

Ai GROUP SUBMISSION

Attorney General's Department
Australian Government

Religious Freedom Reforms

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Ai
GROUP

About Australian Industry Group

The Australian Industry Group (Ai Group) is a peak industry association in Australia which along with its affiliates represents the interests of more than 60,000 businesses in an expanding range of sectors including: manufacturing, engineering, construction, automotive, food, transport, information technology, telecommunications, call centres, labour hire, printing, defence, mining equipment and supplies, airlines, health, community services and other industries. The businesses which we represent employ more than one million people. Ai Group members operate small, medium and large businesses across a range of industries. Ai Group is closely affiliated with many other employer groups and directly manages a number of those organisations.

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EXECUTIVE SUMMARY

Ai Group welcomes the opportunity to provide a submission in response to the Exposure Drafts of the Religious Freedom Bills released for consultation by the Commonwealth Attorney-General's Department.

The Religious Freedom Bills comprise three exposure drafts: a *Religious Discrimination Bill 2019*, a *Religious Discrimination (Consequential Amendments) Bill 2019*, and a *Human Rights Legislation Amendment (Freedom of Religion) Bill 2019*.

Ai Group supports the right to freedom of religion (including the right not to be religious) in the Australian community. Religious beliefs (including non-religious beliefs) are very diverse and can be deeply personal. They are very important to many individuals, families and community groups in society.

Ai Group, however, is unable to support the Religious Freedom Bills (**the Bills**), as drafted. Some important amendments are needed to make the Bills workable for Australian businesses.

The Bills have the potential to increase conflict in Australian workplaces. The Bills need to be amended to ensure that they are not at odds with the maintenance of harmonious workplace relations and co-operative Australian workplaces.

The concept of a "religious belief" is not defined in the Bills and is very broad and uncertain. Further, a person's religious beliefs can be much less tangible than a person's sex, age, race or disability that feature in existing federal anti-discrimination legislation.

The Bill's restrictions on businesses, in seeking to protect religious and non-religious beliefs and activities, are unreasonable. Businesses need to be able maintain appropriate standards of conduct in their workplaces. Businesses also need to be able to impose reasonable requirements on their employees with regard to social media and regular media activity, to prevent their reputations, their brands and other legitimate commercial interests being damaged. As drafted, the Bill would give employees a very wide ability to argue that they should not have to comply with particular reasonable company policies.

The Bills also add to the existing complex web of Federal and State anti-discrimination laws that Australian businesses need to comply with.

If the Bills are to proceed, substantial amendments are needed. In particular, the following provisions in the *Religious Discrimination Bill 2019 (RD Bill)* need to be removed:

- The statement of belief provisions;
- The indirect discrimination provisions; and
- The reverse onus of proof.

BACKGROUND

The Government's release of the Bills for consultation are in response to recommendations by the Religious Freedom Review; a review announced by the Federal Government on 22 November 2017.

The RD Bill prohibits discrimination on the ground of religious belief or activity in key areas of public life. It also creates the new office of the Freedom of Religion Commissioner in the Australian Human Rights Commission.

The *Religious Discrimination (Consequential Amendments) Bill 2019* makes consequential amendments necessary to support the implementation of the Religious Discrimination Bill.

The *Human Rights Legislation Amendment (Freedom of Religion) Bill 2019* amends existing Commonwealth legislation to better protect the right to freedom of religion.

Ai GROUP'S POSITION ON RELIGIOUS FREEDOM

Ai Group supports the right to freedom of religion, and the right not to be religious in the Australian community. Religious beliefs (including non-religious beliefs) are vastly diverse in the Australian community and can be deeply personal and important to the human self, families and community groups in society.

Ai Group also supports respectful discussions and debate between persons of religious belief and non-religious belief and considers this to be a necessary part of a multi-faith and secular society.

Businesses, of course manage a combination of multi-faith and non-religious workforces while striving to ensure that their operations are viable, productive, competitive and harmonious.

EXISTING PROTECTIONS FOR RELIGIOUS FREEDOMS

There are already comprehensive protections in place to protect religious freedoms, including to ensure that persons are not discriminated against due to their religious beliefs.

The Constitution

Section 116 of the Constitution provides that:

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

The Fair Work Act

Section 351(1) of the *Fair Work Act 2009* (FW Act) provides that:

- (1) An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person's race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

State and Territory anti-discrimination laws

The table below sets out which State and Territory anti-discrimination laws protect persons against discrimination on the basis of religion.

