

EXPOSURE DRAFT OF THE RELIGIOUS  
DISCRIMINATION (CONSEQUENTIAL  
AMENDMENTS) BILL 2019

EXPLANATORY NOTES

# RELIGIOUS DISCRIMINATION (CONSEQUENTIAL AMENDMENTS) BILL 2019

## GENERAL OUTLINE

### *Purpose and objective*

1. The Religious Discrimination (Consequential Amendments) Bill 2019 makes consequential amendments necessary to support the implementation of the Religious Discrimination Bill 2019.
2. The Religious Discrimination Bill introduces federal protections to prohibit discrimination on the basis of a person's religious belief or activity in a wide range of areas of public life, including in relation to employment, education, access to premises, goods, services and facilities, and accommodation.
3. The Religious Discrimination Bill also establishes the standalone statutory office of the Freedom of Religion Commissioner at the Australian Human Rights Commission (the Commission), and confers functions on the Commission in relation to discrimination on the grounds of religious belief or activity.
4. This Bill makes consequential amendments to the *Australian Human Rights Commission Act 1986* (the AHRC Act) and other existing federal legislation to ensure that discrimination on the basis of religious belief or activity under the Religious Discrimination Bill is treated in the same manner as discrimination under the *Age Discrimination Act 2004*, *Disability Discrimination Act 1992*, *Racial Discrimination Act 1975* and the *Sex Discrimination Act 1986*.
5. Most significantly, this Bill amends the AHRC Act to extend the Commission's functions of inquiring into and attempting to conciliate complaints of unlawful discrimination to complaints of unlawful discrimination under the Religious Discrimination Act (as enacted). Accordingly, these amendments allow complaints of discrimination on the basis of religious belief or activity to be made to the Commission. Where such a complaint cannot be successfully conciliated by the Commission, an individual may then make an application to the Federal Court or the Federal Circuit Court.
6. This Bill also makes amendments to the AHRC Act and the *Inspector-General of Intelligence and Security Act 1986* to ensure that complaints of discrimination on the basis of religious belief or activity are dealt with by the appropriate entity. These amendments reflect the existing framework for referral of complaints from the Commission where those complaints are in relation to the conduct of intelligence agencies or relate to discriminatory industrial instruments.
7. This Bill also makes the necessary consequential amendments to the AHRC Act to establish the Freedom of Religion Commissioner as a member of the Commission, alongside the President and the existing seven special-purpose Commissioners. These administrative amendments ensure that the Commissioner is conferred the same functions, powers, duties and privileges as the existing Commissioners. This includes, for example, the function of assisting the court as *amicus curiae* and the application of non-disclosure obligations.

8. Finally, this Bill makes consequential amendments to other Commonwealth legislation necessary to reflect the new prohibition on discrimination on the basis of religious belief or activity. This includes recognising the Religious Discrimination Act as an anti-discrimination law for the purposes of section 351 of the *Fair Work Act 2009* and the *Sea Installations Act 1987*, and amending the *Civil Aviation Act 1988* to provide that civil aviation regulations may be inconsistent with the Religious Discrimination Act if necessary for the safety of air navigation.

## NOTES ON CLAUSES

### *List of abbreviations*

Age Discrimination Act	<i>Age Discrimination Act 2004</i>
Disability Discrimination Act Commission	<i>Disability Discrimination Act 1992</i> Australian Human Rights Commission
AHRC Act	<i>Australian Human Rights Commission Act 1986</i>
Fair Work Act	<i>Fair Work Act 2009</i>
Inspector-General IGIS Act	Inspector-General of Intelligence and Security <i>Inspector-General of Intelligence and Security Act 1986</i>
President	President of the Australian Human Rights Commission
Racial Discrimination Act	<i>Racial Discrimination Act 1975</i>
Religious Discrimination Act	Religious Discrimination Act 2019 (as enacted)
Religious Freedom Review	Report of the Expert Panel into Religious Freedom
Sex Discrimination Act	<i>Sex Discrimination Act 1984</i>

## **PRELIMINARY**

### ***Clause 1 Short title***

9. This clause provides for the short title of the Act to be the *Religious Discrimination (Consequential Amendments) Act 2019*.

