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Hon Christian Porter MP

Attorney General

By email: [FoRConsultation@ag.gov.au](mailto:FoRConsultation@ag.gov.au)

## Second Exposure Draft - Religious Freedom Bills

Dear Attorney

Thank you for the opportunity to provide a further submission in response to the Australian Government's second exposure drafts on religious discrimination.

Diversity Council Australia is the only independent, not-for-profit workplace diversity and inclusion advisor to business in Australia. Our membership represents almost 15% of the Australian labour market. 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 strongly 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, DCA remains concerned that this proposed legislation could stop Australian businesses fostering inclusive cultures, eroding any business benefit derived from inclusion.

**Instead of introducing the draft exposure legislation, we would reiterate our recommendation 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.**

**A standard discrimination bill, designed along the same lines of existing Australian laws, could protect people of faith and without faith, without taking away existing protections or introducing complex and untested rules, that will be difficult for business to manage.**

Please feel free to contact myself or Cathy Brown, DCA's Manager Government Relations on 0424 578 698, or [cathy@dca.org.au](mailto:cathy@dca.org.au), should you require any further information about this matter.

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.

### DCA's Membership represents 15% of the Australian workforce

DCA's prestigious group of over 600 members is drawn from business and workplace diversity leaders and includes some of Australia's biggest employers. Our membership reaches approximately **15%** of the Australian labour market (two million Australians).

### About our members

- Over 600 member organisations, including almost 40 ASX100 Listed companies.
- Our members are drawn from across the corporate, government and not-for-profit sectors and vary from small to large workforces in size.
- Our founding members include ANZ, AMP, BHP, Coles, IBM Australia, Myer, Rio Tinto and Westpac.
- DCA is not government funded – our income is generated from membership fees, sponsorships and services to business/employers.

DCA's Members are listed on our website here: <https://www.dca.org.au/membership/current-dca-members>.

### 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.

Our focus covers all aspects of diversity in employment, reflecting changes in practice to embrace all areas of the diversity of human resources.

## 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, BHP, 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.



## II. SUMMARY

This submission builds on our previous submission (dated 2 October 2019) in response to the Australian Government's draft package of proposed legislative reforms on religious freedom.

**While we note that some changes were made to the original drafts, we do not believe that these changes address the overarching concerns raised in our earlier submission.**

In addition to the concerns raised in our previous submission ([available here](#)<sup>i</sup>), we raise the following concerns with the second exposure drafts:

**DCA supports protection from discrimination, but by overriding other anti-discrimination laws the second exposure draft continues to privilege religious interests over other attributes:**

While DCA strongly supports individuals being protected from discrimination and harassment because of their religious belief, we don't support section 42 which would override existing anti-discrimination protections.

A standard discrimination bill, designed along the same lines of existing Australian laws, could protect people of faith and without faith, without taking away existing protections or introducing complex and untested rules, that will be difficult for business to manage.

**The second exposure draft would further expand discrimination against LGBTIQ+ people, and DCA members do not support new laws that would expand discrimination against LGBTIQ+ people.**

As outlined in our previous submission, DCA members do not support the introduction of any further laws that allow further discrimination against LGBTQ+ people.

By expanding the services, organisations, and types of accommodation in the second exposure draft would actually expand the services, organisations and venues that can discriminate against LGBTIQ+ people.

Furthermore a publicly available policy that states that accommodation is not available to certain groups on the basis of religious reasons would further stigmatise LGBTIQ+ people. Rather, we would reiterate our recommendation from our previous submission, that: Instead of pursuing new laws that would expand discrimination

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<sup>i</sup> See <https://www.dca.org.au/submissions/submission-response-exposure-draft-religious-freedom-bills>



against LGBTIQ+ people, the Government should instead continue with the Australian Law Reform Commission's inquiry into religious exemptions.

