financial hardship

37. To the extent that the restriction prescribed by subclause 8(3) of the Bill prohibiting large private sector employers establishing reasonable conditions on employees making statement of beliefs outside of working hours is retained⁸, we believe that the reference to *“unjustifiable financial hardship”* should be amended..
38. The revised explanatory memorandum identifies that this test is drawn from the *Disability Discrimination Act 1992 (Cth)* which provides that employers are required to make reasonable adjustments to help a person with a disability carry out the inherent requirement of the job unless it places an unjustifiable hardship on the organisation.⁹
39. In the first instance, it is worth noting that unjustifiable hardship for the purpose of the Disability Discrimination Act is not based solely on the financial costs of the adjustments and takes into account a broader range of considerations, including general hardship. Likewise, we believe that subclause 8(3) should take into consideration a broader range of issues, such as reputational risk.
40. Secondly, there is no parallel between determining the current cost of making modifications to accommodate a person’s disability and assessing future damages potentially arising from an employee’s failure to comply with an employer’s reasonable direction.
41. To address this, we recommend that the last line of subclause 8(3) be replaced with *“is not reasonable unless compliance is necessary to avoid significant risk of reputation harm or financial loss to the employer”*. This amendment would reinforce that the test is based on assessment of future risk of damages that may arise if the requirement was not in place.

Domestic Duties

42. Subclause 32(1) of the Bill provides an exemption from discrimination in relation to employment of a person to perform domestic duties at their place of residence. This provision is aimed at protecting an individual’s right to choose who performs work in their home.
43. This exemption clearly applies where an individual directly employs a person to provide domestic duties. However, it is not clear how it will apply where in-home domestic services are provided by a disability or aged care provider, and a client objects to an individual worker providing services based on their religious belief or activities.

⁸ See paragraph 11 to **Error! Reference source not found.** of this submission.

⁹ [Section 21B](#).

44. We therefore believe that greater clarification is required on the following:
- 44.1. does the exemption apply where the worker is employed by a third-party service provider?
 - 44.2. if it does not, what course of action is available to the worker against both the resident and/or the service provider in the event that discrimination occurs?
 - 44.3. if it does, is there any potential liability on the service provider arising from the resident's decision, and if so how can this be mitigated?
45. These questions are raised based on our concern that notwithstanding that the first person's 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.
46. To resolve these concerns section 32 should be amended to include a new subclause which provides 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.

Law enforcement, national security and intelligence functions

47. Subclause 30(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.
48. We believe that this provision should be extended to include *"a law or program of a state or territory Government"*, in order to ensure that it appropriately captures the full range of law enforcement and associated activities.