

Religious Freedom Bills: Overview

Following the Australian Marriage Law Postal Survey, Prime Minister Malcolm Turnbull announced a review into religious freedom in Australia. **The Religious Freedom Review concluded that ‘by and large, Australians enjoy a high degree of religious freedom, and that basic protections are in place in Australian law’.**¹ However, it also made 20 recommendations to further enhance the protection of freedom of religion in Australia, both through legislative amendments to Commonwealth, state and territory laws, and through non-legislative measures.

In response to these recommendations, the Government has referred some matters to the Australian Law Reform Commission for further consideration, while also proposing a package of legislative reforms on religious freedom:

- the **Religious Discrimination Bill** will provide comprehensive protection against discrimination on the basis of religious belief or activity in specified areas of public life;
- the **Religious Discrimination (Consequential Amendments) Bill** will make consequential amendments necessary to implement the Religious Discrimination Bill; and
- the **Human Rights Legislation Amendment (Freedom of Religion) Bill** will amend existing Commonwealth legislation to better protect the right to freedom of religion.

This briefing provides a summary of these Bills, focusing on the provisions of most concern to LGBTI people. More detailed information, including the Exposure Drafts and Explanatory Notes, is available on the Attorney-General’s website: <https://www.ag.gov.au/Consultations/Pages/religious-freedom-bills.aspx>.

The **Religious Discrimination Bill** will make it unlawful to discriminate on the basis of religious belief or activity in specified areas of public life. It will not create a positive right to freedom of religion. In this respect, the provisions in this Bill are broadly consistent with existing federal discrimination law (in particular, the *Age Discrimination Act 2004* (Cth), the *Disability Discrimination Act 1992* (Cth) and the *Sex Discrimination Act 1984* (Cth)) as well as the state and territory discrimination laws (for example, the *Queensland Anti-Discrimination Act 1991* which, like every state and territory except for New South Wales and South Australia, already prohibits discrimination on the grounds of religious belief or religious activity).

Under the Religious Discrimination Bill, a person will be entitled to make a complaint to the Commission alleging that they have been subject to unlawful discrimination on the basis of their religious belief or activity if the:

- person has or engages in a religious belief or activity;
- person has been subject to direct or indirect discrimination on the basis of their religious belief or activity;
- discrimination occurs in a specified area of public life (work, education, access to premises, goods services and facilities, accommodation, land, sport and clubs); and
- conduct is covered by this Bill and an exception does not apply.

¹ Expert Panel, *Religious Freedom Review* (2018) [1.419].

The term **‘religious belief or activity’** is defined broadly in the Bill as holding or not holding a religious belief, or engaging, not engaging or refusing to engage in lawful religious activity.

The concept of religious belief is not defined for the purposes of this Bill. Religious belief is intended to include beliefs associated with major faith traditions (such as Christianity, Islam, Hinduism, Buddhism or Judaism) in addition to the beliefs of smaller and emerging faith traditions.

The concept of religious activity is also not defined for the purposes of this Bill. Religious activities may include participating in religious observances (such as prayers, fasting, ceremonies or other holidays); wearing religious dress (such as a hijab, kippah or kirpan); not engaging in certain conduct in accordance with religious belief (such as not eating meat or drinking alcohol); or expressing religious beliefs, such as through evangelising, where adherents of that religious group are required, or encouraged, to evangelise.

The definition of ‘religious activity’ is limited to lawful religious activities. The Bill does not protect religious activities that are inconsistent with Commonwealth, state or territory law, including those which may constitute criminal conduct.

Like all other anti-discrimination laws, **discrimination on the basis of religious belief or activity for the purposes of this Bill also includes both direct discrimination and indirect discrimination.**

Direct discrimination is where a person treats another person less favourably than someone in similar circumstances, because of that person’s religious belief or activity. For example, it could be direct discrimination for a company to refuse to hire a Buddhist person because of their Buddhist faith.

Indirect discrimination is where an apparently neutral condition has the effect of disadvantaging people of a particular religious belief or who engage in a particular religious activity. However, a person does not indirectly discriminate against another person by imposing a condition, requirement or practice that is reasonable in all the circumstances.

Indirect discrimination in this Bill is different from the concept of indirect discrimination in all other discrimination laws in Australia in two important respects. These differences are novel, go beyond what is provided for in other discrimination laws, and privilege religious belief and activity over other beliefs and activities.

The first is the **employer conduct rule** contained in clause 8(3), which appears to be a response to target the Israel Falou case. An employer conduct rule (such as a code of conduct for employees) would not be reasonable if it would ‘restrict or prevent an employee from making statements of belief in their private capacity’ unless the statement of belief is malicious or would harass, vilify or incite hatred against a person or group, or if compliance with the rule by employees is necessary to avoid unjustifiable financial hardship to the employer. This provision only applies, however, to employers with an annual revenue over A\$50 million.