**Proposed Employer Conduct Rules will continue to make it difficult for employers to promote an inclusive culture.**

Employers have a legal responsibility to protect employees from harassment and bullying, which may occur outside of work. Reasonable Codes of Conduct set expectations of employees and are fundamental to creating safe and inclusive workplaces, and for employers meeting their legal obligations.

DCA reiterates that the proposed employer conduct rules, including those which apply to qualifying bodies, would seriously impede the ability of employers to maintain appropriate standards of conduct and to protect their employees from harassment and discrimination.

Employers will find it harder to create inclusive cultures which their employees, customers, clients and shareholders demand and could face legal challenges if they try to enforce workplace diversity and inclusion policies.

We also strongly reiterate our concerns that:

1. The \$50 million employer revenue provision is an arbitrary figure, 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.
2. 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.

**Under second the exposure draft, prejudicial comments are judged by whether they could be considered to be in accordance with the doctrines, tenets, beliefs or teachings of that religion, rather than the impact on the person experiencing those comments.**

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. As we stated in our previous submission, 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.

Again, we would emphasise that a standard discrimination bill, designed along the same lines of existing Australian laws, could protect people of faith and without faith, without taking away existing protections or introducing complex and untested rules, that will be difficult for business to manage

**The ‘any person of the same religion’ test lowers the bar on what is considered a religious doctrine, tenet, belief or teaching, and provides special protection to much more extreme and unorthodox beliefs.**

The ‘any person of the same religion’ is legally unconventional and could allow for extremely offensive or discriminatory views to be justified if they are shared by just one other person.

## **RECOMMENDATIONS**

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Instead of introducing the draft exposure legislation, we would reiterate our recommendation 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.

A standard discrimination bill, designed along the same lines of existing Australian laws, could protect people of faith and without faith, without taking away existing protections or introducing complex and untested rules, that will be difficult for business to manage

### III. INTRODUCTION

This submission builds on our previous response (dated 2 October 2019, see excerpt below) to the Australian Government's draft package of proposed legislative reforms on religious freedom.

**While we note that some changes were made to the original drafts, we do not believe that these changes address the overarching concerns raised in our earlier submission.**

Therefore, we would emphasise that the issues raised in this submission must be considered in addition to the concerns raised in our earlier submission.

We would also underscore our recommendations from our earlier submission about adopting a model of religious and multi-faith inclusion.

#### **ADOPTING A MODEL OF RELIGIOUS OR MULTI-FAITH INCLUSION**

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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.



## IV. DCA'S RESPONSE TO THE RELIGIOUS FREEDOM BILLS – SECOND EXPOSURE DRAFTS

DCA supports protection from discrimination, but by overriding other anti-discrimination laws the second exposure draft continues to privilege religious interests over other attributes

**Relevant section: Exposure Draft *Religious Discrimination Bill 2019***

**s42 *Statements of belief do not constitute discrimination etc.***

DCA strongly 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, by continuing to include a section which enables the override of federal, state and territory discrimination protections, this legislation creates standard for protection for "a *statement of belief*" that goes beyond typical federal discrimination protections and which privileges 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).

This is an unprecedented intrusion into other jurisdictions by protecting expression of religious speech over acts of discrimination and creates different standards for statements of belief.

While DCA strongly supports individuals being protected from discrimination and harassment because of their religious belief, we don't support section 42 which would override existing anti-discrimination protections.

A standard discrimination bill, designed along the same lines of existing Australian laws, could protect people of faith and without faith, without taking away existing protections or introducing complex and untested rules, that will be difficult for business to manage

The second exposure draft would further expand discrimination against LGBTIQ+ people, and DCA members do not support new laws that would expand discrimination against LGBTIQ+ people

**Relevant section: Exposure Draft *Religious Discrimination Bill 2019***

**s11 Religious bodies may act in accordance with their faith etc.**

DCA outlined in our previous submission that DCA members do not support the introduction of any new legislation that allows further discrimination against LGBTQ+ people.

