2 October 2019

Hon Christian Porter MP  
Attorney General  

By email: FoRConsultation@ag.gov.au

Exposure draft - Religious Freedom Bills

Dear Attorney

Thank you for the opportunity to provide a submission in response to the Australian Government’s package of proposed legislative reforms on religious freedom.

Diversity Council Australia is the only independent, not-for-profit workplace diversity and inclusion advisor to business in Australia. We have a wealth of experience providing advice to our members on the business benefits of diversity and inclusion, and we make the case using evidence that more inclusive workplaces deliver greater productivity, innovation and employee engagement.

DCA supports individuals being protected from discrimination and harassment because of their religious belief and we proactively support our members in creating workplaces where religious belief is afforded the same dignity and respect as other attributes of a person’s identity, however, we have a number of concerns with the proposed legislation.

DCA’s main concern is that the proposed laws could stop Australian businesses fostering inclusive cultures, eroding any business benefit derived from inclusion.

Instead of introducing the draft exposure legislation, we believe that it is critical that the Government continue consulting with relevant stakeholders on this issue, and in particular continue with the Australian Law Reform Commission’s inquiry into religious exemptions.

We also argue that the structure of any laws to prevent religious discrimination should be the same as other existing Commonwealth anti-discrimination legislation, and should not provide additional positive rights that may allow discrimination against people with currently protected attributes.

Yours sincerely

Lisa Annese  
Chief Executive Officer


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I. ABOUT DIVERSITY COUNCIL AUSTRALIA

Who we are
Diversity Council Australia (DCA) is the independent not-for-profit peak body leading
diversity and inclusion in the workplace. We provide unique research, inspiring events and
programs, curated resources and expert advice across all diversity dimensions to a
community of member organisations.

Our mission
In partnership with our members, our mission is to:

- Lead debate on diversity in the public arena;
- Develop and promote the latest diversity research, thinking and practice; and
- Deliver innovative diversity practice resources and services to enable our
  members to drive business improvement.

What we do
DCA, formerly known as the Council for Equal Opportunity in Employment Ltd, was
established in 1985 as a joint initiative of the Australian Chamber of Commerce and Industry
and the Business Council of Australia to demonstrate the business community's commitment
to equal opportunity for women.

Our focus since then has expanded to cover all aspects of diversity in employment, reflecting
changes in practice to embrace all areas of the diversity of human resources.

Over 600 Australian based organisations are members of DCA, many of whom are
Australia’s business diversity leaders and biggest employers. Some of our founding
members include ANZ Bank, AMP, Boral, Coles, IBM Australia, Myer, Orica, Rio Tinto
and Westpac.

DCA is not government funded - its income is generated from membership fees,
sponsorships and services to business/employers.
Our Research
DCA works in partnership with members to generate ground breaking evidence-based diversity and inclusion resources that enables Australian organisations to fully leverage the benefits of a diverse talent pool.

- **DCA resources are ahead of the curve.** They establish leading diversity thinking and practice, enabling Australian organisations to re-imagine and reconfigure the way they manage talent in today’s dynamic operating environments.
- **DCA resources drive business improvement.** They are high impact, driving business improvement through providing evidence-based guidance on how to fully leverage the benefits of a diverse talent pool.
- **DCA resources are practice focused.** They respond to the information needs of industry leaders and the people they employ.
- **DCA resources speak to the Australian context.** DCA projects generate leading diversity thinking and practice that speaks to Australia’s unique and distinctive institutional, cultural and legal frameworks.
- **DCA resources considers all diversity dimensions.** The full spectrum of diversity dimensions are investigated including age, caring responsibilities, cultural background and identity, disability, Aboriginal and/or Torres Strait Islander status, sexual orientation, gender identity, intersex status, and work organisation.

Some recent DCA research of relevance includes:

*Creating Inclusive Multi-Faith Workplaces* – This resource provides guidance to Australian workplaces about how to respond constructively and inclusively to a range of common faith-related queries, and also to provide workplaces with principles to help balance issues where conflicting rights might intersect. [https://www.dca.org.au/research/project/creating-inclusive-multi-faith-workplaces](https://www.dca.org.au/research/project/creating-inclusive-multi-faith-workplaces).

*Counting Culture* – This practical guide is designed to assist Australian businesses to map the cultural diversity of their workforce. [https://www.dca.org.au/research/project/counting-culture](https://www.dca.org.au/research/project/counting-culture)

*Out at Work: From Prejudice to Pride* – In conjunction with RMIT University, DCA presents the evidence about what it means for LGBTIQ+ employees to be out at work and guidelines as to what organisations can do to make everyone feel included: [https://www.dca.org.au/research/project/out-work-prejudice-pride](https://www.dca.org.au/research/project/out-work-prejudice-pride).

*Inclusion@Work Index* – The DCA-Suncorp *Inclusion@Work Index 2017-2018* is a landmark study, providing the first-ever national benchmarks for Australian workplaces in regards to the age, cultural background, disability status, gender, Indigenous background, religion, sexual orientation and gender identity of workers: [https://www.dca.org.au/research/project/inclusion-index](https://www.dca.org.au/research/project/inclusion-index)

II. SUMMARY

Due to the short timeframe for consultation on these Bills, we were unable to consult with our membership on these specific exposure drafts.

However, DCA has previously made submissions to a number of other relevant inquiries, and throughout this document we draw on the information we have previously gathered from our membership on these issues.

We also draw extensively on DCA’s own research on the business benefits of inclusion, our research into the experiences of LGBTIQ+ people at work, and our guidelines for religious and multi-faith inclusion.

DCA supports individuals being protected from discrimination and harassment because of their religious belief, however, we have a number of concerns with the proposed legislation. Most relevant, that the proposed laws could stop Australian businesses fostering inclusive cultures.

In this submission, we raise the following concerns with the draft legislation:

GENERAL CONCERNS

1. DCA supports protection from discrimination, but the exposure legislation will privilege religious interests over other attributes that are currently protected by law

While DCA supports individuals being protected from discrimination and harassment because of their religious belief, we don’t believe that legislation should provide positive rights that allow people or groups to be discriminated against (e.g. on the basis of their race, including colour, national or ethnic origin or immigrant status; sex, pregnancy or marital status and breastfeeding; age; disability; or sexual orientation, gender identity and intersex status) because of another person’s religious belief.

