



Federal Religious Discrimination Bill 2021 Summary

The Bill's strengths

- It provides for the first time national protection for individuals against discrimination on grounds of their *religious belief or lawful religious activity* in many fields of public life (like employment, education, accommodation, provision of goods or services). Currently there is no protection against religious discrimination in NSW or (except for religious dress) in South Australia.
- It protects groups and corporations (e.g., churches and charities) against discrimination based on them being associated with an individual who holds a *religious belief or engages in a lawful religious activity*. E.g., an unincorporated or incorporated religious group is refused hire of a hall because of the religious beliefs or lawful religious activity of its leaders or members (Clause 16).
- The Bill is for the most part consistent with other federal discrimination legislation on grounds of race, age, disability and sex and sexual orientation (see below for departures).
- It recognises that when a religious body acts in accordance with its religious beliefs (e.g., in membership decisions), it is not discriminating on the grounds of religious belief or activity (Clause 9).
- It protects the right, in federal law, of religious bodies (and if they have a publicly available policy) religious schools, hospitals, aged care and disability providers and charities to choose to employ people whose religious beliefs will uphold the religious ethos of their organisation.
- It also provides for a limited override of State and Territory laws to ensure that religious schools can make employment decisions to preference people with the same religious beliefs as the school. The override will apply to effect part of the Victorian Religious Exceptions Act 2021 but not to other effects which restrict religious bodies (like churches and charities) from preferring people with the same religious beliefs in employment decisions and which restrict religious schools in other ways like student conduct rules. The government can make regulations to extend this limited override to other State and Territory laws.
- The test of an individual's religious belief is not determined by a judge or court interpreting what is the doctrine of a religion but is simply based on a belief genuinely held by the individual (Clause 1, EM para39).
- People making moderate, non-vilifying statements of belief and unbelief are protected from being accused of discrimination and taken to an anti-discrimination commission (similar to the case of Archbishop Porteous and 2 other Tasmanian preachers). To be protected, the statements must be made in good faith, not malicious, threatening, harassing, vilifying or encouraging a criminal offence (Clause 12).
- Professionals and tradespeople who make moderate, non-vilifying statements of belief or unbelief outside a work context are protected from their qualifying bodies (e.g., a licensing or conduct standards body) making a rule to prevent such statements unless the rule is an essential requirement of the profession or trade (Clause 15).
- It protects institutions from loss of charity status if they hold to a traditional view of marriage. (Clause 3 of the *Human Rights Legislation Amendment Bill 2021*).

The Bill's omissions and errors

- The Bill omits some key provisions found in every other discrimination law. E.g., if a person is discriminated against because a general rule is more disadvantageous to them because of their religious belief or activity (e.g., a general rule that all employees have to work on the 4th Saturday of a month disadvantages employees whose religious Sabbath falls on Saturday), there is a defence if the discriminator can prove the rule is reasonable. But in the Religious Discrimination Bill alone the burden is on the person discriminated against to prove that the rule is unreasonable.
- Religious schools, hospitals, aged care and disability providers can preference in employment people whose religious beliefs accord with the religious body provided they have a publicly

available policy explaining how that works. The Bill currently gives the Minister the power to make requirements about those employment policies (Clauses 7(7), 9(3), 40(3)). This would be a gross overreach in control by the government, but it seems to be an error in the Bill because the Minister's power to make such requirements for religious schools' employment policies in the override clause was removed. The Minister's power to control employment policies needs to be removed in all parts of the Bill.

What needs to be added to the Bill

- The limited override of State and Territory law only applies to protect employment preferencing by religious schools. It also needs to override any State or Territory limits on employment preferencing by other religious institutions or faith-based charities and any limits on religious schools having student conduct rules based on the religious beliefs of the school (Clause 11).
- Religious organisations and schools need to be protected from qualifying bodies imposing limitations or requirements on them that discriminate against them on the basis of religious belief or activity (e.g., a government decision on accrediting a religious school is affected by religious discrimination) (Clause 21).
- The Bill should protect employees from employer conduct rules which sanction employees from making moderate non-vilifying statements of belief or unbelief. The employer should have to prove that the rules are necessary to achieve a legitimate goal of the employer in managing the workplace and that the rule has the least restrictive effect on employee freedom to make statements in achieving that goal. The reasonableness test in clause 14 allows the potential for an employer to dismiss an employee based on the making of a statement of belief (Clauses 12, 14).
- The Bill should contain a 'reasonable adjustments' clause, equivalent to the Disability Discrimination Act provisions. Organisations would then be obliged to make reasonable adjustments for a person's genuine religious beliefs unless to do so would cause the organisation substantial hardship. E.g., there are enough staff to let 5 work Sunday rather than Saturday. The employer can make a reasonable adjustment to allocate rosters to allow 5 staff to have their Saturday or Sunday Sabbath day off work. If an emergency requires all staff to work a weekend the employer would not need to make the adjustment to rosters that weekend because it would not be a reasonable one.
- When determining the religious beliefs of a religious body, the test should not require a judge to identify and interpret the doctrines of the religion, thus breaking the well-established convention of excluding the judiciary from assessing questions of theology. Instead, the body should be able to adopt a statement of its religious beliefs and that should be sufficient evidence of what they are (Clauses 7(2), 9(3), 40(2)(c)).
- The Bill does not state how claims made under its provisions will interact with claims made under the Sex Discrimination Act where they arise from the same facts in court proceedings, e.g., determining if an employment decision was made on the basis of religious belief or marital status.
- The Bill should expressly clarify that it provides protections for organisations and individuals from being required by another person to express, publish, associate or support statements or opinions which contravene the individual's or organisation's religious beliefs.
- The Bill should clarify that secular workplaces cannot impose 'inherent requirements tests' of secular beliefs to stifle religious expression by employees.
- Federal or State or Territory governments may target a religious activity by making it unlawful (e.g., proselytising or praying in a particular place), and this would in turn remove any protections under the Bill from discrimination which is based on the activity (Clause 5(2)).
- The ability of commercial faith-based businesses to preference employees of the same faith should not be limited to those in senior leadership positions but extend throughout the business (EM para 90).

Mark Sneddon
Executive Director
Institute for Civil Society
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