State or Territory	Law	Religious protection?
New South Wales	<i>Anti-Discrimination Act 1977</i>	No
Victoria	<i>Equal Opportunity Act 2010</i>	Yes – “religious belief or activity”
Queensland	<i>Anti-Discrimination Act 1991</i>	Yes – “religious belief or religious activity”
South Australia	<i>Equal Opportunity Act 1984</i>	Yes – “religious appearance or dress”
Western Australia	<i>Equal Opportunity Act 1984</i>	Yes – “Religious conviction”
Tasmania	<i>Anti-Discrimination Act 1998</i>	Yes – “religious belief or affiliation”
ACT	<i>Discrimination Act 1991</i>	Yes – “religious conviction”
NT	<i>Anti-Discrimination Act</i>	Yes – “religious belief or affiliation”

Given these existing protections, caution should be exercised over the nature of any new legislation proposing an additional layer of protection for religious freedoms.

UNCERTAIN CONCEPT OF A RELIGIOUS BELIEF OR ACTIVITY

The concept of a “religious belief or activity” is not defined in the Bill. It is broad and uncertain and this is problematic for employers. The RD Bill simply defines *religious belief or activity* to mean:¹

- (a) Holding a religious belief; or

¹ Section 5(1).

- (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

It clear that the concept of a religious belief is intended to be broad and apply beyond mainstream faiths.

The Explanatory Notes refer to the High Court Decision in *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120 as informing the Bill's broad approach to defining religion and not limiting the Bill to particular and existing faiths.

While it is impossible to identify all forms of religious and non-religious beliefs, it is apparent that the RD Bill would protect or have the potential to protect:

- Individual spiritual beliefs and emerging faiths;
- Variations of mainstream faiths whether they were accepted or not as part of the tenets and doctrines of a religious body;
- Beliefs that support organised worship, including cults;
- Beliefs that have the potential to promote harm, notwithstanding the limitations in the RD Bill regarding the extent of its protections in certain circumstances; and
- Beliefs that are critical of other religious beliefs or religion generally.

The Explanatory Notes² to the Draft Bill state that:

65. The term religious belief is intended to capture genuine religious beliefs. It is not intended to capture, for the purposes of this Act, beliefs caused by mental illness or which are motivated by criminal intent.

66. It is intended that the attribute of religious belief or activity will capture beliefs, such as atheism and agnosticism, which are defined by reference to a lack of religious belief.

67. However, this definition will not capture non-religious beliefs which are not fundamentally connected to religion such as veganism and pacifism, which are not fundamentally connected to religion.

The intended limitations on what constitutes a religious belief are important but nonetheless would require employers to make subjective and complex judgements about whether an individual's belief system is in fact a religious belief for the purposes of applying the relevant provisions of the RD Bill.

² Explanatory Notes, Exposure Draft of the Religious Discrimination Bill 2019.

A religious belief is not as tangible, or as easily identifiable as sex, race, age, disability and other attributes protected by anti-discrimination laws.

Some religious beliefs (including non-religious beliefs) under the RD Bill's broad definition include opinions and behaviours that conflict with other religious beliefs, promote their own religious beliefs over others or contemplate dire consequences for persons who do not hold a particular religious belief.

POTENTIAL FOR INCREASED CONFLICT IN AUSTRALIAN WORKPLACES

The RD Bill has the potential to increase conflict and disharmony in Australian workplaces. The potential for the provisions of the proposed legislation to be used to advance and protect extremist opinions or behaviour, of whatever kind, in the name of an undefined religious belief should not be underestimated.

The Bill limits the ability for employers to regulate, respond and manage instances of inappropriate conduct by an employee that may cause conflict with, or detriment to, co-workers, notwithstanding that such conduct may occur when an employee is not performing work.

It is also conceivable that an employer's diversity policy that promotes tolerance and acceptance of religious diversity may conflict with some people's religious beliefs.

EMPLOYERS HAVE A LEGAL OBLIGATION TO PREVENT BULLYING AND OTHER BEHAVIOURS THAT ADVERSELY IMPACT UPON THE MENTAL HEALTH OF THEIR EMPLOYEES

Employers are bound by the anti-bullying provisions of the FW Act, WHS legislation (which prohibits bullying), and Federal and State anti-discrimination laws. These laws impose onerous responsibilities on employers. To ensure compliance, employers need to have policies which ensure that appropriate standards of conduct are maintained in the workplace. Employers also need policies to address out of hours conduct that has a sufficient connection with the workplace (e.g. conduct at Christmas parties and other work functions).