2. The draft laws don’t appropriately balance religion with other human rights

We strongly believe that people shouldn’t be discriminated against because of their faith, and workplaces should be creating multi-faith inclusive environments.

However, we do not believe that the exposure drafts in their current form appropriately balance protection from discrimination on the basis of religion with other human rights, and in fact, have the effect of privileging religious expression (whether genuinely held or used as a justification for other forms of prejudice) over other rights at work.

3. International evidence suggests that ‘religious freedom’ laws harm LGBTIQ+ people and women

Under this proposed legislation, women and LGBTIQ+ could be discriminated against on religious grounds, and international evidence shows that this is harmful.
4. DCA members do not support new laws that would expand discrimination against LGBTIQ+ people

DCA members have repeatedly told us (in previous consultations) that they do not support the introduction of additional exemptions that allow further discrimination against LGBTIQ+ people.

In their current form, the proposed laws would give new privileges to people of faith that allow them to infringe on the rights of LGBTIQ+ people and their families, while overriding existing protections from discrimination for others.

Instead of pursuing new laws that would expand discrimination against LGBTIQ+ people, the Government should instead continue with the Australian Law Reform Commission’s inquiry into religious exemptions.

5. The proposed expansion of conscientious objections will be difficult for healthcare employers to manage

The proposed legislation will also make it more difficult for health employers and professional bodies to require all health workers and services to treat all people equally in health care and be difficult for healthcare employers to manage.

CONCERNS ABOUT PRACTICAL BUSINESS IMPLEMENTATION

6. The exposure draft differs significantly to other anti-discrimination legislation, and will be difficult to implement for businesses

For example, the definition of ‘outside of work’ is different to other anti-discrimination legislation.

The proposed Bills exempt behaviour undertaken ‘at a time other than when the employee is performing work on behalf of the employer’. However, there has long been a recognition that work extends beyond the physical boundaries of the workplace and the physical time of work.

Under other anti-discrimination law, intent is not relevant but rather how the behaviour is experienced. Under this draft, if the intention is in good faith, then it is lawful. Again, this is inconsistent with other Commonwealth anti-discrimination legislation and so in effect stipulates that religious expression is more important than other forms of identity.

We believe that the structure of any laws to prevent religious discrimination should be the same as other anti-discrimination legislation.

7. The proposed laws could stop Australian businesses fostering inclusive cultures, which would be damaging to business

This proposed legislation would make it difficult for large employers to promote an inclusive culture or achieve their mission by requiring reasonable employee conduct rules on religious expression outside of work hours.

This would impair organisational efforts to implement diversity and inclusion policies.
There is strong evidence that inclusion is good for business and DCA’s strong view is that these proposals are not good for workplace inclusion and therefore not good for business.

DCA defines Inclusion as getting the mix of people in an organisation to work together to improve performance and wellbeing.

DCA’s Inclusion@Work Index 2017-2018 research shows that inclusion matters to Australian workers – it fuels team performance and boosts employee satisfaction, success and security, while also minimising the risk of harassment and discrimination.

Therefore, laws that are damaging to inclusive workplace cultures would have a negative impact on business needs, and could actually increase discrimination, which is surely counter to the aims of the exposure drafts.

8. Concerns relating to proposed employee conduct clauses

The draft legislation would make it difficult for organisations to implement effective codes of conduct. A reasonable employee code of conduct is important to business as it clearly sets out expectations for employee behaviour and underpins a positive and inclusive organisational culture.

Under the proposed legislation employees would have a very wide ability to argue that they should not have to comply with particular company policies.

Under s8(3), the Bill would make it unlawful for a private sector employer with revenues of at least $50 million to restrict or prevent an employee from making a ‘statement of belief’ outside of work hours unless compliance with that rule is necessary to avoid ‘unjustifiable financial hardship’ to the employer.

Again, we would argue that the concept of what constitutes a workplace or work hours, given it is not defined in the draft exposure is potentially problematic.

DCA is concerned that the $50 million revenue is arbitrary, and suggests that employers should care more about the conduct of their employees than when it affects their bottom line and not the welfare of their employees, stakeholders or the broader community.

9. Concerns relating to the over-ride of State Laws

The proposed bill waters-down state-based protections for women, LGBTIQ+ community, racial minorities and people with disability, as well as discrimination on the basis of breastfeeding, parenting or family responsibilities.

10. The proposed legislation would give licence to a wide range of potentially harmful and offensive statements to be made by religious people, contributing to hostile, unsafe or non-inclusive workplaces

Under the Bill ‘a statement of belief’ could be used as a smokescreen for harassment, homophobia, sexism, ableism or some other form of prejudice.

See: https://www.dca.org.au/research/project/inclusion-index
Under proposed Section 41 of the bill, statements of belief will not constitute discrimination under commonwealth, state or territory anti-discrimination law unless the statement is ‘malicious, would or is likely to, harass, vilify or incite hatred or violence against another person or group’.

Given that there is no ‘test’ to determine that a particular view is ‘genuine’ or even a core tenant of a religion, comments that are ‘genuinely held’ and ‘in good faith’ could be used arbitrarily and with ill intent. It also does not take into account that the impact of any comments or behaviour is (under other discrimination laws) in the ‘eye of the beholder’.

In practice, this means that individuals could use their religion as a cover for comments that are homophobic, sexist, racist, or ableist.

ADOPTING A MODEL OF RELIGIOUS OR MULTI-FAITH INCLUSION

At DCA, we are interested in seeing religious and multi-faith inclusion, especially in workplaces. Religious inclusion is a higher bar than legal compliance, it’s about ensuring that an individual’s right to have a religious belief or no religious belief is respected.

We believe that people should be protected against discrimination because of their faith. But at the same time, we know that using that faith as a reason, genuinely held or not, to discriminate against others isn’t good for inclusion.

DCA’s *Creating Inclusive Multi-Faith Workplaces* provide a framework for multi-faith inclusion which elevates this discussion so we can respect and include all.

RECOMMENDATIONS

Instead of introducing the draft exposure legislation, we believe that the Government should continue consulting with relevant stakeholders on this issue, and must continue with the Australian Law Reform Commission’s inquiry into religious exemptions.

