

# Ai GROUP SUBMISSION

Parliamentary Joint Committee on  
Human Rights  
&  
Senate Legal and Constitutional  
Affairs Legislation Committee

**Religious Discrimination  
Bill 2021**

21 December 2021

**Ai**  
GROUP

## EXECUTIVE SUMMARY

The Australian Industry Group (**Ai Group**) welcomes the opportunity to provide a submission in response to the *Religious Discrimination Bill 2021 (the Bill)* and the associated *Religious Discrimination (Consequential Amendment) Bill 2021* and *Human Rights Legislation Amendment Bill 2021*, as introduced into the Australian Parliament on 25 November 2021.

This submission is directed at the two Parliamentary Inquiries tasked with reviewing the Bills, the first by the Parliamentary Joint Committee on Human Rights and the second by the Senate Legal and Constitutional Affairs Legislation Committee.

Ai Group supports the right to freedom of religion (including the right not to be religious) in the Australian community. Businesses manage a combination of multi-faith and non-religious workforces while striving to ensure their operations are viable, productive, competitive and harmonious. As a peak employer body, Ai Group's submission is directed at matters concerning employers and employees.

For employers, the Bill is an improvement on the two earlier exposure drafts released in October 2019 and January 2020 respectively. We acknowledge that the Government has sought to address a range of concerns raised by numerous stakeholders, including Ai Group.

In response to the exposure drafts, Ai Group provided the following detailed submissions highlighting some significant concerns for employers:

- [Ai Group's submission](#) of 2 October 2019 in response to the first exposure draft.
- [Ai Group's submission](#) of 31 January 2020 in response to the second exposure draft.

Ai Group's primary concern with the earlier exposure drafts was in relation to the combined operation of the statement of belief provisions and the restrictions on employer conduct rules. The earlier versions of the Bill would have:

- Unfairly restricted the legitimate and necessary operating policies and procedures of businesses, including in circumstances where such policies were needed to manage obligations under current employment laws;
- Likely reduced tolerance for religious diversity in workplaces by protecting a broad range of statements of belief about religion and/or other religions, including statements that caused offence; and
- Likely resulted in increased workplace grievances that were unable to be resolved by employers, but which nonetheless would impact employers' businesses.

Accordingly, we welcome the current Bill's removal of the employer conduct rule restrictions that were attached to the Bill's statement of belief provisions in the exposure drafts.

We have identified an essential amendment to the defences included in the Bill to ensure that employers are able to address any inappropriate workplace conduct engaged in on the basis of an employee's religious belief and activity. The current defences do not appropriately align with the apparent policy intent that the Bill should not restrict the application of employer conduct rules where employee conduct is unreasonable. Our suggested amendment is set out in this submission.

## **STATEMENTS OF BELIEF**

Despite the welcome removal of the employer conduct rule restrictions, that were included in the earlier exposure drafts, the statement of belief provisions have been retained in section 12 and are defined in section 5.

The Bill creates a revised definition for a statement of belief that now captures a broader range of communications for the purpose of the Bill's protection. The second exposure draft limited a statement of belief to written or spoken words connected to a religious belief and by whether a person of the same religion would reasonably consider the statement to be in accordance with the religion's doctrines, tenets, beliefs or teaching.

The Bill expands this definition by protecting statements of belief that may be made through all forms of communication other than physical contact, and where the connection to religion need only be by the person's genuine belief that the statement is in accordance with the religion's doctrines, tenets, beliefs or teachings.

In response to the earlier exposure drafts, Ai Group raised concern about the wide variety of statements that could be made and protected from employer response action in circumstances where there was a clear detrimental impact of the statement of belief on the workplace or employer's business. This was based on a concern that statements of belief could be damaging, harmful or cause offence to an employer's staff, customers and/or business reputation. Therefore, it is essential that employer conduct rules can be applied to enable employers to address such statements.

The removal of restrictions around the application of employer conduct rules, that were included in the earlier exposure drafts, is welcome. It is important that employers are able to retain the relevant rules and policies they have developed for the efficient and harmonious running of their business.

## **DEFENCES**

Division 4 provides a range of exemptions and exceptions to conduct that would otherwise be considered by the Bill to be unlawful discrimination. These exemptions are important because they establish parameters around the expression of a religious belief and engagement in religious activity in various settings of public life, including employment.

Division 4, as with all existing anti-discrimination legislation, does not provide unlimited and unfettered protections for protected attributes. This intent is clearly reflected in the Explanatory Memorandum. Indeed, the Bill provides religious bodies themselves with wide exemptions from the obligation to not discriminate on the grounds protected by the Bill, indicating that the protections are not unlimited, but measured and tempered by other rights and obligations.

As we have pointed out in our earlier submissions, the attribute being protected by this Bill is both religious belief *and* activity. That is, the Bill is not limited to protecting the holding of a religious belief (or non-belief) or one's religious or non-religious identity, it extends to the protection of *religious activity*, being conduct that is engaged in or not engaged in by a particular person as part of holding that religious belief.