### ***Clause 2 Commencement***

10. This clause provides for the commencement of each provision in the Bill, as set out in the table at subclause 2(1).

11. Item 1 in the table provides that sections 1 to 3 and anything in the Act not elsewhere covered by the table will commence on the day on which the Act receives the Royal Assent.

12. Item 2 in the table provides that Schedule 1 will commence at the same time as the Religious Discrimination Act commences, the date of which is set by Proclamation or six months from Royal Assent, if not Proclaimed earlier.

13. Subclause 2(2) specifies that information in column 3 of the table is not a part of the Act, and information may be inserted in this column, or information in it may be edited, in any published version of this Act.

### ***Clause 3 Schedules***

14. This clause enables legislation that is specified in a Schedule to this Act to be amended or repealed as set out in the applicable items in the Schedule concerned, and specifies that any other item in a Schedule to this Act has effect according to its terms.

## **SCHEDULE 1 – AMENDMENTS CONSEQUENTIAL ON THE ENACTMENT OF THE RELIGIOUS DISCRIMINATION ACT 2019**

### ***Australian Human Rights Commission Act 1986***

#### **Item 1            Subsection 3(1)**

15.     Item 1 inserts a definition of ‘Freedom of Religion Commissioner’ into subsection 3(1) of the AHRC Act to mean the person that is appointed under the Religious Discrimination Act.

#### **Item 2 Subsection 3(1) (after paragraph (b) of the definition of *unlawful discrimination*)**

16.     Item 2 extends the definition of ‘unlawful discrimination’ in subsection 3(1) of the AHRC Act to include any acts, omissions or practices that are unlawful under Part 3 of the Religious Discrimination Act.

17.     This ensures that the Commission can exercise its functions relating to unlawful discrimination in respect of unlawful discrimination on the ground of religious belief or activity under the Religious Discrimination Act. This includes the Commission’s functions of inquiring into and attempting to conciliate complaints of unlawful discrimination under Part IIB of the AHRC Act.

#### **Item 3 Subsection 3(1) (after paragraph (e) of the definition of *unlawful discrimination*)**

18.     Item 3 extends the definition of ‘unlawful discrimination’ in subsection 3(1) of the AHRC Act to include any conduct that is an offence under Part 5 of the Religious Discrimination Act.

19.     This ensures that the Commission can exercise its functions relating to unlawful discrimination in respect of offences under the Religious Discrimination Act. This includes the Commission’s functions of inquiring into and attempting to conciliate complaints of unlawful discrimination under Part IIB of the AHRC Act. Accordingly, the Commission is able to inquire into and attempt to conciliate complaints of victimisation and of discriminatory advertisements under Part 5 of the Religious Discrimination Act.

#### **Item 4            At the end of subsection 8(1)**

20.     Item 4 amends subsection 8(1) of the AHRC Act to provide that the composition of the Commission must include the Freedom of Religion Commissioner as a member of the Commission.

21.     Subsection 8(1) of the AHRC Act provides that the Commission is to consist of the President (paragraph 8(1)(a)) and the existing seven special-purpose statutory Commissioners (paragraphs 8(1)(b)-(g)). All statutory Commissioners are members of the Commission.

22.     As a member of the Commission, the Freedom of Religion Commissioner is required to work co-operatively with the other Commissioners to achieve common objectives (subsection 8(2)).

23. In addition, the Commission may delegate any of the functions or powers conferred on it by the AHRC Act to the Freedom of Religion Commissioner (section 19). In addition, the Freedom of Religion Commissioner is protected from civil actions related to the performance of such functions done in good faith (section 48), and is subject to the non-disclosure provisions of section 49.

**Item 5 Subsection 8(7)**

24. Item 5 amends subsection 8(7) of the AHRC Act to provide that a vacancy in the office of the Freedom of Religion Commissioner does not, of itself, affect the Commission's performance of its functions or exercise of its powers.

**Item 6 Paragraph 11(1)(a)**

25. Item 6 amends paragraph 11(1)(a) of the AHRC Act to ensure that the functions of the Commission include such functions conferred on the Commission by the Religious Discrimination Act. This includes, for example, the functions conferred on the Commission by section 54 of the Religious Discrimination Act.

**Item 7 Subsection 11(3)**

26. Item 7 amends subsection 11(3) of the AHRC Act to provide that the Commission must refer complaints made to the Commission alleging that an act or practice of an intelligence agency is unlawful under the Religious Discrimination Act to the Inspector-General.