The structure of any laws to prevent religious discrimination should be the same as other anti-discrimination legislation, and should not provide additional positive rights that allow new discrimination against other people.
III. INTRODUCTION

Diversity Council Australia (DCA) is the independent not-for-profit peak body leading diversity and inclusion in the workplace. We provide unique research, inspiring events and programs, curated resources and expert advice across all diversity dimensions to a community of member organisations.

We have a wealth of experience providing advice to Australian organisations on issues relating to diversity and inclusion, in particular research relating to the business benefits of inclusive organisations.

Due to the short timeframe for consultation on these Bills, we were unable to consult with our membership on these exposure drafts.

However, DCA has previously made submissions to the AHRC inaugural Religious Freedom Roundtable, and the Expert Panel Religious Freedom (Ruddock Review) 2018, as well as a number of other relevant inquiries, and throughout this document we draw on the information we have previously gathered from our membership on these issues.

We also draw extensively on DCA’s own research on the business benefits of inclusion, our research into the experiences of LGBTIQ+ people at work, and our guidelines for religious or multi-faith inclusion.
IV. WHO EXPERIENCES EXCLUSION ON THE BASIS OF THEIR FAITH?

Much of the commentary around religious freedom suggests that it is Australian Christians who experience high levels of exclusion or discrimination on the basis of their faith. In addition, many of the most vocal supporters of these proposed laws have been people from Christian faiths, and the specific cases that the proposed laws have attempted to address (Israel Folau and the complaint against Archbishop of Hobart, Julian Porteous) relate to issues with Christian teachings.

Yet DCA’s representative survey of over 3000 workers (to be released in late 2019) strongly challenges the idea that it is people of Christian faith who experience exclusion or discrimination on the basis of their religion.

DCA’s research found that employees from non-Christian backgrounds experience exclusion at significantly higher rates than their Christian and non-religious colleagues.

In the past 12 months at my organisation I have experienced....

- Being ignored by people at work or treated as if I didn't exist (% sometimes, often, always)
  - Christian: 25%
  - No Religion: 24%
  - Non-Christian Religion: 33%

- Not getting opportunities or privileges others received (% sometimes, often, always)
  - Christian: 25%
  - No Religion: 32%
  - Non-Christian Religion: 42%

- Being left out of a work social gathering (% sometimes, often, always)
  - Christian: 25%
  - No Religion: 25%
  - Non-Christian Religion: 33%

- People have made incorrect assumptions about my abilities because of my age, culture/ethnicity, disability, gender Indigenous background, or sexual orientation (% sometimes, often, always)
  - Christian: 30%
  - No Religion: 32%
  - Non-Christian Religion: 44%

- I have felt excluded because of my age, culture/ethnicity, disability, gender, Indigenous background, or sexual orientation (% sometimes, often, always)
  - Christian: 21%
  - No Religion: 20%
  - Non-Christian Religion: 33%

- Any form of harassment or discrimination (% yes)
  - Christian: 28%
  - No Religion: 31%
  - Non-Christian Religion: 48%
Employees from non-Christian backgrounds were roughly 30% more likely to be ignored at work, miss out on work opportunities, or be left out of a work social gathering, 40% more likely to have had incorrect assumptions made about their abilities, almost 60% more likely to have felt excluded, and about 50% more likely to have experienced any form of harassment or discrimination than their Christian, or non-religious colleagues.

These findings are echoed in the annual Monash Scanlon Foundation Social Cohesion survey.\(^3\) Aggregated data over the past six surveys of this study shows that people of non-Christian faiths, reported experiences of discrimination two to three times higher than those of Christian faiths:

*The aggregated data for the last six national surveys (2013-2018) indicates a pattern of differentiation when responses are analysed by religion… Reported experience of discrimination ranges from 13% Anglican and 14% Catholic, to 22% Buddhist, 36% Hindu and 39% Muslim.*\(^4\)
V. DCA’S RESPONSE TO THE PROPOSED LEGISLATION

GENERAL CONCERNS

1. DCA supports protection from discrimination, but the exposure legislation will privilege religious interests over other attributes that are currently protected by law

As we argued in submission to the Inaugural Meeting of the Religious Freedom Roundtable (Australian Human Rights Commission, 2015):

*Currently no protection is offered on the grounds of religious belief under the Racial Discrimination Act (or other federal discrimination legislation) although a number of State and Territory jurisdictions offer such protection. Likewise, several States prohibit vilification of a person or people on the basis of their religion.*

*As this attribute is already covered by the Fair Work Act, in relation to employment, DCA would not anticipate the addition of ‘religious belief’ to the attributes covered in federal anti-discrimination legislation imposing any significant additional burden on employers.*

However, the draft exposure Bills go much further than simply introducing ‘religious belief’ to the attributes covered in federal anti-discrimination legislation. By inserting a clause which enables the override of federal, state and territory discrimination protections, this legislation creates standard for protection on the basis of religion (which in itself isn’t clearly defined) and contain a number of provisions which go beyond typical federal discrimination protections and which privilege religious interests over the interests of other Australians (e.g. a person’s race, including colour, national or ethnic origin or immigrant status; sex, pregnancy or marital status and breastfeeding; age; disability; or sexual orientation, gender identity and intersex status).

While DCA supports individuals being protected from discrimination and harassment because of their religious belief, we don’t believe that legislation should provide positive rights that allow people or groups to be discriminated against (e.g. on the basis of their race, including colour, national or ethnic origin or immigrant status; sex, pregnancy or marital status and breastfeeding; age; disability; or sexual orientation, gender identity and intersex status) because of another person’s religious belief.
2. The draft laws don’t appropriately balance religion with other human rights

The right to freedom of thought, conscience and religion is recognised in Article 18 of the International Covenant on Civil and Political Rights (ICCPR).

However, no right is limitless, but must instead be carefully balanced. In fact, the United Nations Human Rights Committee has commented extensively on this, and has drawn a clear distinction drawn between freedom to have a religion or belief which is regarded as an absolute right, and the freedom to manifest one's religion or beliefs which *may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others*. 7

This is a situation commonly handled in Australian organisations, where someone’s religious beliefs, challenge another person’s belief or identity, especially if this has an impact on the needs of the business. There are no easy answers, but the principle of inclusion – ensuring that all employees are respected, connected, and able to contribute and progress – can help navigate some of these situations. (See below an excerpt from DCA’s Creating Inclusive Multi-Faith Workplaces which sets out a framework for handling these situations).