This dimension to religious belief or activity is different to many other attributes currently protected under anti-discrimination legislation by extending the protection to conduct that may impact others in the community, particularly in the workplace. For example, the protection against sex, age, disability or ethnicity/race from discrimination relate to attributes that (in most cases) may be more physically discernible rather than an attribute expressed in conduct. It is important therefore that the exceptions in the Bill address this dimension of the attribute being protected.

It is essential that exemptions and defences for employers that manage multi-faith and/or secular workplaces are appropriately framed to ensure that a religious activity at work can be subject to the relevant remedial action an employer may be required to take, or reasonably wish to take, to prevent harm to others and the employer's business.

We do not consider that the current exceptions and exemptions in the Bill are adequate for employers who are trying to create a productive and harmonious workplace by accommodating employees holding a diverse range of religious and non-religious beliefs.

### **Proposed amendments to section 39**

Section 39 is particularly important. It provides the available exemptions for employers to demonstrate that their conduct is not discrimination because it is engaged in for some other authorised purpose.

The Bill's current inherent requirements exception at subsection 39(2) is appropriate to address circumstances where an employee may not be able to perform the job because of a religious belief or activity (e.g. a job that requires the employee to work at certain times of the day or week which the employee is not available to work because of religious activities). However, the inherent requirements exception is not adequate to enable employers to address unreasonable religious activity in the workplace. For example, the exception would not be relevant where an employee complains to the employer about a co-worker who leaves religious pamphlets on the employee's desk every day, despite the employee communicating to the co-worker that this is unwanted, or a co-worker who makes constant unwelcome attempts to convince the employee to follow their religion.

Consistent with the apparent policy intent that employers are able to maintain appropriate standards of conduct in the workplace, the Bill's exceptions to discrimination in employment should be amended to enable employers to take reasonable management action to deal with unreasonable religious activity in the workplace. Indeed, the importance of reasonableness is recognised in both the definition of indirect discrimination at paragraph 14(1)(c) and in the removal of the employer conduct rule restrictions.

To give effect to this intention, it is essential that section 39 of the Bill be amended to include an appropriate exception to address this important issue. We suggest that this amendment be modelled on the exception provided in the FW Act's anti-bullying provisions, where at section 789FD(2), "reasonable management action carried out in a reasonable manner" is excluded from the definition of a worker being bullied at work.

Appropriate amendments to subsections 39(2) and (3) in the Bill would be:

***Exception—inherent requirements and reasonable management action***

- (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 because of the other person's religious belief or activity, the other person is unable to carry out the inherent requirements of the employment or partnership; or*
  - (b) *the conduct constituting the discrimination is reasonable management action carried out in a reasonable manner.*
- (3) *Subsection (2)(a) 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.*

The above defence is particularly important because direct and indirect discrimination on the ground of religious belief or activity is defined broadly in sections 13 and 14, and subsection 19(2) includes the following provision which would make it unlawful for an employer to discriminate against an employee by subjecting the employee to any detriment on the ground of the employee's religious belief or activity: (Emphasis added)

**19 Employment**

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- (2) *It is unlawful for an employer to discriminate against an employee on the ground of the employee's religious belief or activity:*
- (a) *in the terms or conditions of employment that the employer affords the employee; or*

- (b) *by denying the employee access, or limiting the employee's access, to opportunities for promotion, transfer or training, or to any other benefits associated with employment; or*
- (c) *by dismissing the employee; or*
- (d) *by subjecting the employee to any other detriment.*

## **CONCLUSION**

Ai Group acknowledges the welcome removal of the employer conduct rule provisions which were in the earlier exposure drafts. However, the Bill requires further amendments to achieve the apparent policy intent that employers can take reasonable management action in a reasonable manner to address inappropriate conduct in the workplace.



## ABOUT THE AUSTRALIAN INDUSTRY GROUP

The Australian Industry Group (Ai Group®) is a peak employer organisation representing traditional, innovative and emerging industry sectors. We are a truly national organisation which has been supporting businesses across Australia for nearly 150 years.

Ai Group is genuinely representative of Australian industry. Together with partner organisations we represent the interests of more than 60,000 businesses employing more than 1 million staff. Our members are small and large businesses in sectors including manufacturing, construction, engineering, transport & logistics, labour hire, mining services, retail, food, the defence industry, civil airlines and ICT.

Our vision is for thriving industries and a prosperous community. We offer our membership strong advocacy and an effective voice at all levels of government underpinned by our respected position of policy leadership and political non-partisanship.

With more than 250 staff and networks of relationships that extend beyond borders (domestic and international) we have the resources and the expertise to meet the changing needs of our membership. We provide the practical information, advice and assistance businesses need. Our deep experience of industrial relations and workplace law positions Ai Group as Australia's leading industrial advocate.

We listen and we support our members in facing their challenges by remaining at the cutting edge of policy debate and legislative change. We provide solution-driven advice to address business opportunities and risks.

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