

ANTI-DISCRIMINATION AMENDMENT (RELIGIOUS FREEDOMS AND EQUALITY) BILL 2020

Organisation: Coalition of Major Professional and Participation Sports (COMPPS)

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Joint Select Committee on the [Anti-Discrimination Amendment \(Religious Freedoms and Equality\) Bill 2020](#).

COMPPS SUBMISSION - Religious Freedoms and Equality Bill 2020

The Coalition of Major Professional and Participation Sports (**COMPPS**) welcomes the opportunity to comment on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 (**the Bill**). COMPPS is made up of the following member organisations:

- (a) Australian Football League;
- (b) Cricket Australia;
- (c) Football Federation Australia;
- (d) National Rugby League;
- (e) Netball Australia;
- (f) Rugby Australia; and
- (g) Tennis Australia.

Each of these sports is the governing body and custodian of a major professional sport in Australia. COMPPS members play an important role in developing, promoting and presenting sport in Australia from the grass roots through to the international level.

All COMPPS members are not-for-profit bodies and are responsible for the long-term development and sustainability of their sports. Between them, they have over 9 million participants through 16,000 clubs. When participation numbers are combined with the millions of Australians who watch and support the seven sports in their professional mode, the reach across the lives of Australians on a daily basis is significant.

One of COMPPS' roles is to facilitate a response to public inquiries on behalf of its member sports.

1 INTRODUCTORY REMARKS - COLLECTIVE COMMITMENT TO INCLUSION AND PROTECTION FROM DISCRIMINATION OF ALL FORMS

COMPPS members recognise and publicly acknowledge the important role that sporting bodies, from local clubs through to National Sporting Organisations, play in reflecting the diversity of the communities of which they are a part and ensuring that every person is treated with respect and dignity and protected from discrimination. Our Members support the protection of religious freedoms within a framework that equally protects other recognised freedoms and human rights.

Sport, from the elite, professional level to grassroots and community sport, forms an integral part in the fabric of Australian life. Sport, through its presence in the daily life of Australians has a power to influence and unite Australians in ways that extend well beyond the



boundaries of the field or court. High profile athletes have the potential to, and often do, act as important role models, particularly for young Australians. Sporting clubs and sporting competitions, at all levels, provide connection and belonging for people of all age groups, religious, racial and ethnic backgrounds and sporting participation and development programs have been important in driving a more socially inclusive country.

COMPPS notes that the Bill contains provisions dealing with various aspects of civil and commercial activity as well as provisions directed at specific entities such as educational institutions, industrial organisations, state government bodies etc. This submission does not seek to comment on provisions of broad societal application or those pertinent to organisations in other sectors. This submission focuses on aspects of the Bill which have particular relevance to the COMPPS members in their capacity as employers and as the national governing bodies for their respective codes. In only commenting on those provisions that directly impact them in the conduct of their charters as national sporting organisations, the COMPPS members are not to be taken as endorsing other provisions of more general societal application or specific application to other sectors.

It is within the context set out in this introductory section that COMPPS makes its submission on the Bill.

2 COMMENTS ON THE BILL

Section 22N – Discrimination in work - general comments

COMPPS' observations on the Bill are focused on section 22N which would impact directly on the COMPPS members when carrying out their charters as the national governing bodies for their respective codes. In our submission, this section (particularly sections 22N(3)-(5)) goes beyond what is required to protect the rights of Australians to engage in religious activity without fear of discrimination and significantly limits the efforts of COMPPS members and their associated clubs and organisations to create inclusive, diverse, accessible and safe communities within which Australians can participate in and enjoy sport.

COMPPS members believe in the importance of creating safe and inclusive workplaces. Responsible employers have a duty of care to ensure all employees — regardless of their background or beliefs — are treated respectfully and free from discrimination. The primary means by which COMPPS members create sporting environments and workplaces that are inclusive and welcoming are through regulation, employment contracts and codes of conduct. By favouring an employee's right to religious expression over other people's rights, the Bill undermines COMPPS members' ability to enforce codes of conduct that are designed to strike the critical balance between differing, potentially conflicting rights.

The important and unique role that sport plays in promoting inclusiveness, community cohesion and the health and wellbeing of Australians is well recognised by government and sponsors who seek to associate themselves with the brands of COMPPS members. Increasingly the sponsors who invest in supporting Australian sport do so on the basis of shared values and beliefs. One important way that COMPPS members promote their values and beliefs is through the implementation of codes of conduct (or similar rules) which establish expectations for professional athletes and other employees. These codes assist COMPPS members to build positive and inclusive cultures internally and externally. These rules are also essential for COMPPS members to protect the value of their brands and provide a mechanism for sports to ensure that the values and behaviours of their participants reflect community expectations and the expectations of commercial partners.

Codes of conduct are not only essential as a means of promoting and protecting sports' values and beliefs; they also form part of COMPPS members' compliance with Federal

Government policy. Sporting organisations are required to meet the minimum standards set out in Sport Australia's Member Protection Policy (MPP) template 2016, the recitals to which state:

National sporting organisations (NSOs) have a responsibility to make sure that their sports are safe, fair and inclusive for everyone involved. NSOs also have legal obligations to prevent and address discrimination and harassment and to protect children from abuse.