We strongly believe that people shouldn’t be discriminated against because of their faith, and workplaces should be creating multi-faith inclusive environments.

However, we do not believe that the exposure drafts in their current form appropriately balance protection from discrimination on the basis of religion with other human rights, and in fact, have the effect of privileging religious expression (whether genuinely held or used as a justification for other forms of prejudice) over other rights at work.

3. International evidence suggests that ‘religious freedom’ laws harm LGBTIQ+ people and women

Under this proposed legislation, women and LGBTIQ+ could be discriminated against on religious grounds, and international evidence shows that this is harmful.

A recent study from Human Rights Watch (US), shows the harm that can be done by laws that permit people to infringe on the rights of LGBT individuals and their families to uphold their own religious or moral beliefs. 8

Researchers interviewed 112 LGBT people, service providers, and advocates, about the discrimination that LGBT people have faced due to ‘religious freedom’ laws in the U.S. The researchers found that:

*Some laws enable and embolden businesses and service providers to refuse to serve LGBT people, compelling LGBT people to invest additional time, money, and energy to find willing providers; others simply give up on obtaining the goods or services they need. More insidiously, they give LGBT people reason to expect*
discrimination before it even occurs, and to take extra precautions or avoid scenarios where they might face hostility out of self-preservation.

…Such legislation immediately endangers LGBT rights. By allowing people to elevate their prejudices above fairness and equality, it also threatens the broader principle that people should not be refused goods and services solely because of who they are.⁹

What’s more, the researchers argued that such laws:

…send a signal that the state governments enacting them accept and even embrace the dangerous and harmful notion that discrimination against LGBT people is a legitimate demand of both conscience and religion.¹⁰

According to the ACLU ‘religious freedoms’ are also being used to discriminate against women:

In health care, we are seeing hospitals, insurance companies, pharmacies, and other health care entities discriminate against women by denying basic care—such as birth control, emergency contraception, and abortion—in the name of religion….

In employment, we have seen a recent spate of cases in which religiously affiliated schools have fired women for getting pregnant while single or for using IVF. These cases are suggestive of a past when women were routinely pushed out of the workplace because of pregnancy.¹¹

4. DCA members do not support new laws that would expand discrimination against LGBTIQ+ people

DCA members have repeatedly told us (in previous consultations) that they do not support the introduction of additional exemptions that allow further discrimination against LGBTIQ+ people.

In their current form, the proposed laws would give new privileges to people of faith that allow them to infringe on the rights of LGBTIQ+ people and their families, while overriding existing protections from discrimination for others.

DCA has long held the view that exemptions to anti-discrimination legislation can weaken protections for marginalised groups. For example, in 2015, responding to the Australian Human Rights Commission’s call for submissions in advance of AHRC inaugural Religious Freedom Roundtable, DCA argued that

We are strongly of the view that the current exemptions and exceptions in anti-discrimination law at both State and Commonwealth levels, diminish the appropriate coverage of universal anti-discrimination protections. DCA believes that religious exemptions on any grounds should be specifically limited to those circumstances where there is a specific religious element to employment or the provision of goods and services, mirroring inherent requirements and genuine occupational qualifications in other areas.
DCA is of the view that limiting religious exemptions to those circumstances where there is a specific religious element to employment, strikes an appropriate balance between religious rights and freedoms. For example, we support continued exceptions where a religious body employs a person as a priest, minister of religion etc. Similarly, if a religious school employs a teacher of religion it would appear reasonable for that person to be required to adhere to the relevant religion and its tenets.\textsuperscript{ii}

In 2016, responding to the exposure draft of \textit{Marriage Amendment (Same-Sex Marriage) Bill}, DCA members told us they:

- Opposed the introduction of exemptions based on the concept of ‘conscientious belief’;
- Opposed the introduction of exemptions that would allow ministers of religion to refuse to solemnise a wedding for an LGBTIQ+ couple on the basis of a ‘conscientious belief’, regardless of the teachings of their church;
- Opposed the introduction of exemptions that would allow civil celebrants the right to refuse to marry LGBTIQ+ couples on the basis of ‘conscientious belief’; and
- Opposed the introduction of exemptions that would allow civil celebrants the right to refuse to marry LGBTIQ+ couples on the basis of religious beliefs.\textsuperscript{12}

And in 2018, the DCA members who responded to our consultation for the \textit{Expert Panel Religious Freedom} expressed strong opposition to any new exemptions that would allow new discrimination against LGBTIQ+ people.

\textit{Figure: DCA submission to the Expert Panel Religious Freedom (Ruddock Review) 2018:}

‘Do you support the introduction of NEW exemptions to anti-discrimination laws that would allow service providers to refuse services to LGBTIQ+ people, or women, because of a religious belief?’

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{piechart.png}
\caption{DCA submission to the Expert Panel Religious Freedom (Ruddock Review) 2018:}
\end{figure}

\textsuperscript{ii} See DCA’s Submission in advance of AHRC inaugural Religious Freedom Roundtable, here: https://www.dca.org.au/submissions/submission-advance-ahrc-inaugural-religious-freedom-roundtable.\textsuperscript{12}
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DCA would again emphasise the harm that can be caused by exempting groups of people from laws designed to protect individuals from harassment and discrimination.

This legislation would inevitably lead to more people hiding who they are at work; which, as DCA’s *Out at Work* research highlights, has costs for LGBTIQ+ people, organisations and Australia.  

‘I don’t want special treatment, I just want the same opportunities as anyone else and not to have to conceal who I am at work. It’s exhausting having to hide that’.

(Respondent to DCA survey).

- **For LGBTIQ+ People.** Hiding who they are comes at a cost for LGBTIQ+ people – to their psychological wellbeing, job and life satisfaction, as well as skills and abilities.
- **For Organisations.** When organisations overlook LGBTIQ+ inclusion, they also overlook a significant business opportunity. Companies that are supportive of their LGBTIQ workers achieve higher productivity and profitability than companies who do not have LGBTIQ inclusive policies. Recent research found that leading LGBTI employers outperformed the wider market by 3% in share price growth over a six-year period.
- **For Australia.** The financial benefits associated with encouraging not out Australian workers to ‘come out’ could lead to as much as $285 million in savings per year nationally, including an 11% staff retention dividend and a 30% team productivity benefit. 