The provisions of the Bill, as drafted, would seriously impede the ability of employers to maintain appropriate standards of conduct and to protect their employees from harassment and discrimination.

INDIRECT DISCRIMINATION

The notion of indirect discrimination is dealt with in section 8 of the RD Bill. It provides that a business discriminates against another person on the ground of the person's religious belief or activity if:

- (a) The business 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.

Subsection 8(2) provides that whether a condition, requirement, or practice is reasonable depends on all the relevant circumstances of the case and lists the factors which may be taken into account in determining whether a condition, requirement or practice is reasonable.

The indirect discrimination provisions of the Bill would be problematic for employers. For employers with a multi-faith workforce, it is unreasonable to assume that employers and managers are well-versed in understanding the broad range of religious beliefs and activities present at that workplace. The broad and undefined concept of a religious belief, as described above, extends to all types of religious beliefs, personal or otherwise, beyond mainstream religions around the globe. Designing conditions, requirements or practices to accommodate and not disadvantage employees who may collectively, hold a broad range of religious beliefs would be very difficult for employers.

Most employers would not be aware of the religious or non-religious beliefs held by their employees because they do not ask for this information to be disclosed. Accordingly, employers may only become aware that they have indirectly discriminated against a person(s) on the grounds of religious belief, after the condition, requirement or practice has been implemented.

The explanatory notes for the Bill provide the following example in relation to how the indirect discrimination provisions may apply to uniforms.

“...a requirement that all employees involved in food preparation wear certain clothing for food safety purposes may disadvantage persons who wear religious dress. This is likely to be reasonable if it is necessary to satisfy food safety requirements. However, if the dress code prohibited employees from wearing any form of religious dress that was not related to food safety requirements, or prohibited them from wearing religious dress at all times while in the workplace, this could disproportionately limit the ability of employees to engage in their religious activity, and therefore could be unreasonable.”

In circumstances where employers have a requirement for employees to wear a uniform for other than WHS purposes, it would be open for employees to challenge the requirement on the grounds of religious belief. For example, many retail outlets require staff to wear work uniforms so they can be easily identified by customers as a representative of the business rather than another member of the public. Also, technicians, tradespeople and other workers who are sent by their employer to perform work at customers' commercial or residential premises are often required to wear uniforms so that customers can be confident that the person they are inviting into their home or business is genuinely associated with the business that they have engaged. Uniforms are very commonly required to be worn by employees in numerous industries including the health, security and aviation industries. Allowances relating to uniforms are common in industrial instruments.

The indirect discrimination provisions of the Bill are bound to cause problems for employers. The provisions would give employees a wide ability to challenge legitimate business and workplace practices that comply with workplace laws and industrial instruments.

Requests to change working arrangements on religious grounds are not uncommon in industry and employers frequently accommodate such requests where they are able to. However, the provisions in the RD Bill extend far beyond the provisions in the FW Act which give certain employees the right to request flexible work arrangements.

The indirect discrimination provisions in the Bill should be removed.

Statements of belief

The statement of belief provisions in section 8 of the Bill are unbalanced, unworkable and unfair upon employers.

A statement of belief is where:

- (a) The statement is:
 - (i) of a religious belief held by a person; and
 - (ii) made by the person in good faith; and
 - (iii) of a belief that may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion; or
- (b) the statement is:
 - (i) made by a person who does not hold a religious belief; and
 - (ii) of a belief held by the person that arises directly from the fact that the person not hold a religious belief; and
 - (iii) is made in good faith; and
 - (iv) is about religion.

The RD Bill at subsection 8(3) provides that certain conduct rules imposed by a larger business (defined as an employer with annual revenue of at least \$50 million) are *prima facie* unreasonable. These are rules which would have the effect of restricting or preventing employees from making a statement of belief at a time other than when the employee is performing work. Under the RD Bill, such a conduct rule is regarded as unreasonable unless compliance with the rule is necessary to avoid “unjustifiable financial hardship” to the employer.

The RF Bill would require the employer to prove that the condition, requirement or practice is reasonable.