The second significant difference is contained in clause 8(5) which allows **conscientious objections by health practitioners.** The Bill provides that health practitioner conduct rules imposed on a health practitioner are not reasonable if the rule would have the effect of restricting or preventing the health practitioner from conscientiously objecting to providing the health service on the basis of their religious belief or activity. This could allow health practitioners, including doctors, nurses and pharmacists, to refuse to perform health services on religious grounds, such as abortion, assisted suicide and procedures for transgender patients.

The Religious Discrimination Bill also **explicitly overrides existing discrimination protections for other groups**. Clause 41 provides that a statement of belief made in good faith will not constitute discrimination under Commonwealth, state or territory discrimination law and does not contravene subsection 17(1) of the Tasmanian *Anti-Discrimination Act 1998*, unless the statement is malicious, or is likely to harass, vilify or incite hatred or violence against a person or group of persons, or advocates for the commission of a serious criminal offence. By overriding state laws – something the Attorney-General explicitly stated in July 2019 the Bill would not do – this Bill becomes the first and only time a federal discrimination law explicitly overrides other discrimination laws. This undermines Australia’s discrimination law framework which operates on the basis of there being concurrent federal and state discrimination laws. Further, unlike every other federal discrimination law, this Bill does not contain a specific provision stating that it is not intended to exclude or limit the operation of a law of a state or territory that is capable of operating concurrently with this Bill.

This effect of this provision is that statements of religious belief made in good faith that offend, humiliate, insult or intimidate LGBTI people, women, or people with a disability would be lawful, no matter what state or territory laws provide. Only statements that meet the higher threshold of harassment, vilification or incitement of hatred can be unlawful.

The Religious Discrimination Bill also contains **provisions that are broader than other federal discrimination laws on what does not constitute religious discrimination**. For example, clause 10 provides that where religious bodies engaging in good faith in conduct that may reasonably be regarded as being in accordance with their religious beliefs, these acts cannot be unlawful discrimination. A ‘religious body’ includes religious educational institutions, religious charities and any other body conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion (other than those that engage solely or primarily in commercial activities). This means, for example, that not only would a Catholic charity be able to require that all employees, including volunteer workers, were Catholic, the provision is so broad that a Catholic charity could also refuse to provide their charitable services to a Muslim or Hindu person.

Other discrimination laws do contain provisions that provide that some religious acts are not discrimination but these are not as broad as the protections provided in this Bill. For example, section 37 of the *Sex Discrimination Act 1984* (Cth) provides an exemption for religious bodies where the act or practice ‘conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion’. That is a narrower provision and higher standard to meet than clause 10 of the Bill, which merely requires that the conduct “may be reasonably regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion”.

The Religious Discrimination Bill also **creates the statutory position of Freedom of Religion Commissioner** in the Australian Human Rights Commission. This **contravenes recommendation 19 of the Religious Freedom Review**, that ‘The Australian Human Rights Commission should take a leading role in the protection of freedom of religion, including through enhancing engagement, understanding and dialogue’ and that ‘This should occur within the existing commissioner model and not necessarily through the creation of a new position.’

Finally, the **Human Rights Legislation Amendment (Freedom of Religion) Bill** amends the objects clauses in existing anti-discrimination legislation including the *Racial Discrimination Act 1975* (Cth), *Sex Discrimination Act 1984* (Cth), *Disability Discrimination Act 1992* (Cth) and *Age Discrimination Act 2004* (Cth) to ensure that each Act has an objects clause which recognises ‘the indivisibility and universality of all human rights’.

The Explanatory Notes state that these provisions recognise that anti-discrimination law should be interpreted in a manner which is consistent with all human rights, so far as is possible. This means there could be an increased role for religious freedom as well as freedom of speech when discrimination claims are brought on the basis of sex, race or LGBTI status. Over time this has the potential to reduce discrimination protections for these and other groups.

This Bill also amends the *Marriage Act 1961* (Cth) to provide protections for religious educational institutions by clarifying that the religious educational institution may lawfully refuse to provide goods, services or facilities for the solemnisation of a marriage. This will allow religious educational institutions, which receive tax-payer funding, to deny commercially available facilities to same-sex couples. This could be especially problematic for same-sex couples living in regional or rural areas with limited services.

In summary, the Religious Freedom Bills do not to protect religion in the same way as our existing discrimination law protect age, disability, sex and race. Rather, the Religious Freedom Bills privilege religious belief and activity over other beliefs and activities.