By expanding the definition of religious bodies, the second exposure draft would have the practical impact of allowing more service providers and organisations to discriminate against LGBTIQ+ people. This would entrench further discrimination and is not something DCA supports.

*e.g. A Religious charity that is registered as public benevolent institution, could refuse to hire a person who is gay on the basis of their sexual orientation if it would “avoid injury to the religious susceptibilities of adherents of the same religion as the religious body”.*

**s33 Exceptions relating to accommodation: *religious camps and conference sites***

The second draft would also allow religious camps and conference sites to “*take faith into account when deciding whether to provide accommodation*”, if it is stated that they would do so in a publicly available policy.

*E.g. a religious conference centre could refuse to hire a venue for a workplace Pride group to undertake a strategic planning event.*

Doing so “in accordance with a publicly available policy” could mean that religious camps and conferences can publicly state they are not available to LGBTIQ+ people or groups, which would be both stigmatising and discriminatory.

*E.g. a religious camp could refuse to hire premises to a community group organising a resilience camp for gender diverse children because they have a policy that states that they view gender as binary as outlined in the Bible.*

This is therefore a form of **double discrimination** that firstly allows for certain people (or groups) to be excluded from accommodation, and secondly stigmatises of those people (or groups) by stating so in a public policy.

As outlined in our previous submission, DCA members do not support the introduction of any further laws that allow further discrimination against LGBTQ+ people.

Expansion of the services, organisations, and types of accommodation in the second exposure draft would actually expand the services, organisations and venues that can discriminate against LGBTIQ+ people.

Furthermore a publicly available policy that states that accommodation is not available to certain groups on the basis of religious reasons would further stigmatise LGBTIQ+ people. Rather, we would reiterate our recommendation from our previous submission, that:

***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.***

## Proposed Employer Conduct Rules will continue to make it difficult for employers to promote an inclusive culture

Relevant section: Exposure Draft *Religious Discrimination Bill 2019*

**s8(3) For the purposes of paragraph (1)(c), an employer conduct rule that:**

- (a) is imposed, or proposed to be imposed, by a relevant employer; and**
- (b) would have the effect of restricting or preventing an employee of the employer from making a statement of belief other than in the course of the employee's employment;**

**is not reasonable unless compliance with the rule by employees is necessary to avoid unjustifiable financial hardship to the employer.**

We note that the s8(3) has been amended to be clear that it includes meal breaks and at work social functions.

However, DCA remains concerned that the proposed employer conduct rules would impair organisational efforts to implement diversity and inclusion policies; and continue to make it difficult for large employers to promote an inclusive culture by requiring reasonable employee conduct rules on religious expression outside of work.

Employers have a legal responsibility to protect employees from harassment and bullying, which may occur outside of work. Reasonable Codes of Conduct set expectations of employees and are fundamental to creating safe and inclusive workplaces, and for employers meeting their legal obligations.

The Fair Work Commission has previously recognised that conduct that occurs outside of work which is likely to cause serious damage to the relationship between the employer and employee, damages the employer's interests, or is incompatible with the employee's duty as an employee can result in grounds for dismissal.

What's more, as we highlighted in our earlier submission, the courts have also recognised that the use of social media outside of work can be workplace bullying. For example, the posting of derogatory, offensive and discriminatory statements or comments about other

employees on Facebook can be a valid reason for termination of employment, even where they have been made on a home computer, out of work hours as the separation between home and work is now less pronounced than it once was.

This proposed legislation also goes further by restricting qualifying bodies from imposing conduct rules. This could mean for example, that a qualifying body could not set reasonable expectations that members of a profession abide by a code of conduct

**s8(4) For the purposes of paragraph (1)(c), a qualifying body conduct rule that would have the effect of restricting or preventing a person from making a statement of belief other than in the course of the person practising in the relevant profession, carrying on the relevant trade or engaging in the relevant occupation is not reasonable unless compliance with the rule by the person is an essential requirement of the profession, trade or occupation.**

DCA reiterates that the proposed employer conduct rules, including those which apply to qualifying bodies, would seriously impede the ability of employers to maintain appropriate standards of conduct and to protect their employees from harassment and discrimination.