Instead of pursuing new laws that would expand discrimination against LGBTIQ+ people, the Government should instead continue with the Australian Law Reform Commission’s inquiry into religious exemptions.
5. The proposed expansion of conscientious objections will be difficult for healthcare employers to manage

The proposed legislation will also make it more difficult for health employers and professional bodies to require all health workers and services to treat all people equally in health care and be difficult for healthcare employers to manage.

Currently, under some State and Territory laws some health workers can only ‘conscientiously object’ to certain types of health services (such as abortion and euthanasia) and this may be conditional, such as requiring assistance where necessary to preserve life or provided a referral is organised for the patient.

Under these proposals, it would be unlawful for health employers and professional bodies to restrict or prevent health professionals from conscientiously objecting to providing health services on religious grounds. This would greatly expand the services that health employees could refuse to provide and would be difficult for healthcare employers to manage.
CONCERNS ABOUT PRACTICAL BUSINESS IMPLEMENTATION

6. The exposure draft differs significantly to other anti-discrimination legislation, and will be difficult to implement for businesses

Our previous consultations with DCA members have revealed that there is a high level of misunderstanding around current laws in relation to protection from discrimination on the basis of religion at work.\textsuperscript{20}

Rather than ameliorating that, we believe that the exposure draft, as currently written would create further confusion for workplaces.

For example, the definition of ‘outside of work’ is different to other anti-discrimination legislation.

The proposed Bills exempt behaviour undertaken ‘at a time other than when the employee is performing work on behalf of the employer’. However, there has long been a recognition that work extends beyond the physical boundaries of the workplace and the physical time of work.

For example, the interpretation of ‘at work’ under the Fair Work Commission’s anti-workplace bullying laws, is not limited to the confines of a physical workplace but rather work activities wherever they occur.\textsuperscript{21} The behaviour may not have to had occurred while the worker is actively engaged in work.\textsuperscript{22}

Although complex, there is also a recognition that the use of social media outside of work can be workplace bullying.\textsuperscript{23} The court has stated it does not matter if comments are made on a home computer, out of work hours as the separation between home and work is now less pronounced than it once was.\textsuperscript{24} It has considered the posting of derogatory, offensive and discriminatory statements or comments about other employees on Facebook as a valid reason for termination of employment, dependent on the nature of the comments and the width of their publication.\textsuperscript{25}

Employers have also been held legally responsible for acts of discrimination or harassment that occur in the workplace, including posts and comments made on social media. Such activities have been found to amount to sexual harassment or can be regarded as racial vilification.

Under other anti-discrimination law, \textit{intent} is not relevant but rather how the behaviour is experienced. Under this draft, if the intention is in good faith, then it is lawful. Again, this is inconsistent with other Commonwealth anti-discrimination legislation and so in effect stipulates that religious expression is more important than other forms of identity.

Under Australian anti-discrimination law, the intent of the behaviour is irrelevant, rather the law focuses on the perception of the recipient of the conduct and whether they find it discriminatory. For example, when considering acts of racial hatred under the \textit{Racial}

[...]

- 18 -
Discrimination Act, the victim’s perspective is the measure of whether an act is reasonably likely to offend, insult, humiliate or intimidate. A test of ‘reasonable and good faith’ will only be applied to exemptions to 18C i.e., artistic works, academic and scientific works, debates or comments on matters of public interest and fair comments of public interest. This is also seen in the Sex Discrimination Act and sexual harassment, whereby unwelcome behaviour is assessed by how the conduct was perceived and experienced by the recipient rather than the intention behind it.

The proposed religious freedoms bill instead provides an initial test of ‘good faith’ under the definition of statements of belief, which are prescribed to generally not constitute as discrimination. This shifts the focus from the recipient’s perspective and their right not to be discriminated against and prioritises the intent of the perpetrator and their right to religious freedom. As stated previously, these inconsistencies create a hierarchy of protected identity aspects.

We believe that the structure of any laws to prevent religious discrimination should be the same as other anti-discrimination legislation.

7. The proposed laws could stop Australian businesses fostering inclusive cultures, which would be damaging to business

This proposed legislation would make it difficult for large employers to promote an inclusive culture or achieve their mission by requiring reasonable employee conduct rules on religious expression outside of work hours.

This would impair organisational efforts to implement diversity and inclusion policies.

There is strong evidence that inclusion is good for business and DCA’s strong view is that these proposals are not good for workplace inclusion and therefore not good for business.

DCA defines Inclusion as getting the mix of people in an organisation to work together to improve performance and wellbeing.

Inclusion in a workplace is achieved when a diversity of people (e.g., ages, cultural backgrounds, genders, perspectives) feel that they are:

- RESPECTED for who they are and able to be themselves;
- CONNECTED to their colleagues and feel they belong;
- CONTRIBUTING their perspectives and talents to the workplace; and
- PROGRESSING in their career at work (i.e. have equal access to opportunities and resources).
Inclusion is good for Australian businesses

DCA’s *Inclusion@Work Index 2017-2018* research shows that inclusion matters to Australian workers – it fuels team performance and boosts employee satisfaction, success and security, while also minimising the risk of harassment and discrimination.

Inclusive workplaces reduce harassment and discrimination

DCA’s *Inclusion@Work Index 2017-18* also found that harassment and discrimination are twice as likely to be experienced by people from minority groups – for example, 31% of Aboriginal and/or Torres Strait Islander workers reported having experienced some form of discrimination in the past year, compared to 16% of non-Aboriginal and/or Torres Strait Islander workers. Similarly 23% of LGBTIQ+ workers had been harassed compared to 15% of non-LGBTIQ+ workers.
But, organisational cultures that are inclusive also lower the risks of workplace harassment and discrimination. Specifically, our research found that people who work in inclusive teams are seven times less likely to experience harassment or discrimination.