There are some very limited exceptions. The RD Bill does not prevent the employer implementing a conduct rule to restrict or prevent employees making statements which are malicious, or would harass, vilify, or incite hatred or violence against a person or group, or which advocate for the commission of a serious criminal offence.

The explanatory notes for the RD Bill state that the additional restriction on conduct rules for larger businesses are being imposed because such businesses are said to be influential in shaping community standards in broader society. Ai Group would argue that this social objective is better served by not restricting businesses from responding to conduct issues in an appropriate way.

Specifically, the Bill imposes unreasonable and unworkable restrictions on implementing conduct rules that may restrict or prevent statements of belief in circumstances when employees are not “performing work for the employer”. The provisions are at odds with other workplace laws and established principles over the type of out of work conduct employers may both be liable for and/or able to act on to protect the interests of other workers and the business.

The Bill is inconsistent with workplace laws in respect of when an employer may take remedial or disciplinary action in response to an incident occurring outside the workplace or outside normal working hours. An employee’s employment contract with their employer generally does not stop on each occasion the employee stops the performance of work. Courts and tribunals have developed principles about when employers can reasonably regulate, respond to and address certain employee conduct outside of work. The concept of when an employee is working or at work, for the purposes of employers regulating or responding to employee conduct, has been the subject of many decisions of courts and tribunals under workplace relations laws, WHS laws, anti-discrimination laws and workers’ compensation laws. The RD Bill would disturb these principles in a major way.

For instance, in the context of the anti-bullying provisions in section 789FD of the FW Act, a Full Bench of the Fair Work Commission held that the reference to bullying “at work” in section 789D was broader than when an employee is performing work in the workplace. The Full Bench held:³

[49] While a worker performing work will be ‘at work’ that is not an exhaustive exposition of the circumstances in which a worker may be held to be at work within the meaning of s.789FD(1)(a). For example, it was common ground at the hearing of this matter that a worker will be ‘at work’ while on an authorised meal break at the workplace and we agree with that proposition. But while a worker is on such a meal break he or she is not performing work. Indeed by definition they are on a break from the performance of work. It is unnecessary for us to determine whether the provisions apply in circumstances where a meal break is taken outside the workplace.

[50] In our view an approach which equates the meaning of ‘at work’ to the performance of work is inapt to encompass the range of circumstances in which a worker may be said to be ‘at work’.

[51] It seems to us that the concept of being ‘at work’ encompasses both the performance of work (at

³ *Bowker and Others v DP World Melbourne Limited T/A DP World and Others* [2014] FWCFB 9227.

any time or location) and when the worker is engaged in some other activity which is authorised or permitted by their employer, or in the case of a contractor their principal (such as being on a meal break or accessing social media while performing work).

In other words, where an employee makes a statement of belief during his/her meal break and that statement causes offence to, or conflict with, other co-workers, the employee could be fully or partially protected from any action by their employer. This outcome is unjustified and unbalanced with the need for employers to protect the welfare of other employees and to provide safe, harmonious and productive workplaces. It also shows the arbitrary nature of limiting a conduct rule to an employee “performing work”, when clearly there will be many circumstances where an employee makes a statement of belief “at work”.

In the context of unfair dismissal, a Full Bench of the Fair Work Commission in *Pinawin v Domingo* [2012] FWAFB 1359 made the following comments about whether out of hours misconduct has the relevant work connection to being it within the purview of the work relationship:

[36] Generally employers have no right to control or regulate an employee’s ‘out of hours conduct’. But if an employee’s conduct outside the workplace has a significant and adverse effect on the workplace, then the consequences become a legitimate concern to the employer. A range of ‘out of hours conduct’ has been held to constitute grounds for termination because the potential or actual consequences of the conduct are inconsistent with the employee’s duty of fidelity and good faith. This concept is closely allied to the implied term of ‘trust and confidence’ in employment contracts which relates to modes of behaviour which allow work to proceed in a commercially and legally correct manner.

Also, in *Rose v Telstra Corporation* [1998] AIRC 1592, the Australian Industrial Relations Commission held that the circumstances in which ‘out of hours’ conduct might constitute a valid reason for dismissal were cases where the conduct, viewed objectively, is likely to cause serious damage to the relationship between the employer and employee, damage the employer’s interests, or is incompatible with the employee’s duties as an employee.