Employers will find it harder to create inclusive cultures which their employees, customers, clients and shareholders demand and could face legal challenges if they try to enforce workplace diversity and inclusion policies.

We also strongly reiterate our concerns that:

1. The \$50 million employer revenue provision is an arbitrary figure, 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.
2. 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.

Under second the exposure draft, prejudicial comments are judged by whether they could be considered to be in accordance with the doctrines, tenets, beliefs or teachings of that religion, rather than the impact on the person experiencing those comments

**Relevant section: Exposure Draft *Religious Discrimination Bill 2019***

***statement of belief: a statement is a statement of belief if:***

- (a) the statement:**
  - (i) is of a religious belief held by a person (the first person); and**
  - (ii) is made, in good faith, by written or spoken words by the first person; and**
  - (iii) is of a belief that a person of the same religion as the first person could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of that religion; or**

The proposed legislation introduces complex rules when people make statements based on religious belief or about religion.

DCA notes that the Bill has been updated to consider whether a person of the same religion as the religious body or person could reasonably consider the act to be in accordance with the doctrines, tenets, beliefs or teachings of that religion.

However, this does not address the substantive issue, that Australian anti-discrimination law has long recognised that it is impact, not intent, that determines if something is bullying or harassment.

Under the Bill 'a statement of belief' could be used as a smokescreen for harassment, homophobia, sexism, ableism or some other form of prejudice, provided the person making the statement claims that it was made in "good faith".

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.

What's more, employers will not necessarily know, and cannot ask, whether employees hold particular religious beliefs. It will be much harder to respond appropriately to interpersonal workplace conflict where divergent views are expressed.

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. As we stated in our previous submission, 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.

Again, we would emphasise that a standard discrimination bill, designed along the same lines of existing Australian laws, could protect people of faith and without faith,



without taking away existing protections or introducing complex and untested rules, that will be difficult for business to manage

The 'any person of the same religion' test lowers the bar on what is considered a religious doctrine, tenet, belief or teaching, and provides special protection to much more extreme and unorthodox beliefs

**Relevant section: Exposure Draft *Religious Discrimination Bill 2019***

***statement of belief: a statement is a statement of belief if:***

- (iii) is of a belief that a person of the same religion as the first person could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of that religion; or**

The second exposure draft removes the role of Courts in determining whether something is in accordance with the doctrines, tenets, beliefs or teachings of that religion, and replaces it with a test of whether just one other person agrees that it would be a requirement of their religion.

The explanatory notes explain that the intention of this test is to protect the religious beliefs or activities of different denominations or sects within a particular religion.

However, in practice, it would mean that just one other person has to agree that something is considered a religious doctrine, tenet, belief or teaching. It doesn't have to be an accepted form of belief among the majority of followers of a particular faith or sect.

Not only is this a measure with no legal precedent, but it could be extremely subjective. It could mean that extremist views could be justified if they are shared by just one other person.

The 'any person of the same religion' is legally unconventional and could allow for extremely offensive or discriminatory views to be justified if they are shared by just one other person.

## V. CONCERNS WITH THE DRAFT LEGISLATION

### **DCA supports protection from discrimination, but by overriding other anti-discrimination laws the second exposure draft continues to privilege religious interests over other attributes**

While DCA strongly supports individuals being protected from discrimination and harassment because of their religious belief, we don't support section 42 which would override existing anti-discrimination protections.

A standard discrimination bill, designed along the same lines of existing Australian laws, could protect people of faith and without faith, without taking away existing protections or introducing complex and untested rules, that will be difficult for business to manage

### **The second exposure draft would further expand discrimination against LGBTIQ+ people, and DCA members do not support new laws that would expand discrimination against LGBTIQ+ people**

As outlined in our previous submission, DCA members do not support the introduction of any further laws that allow further discrimination against LGBTQ+ people.