27. Subsection 11(3) of the AHRC Act provides that the Commission's functions do not include inquiring into the acts or practices of an intelligence agency (as defined in subsection 11(4)). If a complaint is made alleging that an act or practice of an intelligence agency is unlawful under the Age Discrimination Act, Disability Discrimination Act, Racial Discrimination Act or the Sex Discrimination Act, the Commission must refer the complaint to the Inspector-General. Similar to existing anti-discrimination law, Item 7 extends this requirement to acts or practices which are alleged to be unlawful under the Religious Discrimination Act.

28. A key function of the Inspector-General is to assist Ministers in ensuring that the activities of Australian intelligence agencies are consistent with human rights (subsection 4(b) of the IGIS Act). Complaints relating to the acts or practices of an intelligence agency which are alleged to constitute unlawful discrimination are therefore more appropriately referred to the Inspector-General for inquiry as part of their general oversight functions.

**Item 8 Subsection 14(8)**

29. Item 8 amends subsection 14(8) of the AHRC Act to provide that the Commission may not make an examination or hold an inquiry in relation to functions conferred on it by the Religious Discrimination Act.

30. Subsection 14(1) of the AHRC provides that the Commission, in the performance of its functions, may make an examination or hold an inquiry in such manner as it sees fit without being bound by the rules of evidence. Such examinations and inquiries are carried

out in respect of the Commission's human rights and equal opportunity in employment functions (Divisions 3 and 4 of Part II of the AHRC Act respectively), but not in respect of the Commission's unlawful discrimination functions (Part IIB of the AHRC Act).

31. Accordingly, subsection 14(8) provides that the functions referred to in subsection 14(1) do not include functions conferred on the Commission by the Age Discrimination Act, Disability Discrimination Act or the Sex Discrimination Act. Item 8 extends these exclusions to functions conferred on the Commission by the Religious Discrimination Act.

**Item 9            Subsection 16(2A)**

32. Item 9 amends subsection 16(2A) of the AHRC Act to provide that an act done by a State or an instrumentality of a State under an inter-governmental arrangement is deemed to have been done by the President for the purposes of the Religious Discrimination Act.

33. Section 16 of the AHRC Act provides that inter-governmental arrangements may be made between the Commonwealth and the States in relation to the performance of the Commission's functions, or the Commission's performance of functions relating to human rights or discrimination in employment on behalf of a State. For example, paragraph 16(1)(b) provides that the Commonwealth and a State may make an arrangement allowing the State or an instrumentality of that State (for example, a State public service employee or a State office holder) to perform any of the Commission's functions on behalf of the Commonwealth.

34. Subsection 16(2A) ensures that any act done by a State or an instrumentality of a State under such an arrangement is deemed to have been done by the President for the purposes of the AHRC Act, the Age Discrimination Act, Disability Discrimination Act, Racial Discrimination Act and the Sex Discrimination Act. Item 9 extends this provision to deem such acts as being done by the President for the purposes of the Religious Discrimination Act.

**Item 10           Subsection 19(6)**

35. Item 10 amends subsection 19(6) of the AHRC Act to clarify that the Commission's ability, under subsection 19(1), to delegate the powers conferred on it under the AHRC Act does not apply to powers conferred on the Commission by the Religious Discrimination Act.

36. Subsection 19(1) provides that the Commission may delegate any of the powers conferred on it under the AHRC Act to a member of the Commission, a member of staff of the Commission or another person or body of persons.

37. Subsection 19(6) provides that these powers do not include the powers conferred on the Commission by the Age Discrimination Act, Disability Discrimination Act, Racial Discrimination Act or the Sex Discrimination Act. This is because the delegation of powers under the Age Discrimination Act, Disability Discrimination Act, Racial Discrimination Act and the Sex Discrimination Act is governed by those Acts.

38. Item 10 ensures that the AHRC similarly cannot delegate the powers conferred on it by the Religious Discrimination Act under subsection 19(1), as delegation of those powers is governed by that Act. Section 61 of the Religious Discrimination Act provides that the Commission may delegate all or any of its functions or powers to the Freedom of Religion

Commissioner or another member of the Commission, a member of staff or any other person or body of persons.