These cases recognise that certain types of employee conduct outside of work can still cause substantial detriment to the employer and other employees, and constitute a fundamental breach of the employment contract, even though they may not cause “unjustifiable financial hardship” to the business. The limitations on conduct rules that the Bill would implement would prevent an employer from disciplining or dismissing an employee in numerous circumstances where there is a valid reason for dismissal or disciplinary action under current well-established legal principles.

The limitations in the Bill on actions that an employer can take when an employee is not “performing work for the employer” do not take into account the various circumstances where employers are, or can be, liable for the conduct of employees outside of work. For instance, under workers’ compensation laws there are many circumstances where employers have been held to be liable for injuries that occurred other than where the employee was “performing work for the employer”.

Also, under the *Sex Discrimination Act*, employers have been held to be liable for instances of sexual harassment occurring outside working hours.

Should the RD Bill proceed, significant confusion would arise about which categories of out of hours conduct employers can legitimately address in order to manage their business.

The assumption under subsection 8(3) that an employer's conduct rule is not reasonable unless compliance is necessary to avoid "unjustifiable financial hardship" is extremely narrow and ignores the detriment that may be suffered by businesses and co-workers beyond financial matters.

Businesses need to be able to impose reasonable requirements on their employees with regard to social media and regular media activity, to prevent their reputations, their brands and other legitimate commercial interests being damaged. Businesses do not impose these requirements lightly. It is often in response to past circumstances where an employee's conduct has created serious detriment to the business in some way.

Many businesses have codes of conduct, social media policies, diversity and inclusion policies and policies on appropriate workplace behavior, including harassment and discrimination. In circumstances involving out of hours conduct, these policies are generally applied after due consideration and with appropriate discretion.

Written contracts of employment also typically contain reasonable obligations on employees relating to WHS, appropriate conduct, avoiding or managing conflicts of interest, keeping sensitive business information confidential and appropriately dealing with third parties. These types of provisions enable businesses to pre-emptively manage risks and the associated damage that may result.

Preventing the application of reasonable business policies and contracts of employment to employee statements of belief unless compliance by the employee is necessary to avoid "unjustifiable financial hardship", is unfairly narrow. We note that it is distinctly narrower than the "unjustifiable hardship" defence in the *Disability Discrimination Act 1992* (Cth) which covers a broader range of factors and circumstances in determining hardship.

The statement of belief provisions of the RD Bill are unfair and unworkable for employers and need to be removed from the Bill.

DEFENCES FOR EMPLOYERS ARE TOO NARROW

The RF Bill contain a series of exemptions and exceptions to discriminatory conduct (as defined in the Bill) being unlawful. Exemptions relevant to many businesses include:

- (a) Where a person has expressed a religious belief that a reasonable person would conclude counsels, promotes, encourages or urges conduct that would constitute a serious offence. A serious offence is taken to mean an offence involving harm (within the meaning of the *Criminal Code*), or financial detriment, that is punishable by

imprisonment for 2 years or more under a law of the Commonwealth, State or Territory.⁴

- (b) Conduct in direct compliance with a Commonwealth law or an instrument made under such law;
- (c) Conduct in direct compliance with a State or Territory law;
- (d) Conduct necessary to comply with an order of a court or tribunal, or an industrial instrument; and
- (e) Conduct that is in connection with a person's position as an employee, and because the person's religious belief or activity prevents them from carrying out the inherent requirements of the person's employment.

The above exemptions are too narrow given how problematic the provisions of the Bill are, as discussed above.

REVERSE BURDEN OF PROOF

The reverse onus of proof in subsection 8(7) is inappropriate. This subsection requires the person who has imposed or proposes to impose the condition, requirement or practice to have the burden of proving that it is reasonable. The reverse onus of proof also applies to claims of indirect discrimination under subsection 8(3).

Further, given the broad and subjective nature of a religious belief that may not be known or articulated to an employer and the wide ability for employees to resist complying with employer conditions, requirements or practices, the reverse onus is inappropriate and unfair.

The assumption that a relevant employer's code of conduct is unreasonable, as referred in subsection 8(3), unless the relevant employer can prove that compliance with it is necessary to avoid "unjustifiable financial hardship" is unfairly skewed against employers.

CONCLUSION

Ai Group is unable to support the Religious Freedom Bills, as drafted. Some important amendments are needed to make the Bills workable and fair for Australian businesses.

⁴ Division 4 of the Bill.



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