**LGBTIQ+ Inclusive Cultures Drive Team Performance**

DCA’s *Out at Work* research also revealed that there is a positive moral and business case for creating workplace cultures that value, welcome and include LGBTIQ+ people. Our research found that employees in organisations which were highly LGBTIQ+-inclusive are at least twice as likely as employees in non-inclusive cultures to achieve, innovate, and provide excellent customer/service.

Therefore, laws that are damaging to inclusive workplace cultures would have a negative impact on business needs, and could actually increase discrimination, which is surely counter to the aims of the exposure drafts.
8. Concerns relating to proposed employee conduct clauses

The draft legislation would make it difficult for organisations to implement effective codes of conduct. A reasonable employee code of conduct is important to business as it clearly sets out expectations for employee behaviour and underpins a positive and inclusive organisational culture.

Under the proposed legislation employees would have a very wide ability to argue that they should not have to comply with particular company policies.

Why is the test financial impact?

Under s8(3), the Bill would make it unlawful for a private sector employer with revenues of at least $50 million to restrict or prevent an employee from making a 'statement of belief' outside of work hours unless compliance with that rule is necessary to avoid ‘unjustifiable financial hardship’ to the employer.

Again, we would argue that the concept of what constitutes a workplace or work hours, given it is not defined in the draft exposure is potentially problematic.

DCA is concerned that the $50 million revenue is arbitrary, and suggests that employers should care more about the conduct of their employees when it affects their bottom line than the welfare of their employees, stakeholders or the broader community.

Allowing some employees to opt-out of clauses

Employees would have a very wide ability to argue that they should not have to comply with particular company policies. These proposed laws would allow individuals to 'opt out' of their organisational diversity and inclusion policies, which would be damaging to organisational cultures and the wellbeing of individuals.

Unjustifiable hardship is undefined

Also, to date, ‘unjustifiable hardship’ is undefined. In the Israel Folau case for example, would a major sponsor pulling out meet this test? This creates confusion and ambiguity for workplaces, which would be a major barrier to implementing diversity and inclusion programs.

9. Concerns relating to the over-ride of State Laws

The exposure drafts also allows for unprecedented intrusion into other jurisdictions by protecting expression of religious speech over acts of discrimination by stating that such speech does not constitute discrimination under commonwealth, state or territory anti-discrimination law.

In particular, provision 41 expressly overrides the Tasmanian Anti-Discrimination Act 1998 which prevents conduct and speech that would ‘offend, insult and humiliate’ people based on protected characteristics, section 17.
The proposed bill waters-down state-based protections for women, LGBTIQ+ community, racial minorities and people with disability, as well as discrimination on the basis of breastfeeding, parenting or family responsibilities.

As discussed above, the proposed law encroaches on anti-vilification protections which set a standard for acceptable behaviour. By overriding state protection and lowering the threshold for harm, it creates different standards for those of religious belief.

10. The proposed legislation would give licence to a wide range of potentially harmful and offensive statements to be made by religious people, contributing to hostile, unsafe or non-inclusive workplaces.

DCA’s Words At Work research shows that language is a powerful tool for building inclusion and exclusion at work. It can be used to create a sense of being valued, respected and one of the team or of being under-valued, disrespected, and an ‘outsider’.

Inclusive language enables a diversity of people (e.g. different ages, cultures, genders) to feel valued and respected and able to contribute their talents to drive organisational performance.

Research also demonstrates that inclusive cultures are high performing cultures – they deliver greater performance and productivity. How we speak to and about each other influences how we treat each other, and this builds our workplace cultures.

Studies show that:
• Non-inclusive language contributes to and continues stereotyping.
• Non-inclusive language harms people who witness it as well as the intended targets.
• When used in job interviews, non-inclusive language results in applicants from excluded groups finding the position less attractive, and experiencing less motivation and identification with the position than those who are exposed to inclusive language.
• Non-inclusive comments in the workplace can have an insidious effect on individuals from the excluded groups, impeding their advancement at work by presenting them as incompetent and not suitable for leadership roles.
• Frequent non-inclusive experiences at work have just as harmful effects as more intense but less frequent experiences (e.g. sexual coercion and harassment).
• Non-inclusive jokes can lead to tolerance of hostile feelings and discrimination against people from excluded groups.29

Under the Bill ‘a statement of belief’ could be used as a smokescreen for harassment, homophobia, sexism, ableism or some other form of prejudice

Under proposed Section 41 of the bill, statements of belief will not constitute discrimination under commonwealth, state or territory anti-discrimination law unless the statement is ‘malicious, would or is likely to, harass, vilify or incite hatred or violence against another person or group’.

This is a different test to what exists on other anti-discrimination legislation (by comparison, Section 18C of the Racial Discrimination Act prohibits speech that ‘offends, insults or humiliates’ a person based on their race) which allows for religious speech to be protected and privileged above other speech. It also places a higher burden of proof for individuals who have been discriminated against on religious grounds.

Furthermore, such statements do not actually have to conform to a person’s religion but only must ‘reasonably be regarded as being in accordance’ with religion.

Given that there is no ‘test’ to determine that a particular view is ‘genuine’ or even a core tenant of a religion, comments that are ‘genuinely held’ and ‘in good faith’ could be used arbitrarily and with ill intent. It also does not take into account that the impact of any comments or behaviour is (under other discrimination laws) in the ‘eye of the beholder’.

In practice, this means that individuals could use their religion as a cover for comments that are homophobic, sexist, racist, or ableist.

WORKPLACE SCENARIOS
Workplace Scenario: racial discrimination

By prioritising religious expression over other human rights, situations could arise where religious belief could be used as reason to ‘offend, insult or humiliate’ people based on their race.

For example, in the not so distant past, biblical quotes were used to justify racial segregation.30 In a workplace, this could mean that someone could use these protections to
make racially offensive comments that would otherwise be prohibited under the *Racial Discrimination Act*.  

**Workplace Scenario: two employees make discriminatory comments, only one is religious**  
Under these laws religious people are exempted from complying with other laws that non-religious people must comply with.  
This could create confusing and conflicting situations where different kinds of speech would have different protections and different limits for when employers can step in to uphold workplace standards of conduct. For example, two employees publishing material on social media that express opposition to same-sex couples raising children and one employee is of a religious background.  