**Item 11          Subsection 46PF(3) (note)**

39.      Item 11 amends the note following subsection 46PF(3) of the AHRC Act to note specific provisions of the Religious Discrimination Act which impose liability for unlawful discrimination onto other persons.

40.      Section 46PF of the AHRC Act relates to inquiries into complaints alleging unlawful discrimination. Subsection 46PF(3) provides that a complainant, with leave of the President, may amend their complaint to add, as a respondent, a person who is alleged to have done the alleged act of unlawful discrimination.

41.      The note following subsection 46PF(3) notes that a person may be regarded as responsible for acts of unlawful discrimination done by another person, referring to the relevant provisions of the Age Discrimination Act, Disability Discrimination Act, Racial Discrimination Act and the Sex Discrimination Act which impose liability for unlawful discrimination onto other persons. Item 11 ensures that the note also includes a reference to sections 62 and 63 of the Religious Discrimination Act, which concern liability for conduct ancillary to unlawful discrimination (section 62) and liability for the conduct of representatives (section 63).

**Item 12          At the end of subsection 46PV(3)**

42.      Item 12 amends subsection 46PV(3) of the AHRC Act to enable the Freedom of Religion Commissioner to assist the Federal Court or the Federal Circuit Court as *amicus curiae* in certain proceedings.

43.      Section 46PV of the AHRC Act provides that special-purpose Commissioners may assist the Federal Court and the Federal Circuit Court as *amicus curiae* in certain proceedings under Division 2 of the AHRC Act. An *amicus curiae*, or a ‘friend to the court’, assists the court on points of law or relevant facts, but does not have a legal interest in the proceedings nor are they a party to the proceedings.

44.      For the purposes of this section, special-purpose Commissioner is defined by subsection 46PV(3) to include all members of the Commission, excluding the President. Item 13 extends the definition of ‘special-purpose Commissioner’ in subsection 46PV(3) to include the Freedom of Religion Commissioner. Accordingly, the Freedom of Religion Commissioner may assist the Court as *amicus curiae* in proceedings which may have significant implications for the administration of the Religious Discrimination Act, proceedings in which the orders sought may affect to a significant extent the human rights of persons who are not party to the proceedings, or proceedings in which it would be in the public interest for the Commissioner to assist the court.

**Item 13          Subsection 46PW(7) (after paragraph (b) of the definition of  
*discriminatory act under an industrial instrument*)**

45.      Item 13 amends subsection 46PW(7) of the AHRC Act to extend the Commission’s power to refer industrial instruments to the Fair Work Commission to include instruments

which require a person to do an act that would be unlawful under the Religious Discrimination Act.

46. Section 46PW of the AHRC Act provides that individuals, groups and trade unions may lodge a complaint with the Commission alleging that a person has done a discriminatory act under an industrial instrument. If the President is of the view that the act is a discriminatory act, made under an industrial instrument, the President must refer the industrial instrument to the Fair Work Commission. Subsection 46PW(7) defines a ‘discriminatory act under an industrial instrument’ as an act that would be unlawful under the relevant provisions of the Age Discrimination Act, Disability Discrimination Act or the Sex Discrimination Act, but for the fact that the act was done in direct compliance with that instrument.

47. Item 14 extends the definition of ‘discriminatory act under an industrial instrument’ in subsection 46PW(7) to include an act that would be unlawful under Part 3 of the Religious Discrimination Act, but for the fact that the act was done in direct compliance with that instrument.

### ***Civil Aviation Act 1988***

#### **Item 14 After subsection 98(6B)**

48. Item 14 provides that regulations made under section 98 of the *Civil Aviation Act 1988* may contain provisions that are inconsistent with the Religious Discrimination Act if the inconsistency is necessary for the safety of air navigation.

49. Subsections 98(6A) and (6B) currently provide that the regulations may contain provisions inconsistent with the Sex Discrimination Act (related to medical standards) and the Disability Discrimination Act, respectively, if the inconsistency is necessary for the safety of air navigation. Item 14 inserts new subsection 98(6BA) to similarly exempt provisions which may be inconsistent with the Religious Discrimination Act but are necessary for the safety of air navigation. Such provisions may include, for example, provisions prohibiting certain types of religious dress which may interfere with safety requirements, such as wearing oxygen masks, or prohibiting flying during periods of fasting.