The MPP template includes codes of behaviour through which NSOs "seek to provide a safe, fair and inclusive environment for everyone involved in our organisation and in our sport". By proposing to introduce statutory limitations on an NSO's ability to uphold codes of conduct designed to promote respectful and inclusive sports, the Bill is inconsistent with and undermines the objectives of the MPP.

Commercial partners (e.g. sponsors and broadcasters) seeking to engage with COMPPS members will seek to align themselves with organisations with similar values and beliefs. It is essential that COMPPS members, who rely on revenue from commercial partners to grow and promote their sports for all Australians, can establish codes of conduct which allow them to protect the reputation and value of their brand and the brands associated with them. The same applies to sports' ability to attract fans, viewers and club members as well as the participants and volunteers who underpin the foundation of the sport at the community level.

Sections 22N(3) to (5) – Discrimination in work – Protected Activity - Specific comments

Against the contextual background outlined above, COMPPS makes the following specific comments on sections 22N(3) to (5).

These provide as follows:

22N

(3) Without limiting subsection (1) and (2), it is unlawful for an employer to—

(a) restrict, limit, prohibit or otherwise prevent an employee from engaging in a protected activity, or

(b) punish or sanction an employee:

(i) for engaging in a protected activity, or

(ii) because an associate of the employee engaged in a protected activity.

*(4) In subsection (3), **protected activity** means—*

(a) a religious activity performed by the employee that:

(i) occurs at a time other than when the employee is performing work and at a place other than the employer's place of work, and

(ii) does not include any direct criticism of, or attack on, or does not cause any direct and material financial detriment to, the employer.

(b) a religious activity performed by an associate of the employee that does not include any direct criticism of, or attack on, or does not cause any direct and material financial detriment to, the employer.

(5) For the avoidance of doubt, the following do not constitute direct and material financial detriment to an employer for the purposes of subsection 4(a) and 4(b)—

(a) any boycott or secondary boycott of the employer by other persons because of the employee's protected activity, or the protected activity of their associate, or

(b) the withdrawal of sponsorship or other financial or corporate support for the employer because of the employee's protected activity, or the protected activity of their associate.

These sections would have the effect of rendering a sporting organisation powerless to prevent or sanction its employees for engaging in conduct that contravenes their employment conditions notwithstanding such conduct is likely to or has caused immense damage to other persons and the sporting code itself.

They do so by preventing sporting organisations, except in limited cases, restricting, prohibiting or taking action against their employees for conduct that would otherwise contravene the sport's rules if such conduct is a "protected (religious) activity" as so defined. The scope of the definition of "protected activity" (and the limited carve-outs) fail to recognise the realities of a sporting environment. The following issues arise which whilst not unique, are particularly pertinent to sport as a sector, and potentially very harmful:

1. The provisions seek to apply only to conduct engaged in by employees not within the scope of their employment (ie in their "private" life). This attempted distinction is flawed and artificial when applied to the sporting context, in particular to high profile, professional athletes. Such individuals have attained their public profile in their capacity as athletes and are indelibly associated in the public eye as practitioners and representatives of their chosen sport. The influence and following that they enjoy (particularly in social media forums) is borne out of their identity as representatives of a particular sport and as such their conduct, whether in or out of the sporting arena, is not divorced in the eyes of the public and business community from the sport they represent. By such default association, their conduct attaches to the sport and requires the sport through its response to such conduct, to declare its own values through either endorsement or conversely, express disavowal and/or sanction. In many instances, the same would apply to other high profile employees in the sports sector such as coaches and administrators.

COMPPS members rely on the profiles of these professional, popular athletes to generate interest in their sports from fans, sponsors and participants. The profiles and the associations of those athletes with the sports in which they participate are not restricted to the time the athlete spends on the court or the field. It is difficult to reconcile traditional notions of working hours and places of work with the activity undertaken by the professional sportsperson whose role includes that they also act as an ambassador for their sport, and potentially those associated with the sport. In this respect, professional sports people (including top level coaches and administrators) differ from other employees, and COMPPS sports from other employers.

The flaw in the Bill's attempted capture of conduct not performed in the course of employment becomes particularly acute when applied to the social media context. Social media is the most likely platform for the dissemination of statements of belief or religious views by employees. The scale and reach of popular athletes' public social media platforms present a significant and complex challenge for COMPPS members. Social media plays a central role in the Australian sports economy, with governing bodies, athletes, broadcasters, sponsors and fans all interacting online to drive interest in and commercial benefit from professional sports. In this environment, COMPPS members must have the ability to sensibly regulate the public speech of its employees to promote inclusiveness and protect against the real risk of disrespectful and harmful online behaviour.

2. The provisions carve out certain exceptions to what is "protected (religious) activity". Activity is not protected if it:

- a. includes direct criticism of, or attack on the employer - s22N(4)(a)(i); and
- b. causes direct and material financial detriment to, the employer - s22N(4)(a)(ii); or
- c. in the case of activity engaged in by an associate of the employee, either includes direct criticism of or attack on the employer or causes direct and material financial detriment to the employer – s22N(4)(b).