**Workplace Scenario: discrimination against people with disability**  
Under the proposed Bill, a ‘statement of belief’ could be used to justify prejudice. For example, there are passages in the Bible that are derogatory towards people with disability.  
Therefore, under this proposed legislation, an employee of an organisation could make deeply harmful and disparaging comments about people with disability, and claim to be simply quoting the Bible to validate their comments which would not be acceptable under other circumstances.  

**Workplace scenario: An employee states that they believe same-sex relationships are sinful**  
For example, under these proposed laws an employee could make a statement such as ‘I believe homosexuality is a sin’. Yet studies show, that this is a message that is harmful to LGB people, and can cause mental health consequences, great emotional distress, and feelings that were associated with anxiety, panic disorders, depression, and suicidality.
VI. ADOPTING A MODEL OF RELIGIOUS OR MULTI-FAITH INCLUSION

At DCA, we are interested in seeing religious and multi-faith inclusion, especially in workplaces.

Religious inclusion is a higher bar than legal compliance, it’s about ensuring that an individual’s right to have a religious belief or no religious belief is respected.

We want to elevate the conversations that we have each day so they respect and include all.

We believe that people should be protected against discrimination because of their faith. But at the same time, we know that using that faith as a reason, genuinely held or not, to discriminate against others isn’t good for inclusion.

DCA developed a guide for Australian workplaces about how to deal with a range of common faith-related queries, and also to provide workplaces with principles to help balance issues where conflicting rights might intersect.

The Business Case for Multi-Faith Diverse and Inclusive Workplaces

In multi-faith contemporary Australia, customers, clients and employees are increasingly expecting products, services, and workplaces to be inclusive of faith-related perspectives.

Diverse markets

Globalisation means clients and target audiences come from diverse cultures and practice different faiths. In some countries around the world over 90% of the population identify as religious. This has resulted in Australian companies developing markets and establishing trading relationships in new communities and regions of the world where business practices may be influenced in part by religious tenets. Organisations that are not responsive, respectful or inclusive of these differences may unknowingly cause offense and risk failure to fully capitalise on business opportunities.

Diverse workforces

Employees too are expecting faith sensitivity and responsiveness as they seek a more holistic approach to their time at work, becoming less willing to disconnect their work and personal identities. This has resulted in an increase in the number of employees seeking to
express their religious and spiritual identity in the workplace. Organisations who take a proactive approach to multi-faith inclusion by supporting the faith-expression of their employees and recognising the faith-based capabilities of their workforce are open to a number of benefits.


Balancing religion with other human rights at work

DCA’s Creating Inclusive Multi-Faith Workplaces also sets out a framework for handling an issue where someone’s religious beliefs challenge another person’s belief or identity.

<table>
<thead>
<tr>
<th>BALANCING RELIGION WITH OTHER HUMAN RIGHTS AT WORK</th>
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<tbody>
<tr>
<td>A common question we receive at DCA is how to handle situations where someone’s religious beliefs challenge another person’s belief or identity, especially if this has an impact on the needs of the business. There are no easy answers, but the principle of inclusion – ensuring that all employees are respected, connected, and able to contribute and progress – can help navigate some of these situations. In practice, aspiring for inclusion means:</td>
</tr>
<tr>
<td><strong>1. STARTING WITH MUTUAL RESPECT.</strong></td>
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<tr>
<td>Inclusive organisations are ones where a diversity of employees are respected. When you encounter a situation where it appears that two ideas may be in conflict with each other, a good point to start from is by ensuring that all employees are treated with respect. In most cases, starting with respect enables there to be a sensible compromise.</td>
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<tr>
<td><strong>2. WELCOMING RELIGIOUS BELIEFS BUT RECOGNISING THAT WORK IS NOT THE PLACE FOR PROSELYTISING – UNLESS YOU ARE EMPLOYED TO DO THIS.</strong></td>
</tr>
<tr>
<td>Inclusive workplaces welcome and encourage religious beliefs and expression, but religious expression shouldn’t involve proselytising at work (unless that is the actual job).</td>
</tr>
<tr>
<td><strong>3. SEPARATING RELIGIOUS BELIEFS FROM RELIGIOUS EXPRESSION.</strong></td>
</tr>
<tr>
<td>Many people in Australia have deeply held religious beliefs, but expressing those beliefs in a way that is harmful to other people could breach anti-discrimination laws, and may also not be respectful in a workplace context.</td>
</tr>
<tr>
<td><strong>4. RECOGNISING THAT COMMUNITY EXPECTATIONS ARE CONSTANTLY SHIFTING OVER TIME.</strong></td>
</tr>
<tr>
<td>At various times in history, religious beliefs were used to justify a range of practices including slavery, prohibitions on interracial marriage, and the criminalisation of homosexuality. But in 2019, thankfully, the views and expectations of the community have since shifted.</td>
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VII. CONCERNS WITH THE DRAFT LEGISLATION

GENERAL CONCERNS

1. DCA supports protection from discrimination, but the exposure legislation will privilege religious interests over other attributes that are currently protected by law

While DCA supports individuals being protected from discrimination and harassment because of their religious belief, we don’t believe that legislation should provide positive rights that allow people or groups to be discriminated against (e.g. on the basis of their race, including colour, national or ethnic origin or immigrant status; sex, pregnancy or marital status and breastfeeding; age; disability; or sexual orientation, gender identity and intersex status) because of another person’s religious belief.

2. The draft laws don’t appropriately balance religion with other human rights

We strongly believe that people shouldn’t be discriminated against because of their faith, and workplaces should be creating multi-faith inclusive environments.

However, we do not believe that the exposure drafts in their current form appropriately balance protection from discrimination on the basis of religion with other human rights, and in fact, have the effect of privileging religious expression (whether genuinely held or used as a justification for other forms of prejudice) over other rights at work.

3. International evidence suggests that ‘religious freedom’ laws harm LGBTIQ+ people and women

Under this proposed legislation, women and LGBTIQ+ could be discriminated against on religious grounds, and international evidence shows that this is harmful.

4. DCA members do not support new laws that would expand discrimination against LGBTIQ+ people

DCA members have repeatedly told us (in previous consultations) that they do not support the introduction of additional exemptions that allow further discrimination against LGBTIQ+ people.

In their current form, the proposed laws would give new privileges to people of faith that allow them to infringe on the rights of LGBTIQ+ people and their families, while overriding existing protections from discrimination for others.