#### **Item 15 Subsection 98(6C)**

50. Item 15 amends subsection 98(6C) of the Civil Aviation Act to provide that the Civil Aviation and Safety Authority (CASA) must consult with the Commission about any proposal that regulations be made containing provisions which are inconsistent with the Religious Discrimination Act.

51. Subsection 98(6C) requires CASA to consult with the Commission about proposed regulations which are inconsistent with the Sex Discrimination Act or the Disability Discrimination Act (in accordance with subsections 98(6A) and (6B) respectively). This item extends subsection 98(6C) to similarly require CASA to consult with the Commission regarding proposed regulations which may be inconsistent with the Religious Discrimination Act in accordance with subsection 98(6BA) as inserted by Item 14 of this Act.

## ***Fair Work Act 2009***

### **Item 16          Section 12**

52.      Item 4 inserts a definition of ‘Freedom of Religion Commissioner’ into section 12 of the Fair Work Act to mean the person that is appointed under the Religious Discrimination Act.

### **Item 17          After paragraph 161(2)(b)**

53.      Item 17 amends subsection 161(2) of the Fair Work Act to entitle the Freedom of Religion Commissioner to make submissions to the Fair Work Commission related to a modern award which requires a person to do an act that would be unlawful under the Religious Discrimination Act.

54.      This amendment is consequential to Item 13 which amends section 46PW of the AHRC Act to provide that the Commission must refer to the Fair Work Commission industrial instruments which require a person to do an act which would otherwise be unlawful under the Religious Discrimination Act but for the fact that the act would be done in direct compliance with the industrial instrument.

55.      Section 161 of the Fair Work Act requires the Fair Work Commission to review a modern award if that award is referred to the Fair Work Commission by the Commission under section 46PW of the AHRC Act.

56.      Where the referral relates to actions which would be unlawful under the Age Discrimination Act, Disability Discrimination Act or the Sex Discrimination Act, subsection 161(2) of the Fair Work Act provides that the relevant Commissioner is entitled to make submissions to the Fair Work Commission. Item 17 will allow the Freedom of Religion Commissioner to similarly make submissions regarding referrals relating to actions which would be unlawful under the Religious Discrimination Act.

### **Item 18          After paragraph 218(2)(b)**

57.      Item 18 amends subsection 218(2) of the Fair Work Act to entitle the Freedom of Religion Commissioner to make submissions to the Fair Work Commission related to an enterprise agreement which requires a person to do an act that would be unlawful under the Religious Discrimination Act.

58.      This amendment is consequential to Item 13 which amends section 46PW of the AHRC Act to provide that the Commission must refer to the Fair Work Commission industrial instruments which require a person to do an act which would be unlawful under the Religious Discrimination Act but for the fact that the act would be done in direct compliance with the industrial instrument.

59.      Section 218 of the Fair Work Act requires the Fair Work Commission to review an enterprise agreement if that agreement is referred to the Fair Work Commission by the Commission under section 46PW of the AHRC Act.

60.      Where the referral relates to actions which would be unlawful under the Age Discrimination Act, Disability Discrimination Act or the Sex Discrimination Act,

subsection 281(2) of the Fair Work Act provides that the relevant Commissioner is entitled to make submissions to the Fair Work Commission. Item 18 will allow the Freedom of Religion Commissioner to similarly make submissions regarding referrals relating to actions which would be unlawful under the Religious Discrimination Act.

**Item 19      After paragraph 351(3)(ac)**

61.      Item 19 extends the definition of ‘anti-discrimination law’ for the purposes of section 351 of the Fair Work Act to include the Religious Discrimination Act.

62.      Subsection 351(1) of the Fair Work Act provides that an employer must not take adverse action against an employee or prospective employee on the basis of that 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.

63.      Paragraph 351(2)(a) provides that the prohibition in subsection 351(1) does not apply to action that is not unlawful under any anti-discrimination law in force in the place where the action is taken. Subsection 351(3) prescribes the list of anti-discrimination laws for the purposes of the exception in paragraph 351(2)(a). This currently includes all existing federal anti-discrimination laws and state and territory anti-discrimination laws.