Whilst these exceptions are important, they are insufficient:

Firstly, as regards the first limb (s22N(4)(a)(i)), they do not cover situations which are conceivably more likely to occur which is where an employee, in pursuit of their religious beliefs, engages in conduct that includes direct criticism or an attack on someone other than their employer. Such criticism or attack could be of an individual for their own beliefs, values or attributes (including attributes that are otherwise subject to anti-discrimination legislation), or a generic group that holds such beliefs, values or attributes. This may expose members of the sporting community who have a disability, are part of the LGBTI+ community or are a representative of a minority group, to offensive and harmful comments based on the religious beliefs of others.

As noted above, the creation and maintenance of a sporting environment that is tolerant, inclusive and welcoming to all, regardless of their beliefs, values and attributes, is not served by elevating the expression of religious freedoms and beliefs over and above and to the detriment of others. The harm in this can be very extreme in a sporting environment where the critical, attacking statements by, for example, an athlete who is held in real regard for their sporting prowess can cause significant damage to those covered by the statements, particularly young and vulnerable Australians. COMPPS considers that the Bill essentially gives the person who makes statements of belief a privileged position over other rights and as such does not accord with global human rights doctrines or the underlying intentions of sport to promote respectful relationships.

Secondly, as regards the second limb in s22N(4)(a)(ii) the exception that activity is not protected if it causes direct and material financial detriment to the employer, is itself subject to a carve-out. This carve-out, contained in s22N(5), is a deeming provision that excludes detriment originating or resulting from boycotts, secondary boycotts, withdrawal of sponsorships or of other financial or corporate support. In the sporting context the breadth and depth of this carve-out makes a mockery of including “material financial detriment” as an exception in the first place. The realities of the COMPPS members’ financial models is that they are driven by and dependent on maintaining the support of a range of stakeholders who watch, attend, play, broadcast and sponsor their product.

These stakeholders include fans and club members, participants and volunteers as well as government and corporate partners, media agencies and broadcasters. The support of these groups is inter-dependent – community participants overlap with fans, who in turn underpin attendance and audience numbers that drive advertisers, corporate sponsors and broadcasters and inversely, the promotion and broadcast of sporting content by media agencies and broadcast partners inspires and motivates the community and fan base. Association with and loyalty to a club, a code and its athletes is very much a matter of emotion and passion and is affected by real and perceived aligned values to a degree not applicable to most other consumer products. Therefore, to exclude boycotts, and lost sponsorship and financial corporate support from the category of “financial detriment”, effectively ignores the base upon which a sport’s viability is built.

3. Finally, but importantly, the lack of any real definition of “*religious activity*” and “*religious belief*” is problematic. Other than excluding any activity that would constitute an offence punishable by imprisonment, the scope is theoretically so broad as to capture many types of behaviour that would otherwise cause harm and offence but are enabled by the protection offered in the Bill. Lack of clarity is of real concern at a practical level, as it makes it very challenging for the COMPPS members to continue their efforts to provide safe, inclusive and respectful places in which to connect, play and work. The significant uncertainty will lead to an increase in disputes, particularly within the sporting context where passionate statements of belief, whether of a religious belief held by a person or made by a person who does not hold a religious belief, frequently form the basis for public commentary.

Section 22N(6) – Discrimination in work – Religious symbols and clothing - Specific comments

COMPPS subscribes to the right of all employees to demonstrate their religion via dress, appearance or behaviour however while this right is important, there may be instances in major competitive sporting organisations where it is desirable or necessary for the sport to limit or exert control over certain types of dress, appearance or behaviours. This may, for example, be a requirement of participation of an Australian representative team in international sporting competitions governed by other bodies.

Accordingly COMPPS submits it is important that the “reasonableness” test in s22N(6) is not limited and suggests this is emphasised by the following highlighted amendments to s22N(6).

Section 22N(6)

It is unlawful for an employer to discriminate against a person on the ground of religious beliefs or religious activities by refusing the employee permission to wear any religious symbol or any religious clothing during work hours, but only if—

(a) the symbol or item of clothing is of a kind recognised as necessary or desirable by persons with the same religious beliefs or who engage in the same religious activities as that of the employee, and

*(b) wearing the symbol or item of clothing during working hours is reasonable having regard to the circumstances of the employment, including **but not limited to** —*

*(i) the workplace safety, productivity, communications, customer service **or team uniform** requirements of that employment, and*

*(ii) the industry standards, **requirements or expectations, including any standards, requirements or expectations of an international governing authority,** of that employment.*

3 CONCLUSION

In conclusion, COMPPS is concerned that the Bill will undermine the collective efforts of all COMPPS members to create and maintain tolerant, inclusive and diverse sports where all members of the community feel welcome to participate. The concerns raised in this submission are intended to highlight the key concerns of members and ensure COMPPS sports can continue to contribute to the development of an inclusive, and diverse society free from all forms of discrimination.

4 CONTACT DETAILS

Should there be any questions in relation to this submission please contact Jo Setright at

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Yours sincerely

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