Expansion of the services, organisations, and types of accommodation in the second exposure draft would actually expand the services, organisations and venues that can discriminate against LGBTIQ+ people.

Furthermore a publicly available policy that states that accommodation is not available to certain groups on the basis of religious reasons would further stigmatise LGBTIQ+ people. Rather, we would reiterate our recommendation from our previous submission, that: ***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.***

### **Proposed Employer Conduct Rules will continue to make it difficult for employers to promote an inclusive culture**

Employers have a legal responsibility to protect employees from harassment and bullying, which may occur outside of work. Reasonable Codes of Conduct set expectations of employees and are fundamental to creating safe and inclusive workplaces, and for employers meeting their legal obligations.

DCA reiterates that the proposed employer conduct rules, including those which apply to qualifying bodies, would seriously impede the ability of employers to maintain appropriate standards of conduct and to protect their employees from harassment and discrimination.

Employers will find it harder to create inclusive cultures which their employees, customers, clients and shareholders demand and could face legal challenges if they try to enforce workplace diversity and inclusion policies.

We also strongly reiterate our concerns that:

1. The \$50 million employer revenue provision is an arbitrary figure, 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.

2. 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.

**Under second the exposure draft, prejudicial comments are judged by whether they could be considered to be in accordance with the doctrines, tenets, beliefs or teachings of that religion, rather than the impact on the person experiencing those comments**

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. As we stated in our previous submission, 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.

Again, we would emphasise that a standard discrimination bill, designed along the same lines of existing Australian laws, could protect people of faith and without faith, without taking away existing protections or introducing complex and untested rules, that will be difficult for business to manage

**The 'any person of the same religion' test lowers the bar on what is considered a religious doctrine, tenet, belief or teaching, and provides special protection to much more extreme and unorthodox beliefs**

The 'any person of the same religion' is legally unconventional and could allow for extremely offensive or discriminatory views to be justified if they are shared by just one other person.

## VI. CONCLUSION & RECOMMENDATIONS

While DCA strongly supports individuals being protected from discrimination and harassment because of their religious belief, by overriding other anti-discrimination laws the second exposure draft continues to privilege religious interests over other attributes.

The second exposure draft would further expand discrimination against LGBTIQ+ people, and DCA members do not support new laws that would expand discrimination against LGBTIQ+ people.

The proposed Employer Conduct Rules will continue to make it difficult for employers to promote an inclusive culture. Businesses could face legal challenges if they tried to enforce workplace diversity and inclusion policies and will find it difficult to protect employees from harassment and discrimination.

Under the second exposure draft, prejudicial comments are judged by whether they could be considered to be in accordance with the doctrines, tenets, beliefs or teachings of that religion, rather than the impact on the person experiencing those comments.

The 'any person of the same religion' test could provide special protection to much more extreme and unorthodox beliefs. It would mean that just one other person has to agree that something is considered a religious doctrine, tenet, belief or teaching. It doesn't have to be an accepted form of belief.

### RECOMMENDATIONS

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**Instead of introducing the draft exposure legislation, we would reiterate our recommendation 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.**

**A standard discrimination bill, designed along the same lines of existing Australian laws, could protect people of faith and without faith, without taking away existing protections or introducing complex and untested rules, that will be difficult for business to manage.**

## VII. Appendix – Summary of DCA’s concerns in relation to the first Exposure draft - Religious Freedom Bills 2019

### **Excerpt from our submission from 2 October 2019**

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**

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#### **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+ people 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 healthcare 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**

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### **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*<sup>ii</sup> 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 provision is an arbitrary figure, 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.

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<sup>ii</sup> See: <https://www.dca.org.au/research/project/inclusion-index>

## **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.

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**

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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**

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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.

**Read our first submission in full here:** <https://www.dca.org.au/submissions/submission-response-exposure-draft-religious-freedom-bills>