64.      Item 19 amends subsection 351(3) of the Fair Work Act to include the Religious Discrimination Act as an anti-discrimination law for the purposes of section 351. This will have the effect of ensuring that conduct which is not unlawful under the Religious Discrimination Act, for example because it falls within an exception, will not be unlawful for the purposes of section 351 of the Fair Work Act. The exceptions in the Religious Discrimination Act will therefore operate concurrently with the existing exceptions in subsection 351(2) of the Fair Work Act, as is the case for existing anti-discrimination legislation.

***Inspector-General of Intelligence and Security Act 1986***

**Item 20      Subparagraph 8(1)(a)(v)**

65.      Item 20 extends the functions of the Inspector-General in relation to the Australian Security Intelligence Organisation (ASIO) to include inquiring into complaints referred to it by the Commission alleging that an act or practice of ASIO may be unlawful under the Religious Discrimination Act.

66.      This amendment is consequential to Item 7 of the amendments to the AHRC Act, which amends subsection 11(3) of the AHRC Act to require the Commission to refer to the Inspector-General complaints alleging that an act or practice of an intelligence agency is unlawful under the Religious Discrimination Act.

67.      Subparagraph 8(1)(a)(v) of the IGIS Act provides that the Inspector-General has the function of inquiring into any act or practice of ASIO referred to the Inspector-General by the Commission that may be inconsistent with or contrary to any human right, that may constitute discrimination or that may be unlawful under existing federal anti-discrimination law. Item 20 extends this inquiry function to include an act or practice of ASIO that may be unlawful under the Religious Discrimination Act.

**Item 21            Subparagraph 8(2)(a)(iv)**

68.     Item 21 extends the functions of the Inspector-General in relation to the Australian Secret Intelligence Service (ASIS), Australian Geospatial-Intelligence Organisation (AGO) and the Australian Signals Directorate (ASD) to include inquiring into complaints referred to it by the Commission alleging that an act or practice of ASIS, AGO or ASD may be unlawful under the Religious Discrimination Act.

69.     This amendment is consequential to Item 7 of the amendments to the AHRC Act, which amends subsection 11(3) of the AHRC Act to require the Commission to refer to the Inspector-General complaints alleging that an act or practice of an intelligence agency is unlawful under the Religious Discrimination Act.

70.     Subparagraph 8(2)(a)(iv) of the IGIS Act provides that the Inspector-General has the function of inquiring into any act or practice of ASIS, AGO or ASD referred to the Inspector-General by the Commission that may be inconsistent with or contrary to any human right, that may constitute discrimination or that may be unlawful under existing federal anti-discrimination law. Item 21 extends this inquiry function to include an act or practice of ASIS, AGO or ASD that may be unlawful under the Religious Discrimination Act.

**Item 22            Subparagraph 8(3)(b)(i)**

71.     Item 22 extends the functions of the Inspector-General in relation to the Defence Intelligence Organisation (DIO) or Office of National Intelligence (ONI) to include inquiring into complaints referred to it by the Commission alleging that an act or practice of the DIO or ONI that may be unlawful under the Religious Discrimination Act.

72.     This amendment is consequential to Item 7 of the amendments to the AHRC Act, which amends subsection 11(3) of the AHRC Act to require the Commission to refer to the Inspector-General complaints alleging that an act or practice of an intelligence agency is unlawful under the Religious Discrimination Act.

73.     Subparagraph 8(3)(b)(i) of the IGIS Act provides that the Inspector-General has the function of inquiring into any act or practice of DIO or ONI referred to the Inspector-General by the Commission that may be inconsistent with or contrary to any human right, that may constitute discrimination or that may be unlawful under existing federal anti-discrimination law. Item 22 extends this inquiry function to include an act or practice of DIO or ONI that may be unlawful under the Religious Discrimination Act.

***Sea Installations Act 1987***

**Item 23            Schedule**

74.     Section 45 of the *Sea Installations Act 1987* provides that certain Commonwealth Acts, as provided for in the Schedule to that Act, apply to sea installations installed in adjacent areas as if those areas were part of the Commonwealth. This currently includes the Age Discrimination Act, Racial Discrimination Act and Sex Discrimination Act.

75.     Item 23 amends the Schedule to similarly ensure that the Religious Discrimination Act applies to sea installations in adjacent areas.