Instead of pursuing new laws that would expand discrimination against LGBTIQ+ people, the Government should instead continue with the Australian Law Reform Commission’s inquiry into religious exemptions.

5. The proposed expansion of conscientious objections will be difficult for healthcare employers to manage

The proposed legislation will also make it more difficult for health employers and professional bodies to require all health workers and services to treat all people equally in health care and be difficult for healthcare employers to manage.
CONCERNS ABOUT PRACTICAL BUSINESS IMPLEMENTATION

6. The exposure draft differs significantly to other anti-discrimination legislation, and will be difficult to implement for businesses

For example, the definition of ‘outside of work’ is different to other anti-discrimination legislation.

The proposed Bills exempt behaviour undertaken ‘at a time other than when the employee is performing work on behalf of the employer’. However, there has long been a recognition that work extends beyond the physical boundaries of the workplace and the physical time of work.

Under other anti-discrimination law, intent is not relevant but rather how the behaviour is experienced. Under this draft, if the intention is in good faith, then it is lawful. Again, this is inconsistent with other Commonwealth anti-discrimination legislation and so in effect stipulates that religious expression is more important than other forms of identity.

We believe that the structure of any laws to prevent religious discrimination should be the same as other anti-discrimination legislation.

7. The proposed laws could stop Australian businesses fostering inclusive cultures, which would be damaging to business

This proposed legislation would make it difficult for large employers to promote an inclusive culture or achieve their mission by requiring reasonable employee conduct rules on religious expression outside of work hours.

This would impair organisational efforts to implement diversity and inclusion policies.

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Therefore, laws that are damaging to inclusive workplace cultures would have a negative impact on business needs, and could actually increase discrimination, which is surely counter to the aims of the exposure drafts.

8. Concerns relating to proposed employee conduct clauses

The draft legislation would make it difficult for organisations to implement effective codes of conduct. A reasonable employee code of conduct is important to business as it clearly sets out expectations for employee behaviour and underpins a positive and inclusive organisational culture.

Under the proposed legislation employees would have a very wide ability to argue that they should not have to comply with particular company policies.
Under s8(3), the Bill would make it unlawful for a private sector employer with revenues of at least $50 million to restrict or prevent an employee from making a ‘statement of belief’ outside of work hours unless compliance with that rule is necessary to avoid ‘unjustifiable financial hardship’ to the employer.

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DCA is concerned that the $50 million revenue is arbitrary, and suggests that employers should care more about the conduct of their employees when it affects their bottom line than the welfare of their employees, stakeholders or the broader community.

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The proposed bill waters-down state-based protections for women, LGBTIQ+ community, racial minorities and people with disability, as well as discrimination on the basis of breastfeeding, parenting or family responsibilities.

10. The proposed legislation would give licence to a wide range of potentially harmful and offensive statements to be made by religious people, contributing to hostile, unsafe or non-inclusive workplaces

Under the Bill ‘a statement of belief’ could be used as a smokescreen for harassment, homophobia, sexism, ableism or some other form of prejudice.

Under proposed Section 41 of the bill, statements of belief will not constitute discrimination under commonwealth, state or territory anti-discrimination law unless the statement is ‘malicious, would or is likely to, harass, vilify or incite hatred or violence against another person or group’.

Given that there is no ‘test’ to determine that a particular view is ‘genuine’ or even a core tenant of a religion, comments that are ‘genuinely held’ and ‘in good faith’ could be used arbitrarily and with ill intent. It also does not take into account that the impact of any comments or behaviour is (under other discrimination laws) in the ‘eye of the beholder’.

In practice, this means that individuals could use their religion as a cover for comments that are homophobic, sexist, racist, or ableist.
VIII. CONCLUSION & RECOMMENDATIONS

While DCA supports individuals being protected from discrimination and harassment because of their religious belief, we don’t support legislation that provides positive rights that allow people or groups to be discriminated against by others because of another person’s religious belief.

The proposed legislation is deeply unfair, and crosses the line for gender and LGBTIQ+ inclusion, as well as creating an impossible situation for workplaces.

Our previous consultations with DCA members have revealed that there is a high level of misunderstanding around current laws in relation to protection from discrimination on the basis of religion at work.

Rather than ameliorating that, we believe that the exposure draft, as currently written would create further confusion for workplaces.

**Instead of introducing the draft exposure legislation, we believe that the Government should continue consulting with relevant stakeholders on this issue, and must continue with the Australian Law Reform Commission’s inquiry into religious exemptions.**

The structure of any laws to prevent religious discrimination should be the same as other anti-discrimination legislation, and should not provide additional positive rights that allow new discrimination against other people.
IX. ENDNOTES

1 See for example:


2 See for example:


6 There is no single universal definition of ‘religion’ or characteristic that can determine the legal criteria of whether a collection of ideas/practices and beliefs constitute a religion. Rather, the courts have defined features to assist:
the particular collection of ideas and/or practices involves belief in the supernatural, i.e. belief that reality extends beyond that which is capable of perception by the senses

- the ideas relate to man’s nature and place in the universe and relation to things supernatural

- the ideas are accepted by adherents as requiring or encouraging them to observe particular standards or codes of conduct or to participate in specific practices having supernatural significance however loosely knit and varying in beliefs and practices adherents may be, they constitute an identifiable group or identifiable groups, and

- the adherents themselves see the collection of ideas and/or practices as constituting a religion.


9 Ibid.

10 Ibid.


14 R. J. Lewis, V.J. Derlega, E.G. Clarke, and J.C. Kuang, ‘Stigma consciousness, social constraints, and lesbian well-being.’


16 C.R. Critcher and M.J. Ferguson M.J. ‘The cost of keeping it hidden: Decomposing concealment reveals what makes it depleting.’


20 In 2018, as part of our consultation with DCA Members to make a submission to the *Expert Panel Religious Freedom (Ruddock Review) 2018*, our members consistently told us that they were unsure or unaware of how laws around protection from discrimination on the basis of religion interacted with other laws. Our consultations have also revealed that to many workplaces, Australia’s laws covering protection from religious discrimination at work can be confusing, as coverage varies across states as well as federally.


23 Ibid.


31 See for example: *Leviticus 21:17-24*.