



National Secular Lobby
Advancing Australia's Secular Agenda

Submission on the Religious Discrimination Bill 2019 (Exposure Draft)

30 September 2019

Introduction

In summing up the findings of his 2018 review of religious freedom in Australia, the Hon Philip Ruddock made the point that “Australians enjoy a high degree of religious freedom, and that basic protections are in place in Australian law.”

Ruddock also noted the “pivotal role of exceptions to discrimination laws in the protection of freedom of religion”, and recommended that steps be taken to “...develop a Commonwealth Religious Discrimination Act directed at the provision of comprehensive protection against discrimination based on religious belief or activity, including the absence of religious belief.”

As a secular organisation, the NSL agrees with the general aim of a religious discrimination act (or functionally similar legislation). We are in favour of preventing discrimination against individuals on the basis of religion or belief, or lack thereof, just as we are also in favour of preventing discrimination against individuals on the basis of their gender, sexual orientation, age, race and disability status.

However, we believe that any legislation in this area should be framed to achieve protections for all, not used to grant more extensive legal privilege to a few at the expense of the basic protective rights of others.

Unfortunately, attempts to legislate in this area will often come down to a “balancing of rights”; there are instances where the unfettered ability to act in accordance with one’s religion cannot be legally assured without simultaneously removing some of the basic legal protections afforded to other people.

It is our view that as currently drafted, the Religious Discrimination Bill is not a workable solution to Ruddock’s perceived problem of exceptions -- indeed, in many ways, it makes the problem worse -- and that regardless of the unbalanced rights it grants, the Bill is flawed in ways that make it an overly complicated and impractical solution to a problem that barely even exists.

Contravening the ICCPR

The Religious Discrimination Bill as currently drafted does not validate Article 18⁽²⁾ of the International Covenant on Civil and Political Rights (ICCPR), which gives equal rights to “freedom of thought and conscience” (including not having any religious beliefs); nor does it validate Article 20⁽²⁾, “Advocacy of ... religious ... discrimination, hostility or violence shall be prohibited by law”, which includes discrimination BY religion. Here, the secular need for “freedom FROM religion” is discounted.

Fracturing the discrimination claims process

Under current legislation, people claiming discrimination can pursue redress at either a state or federal level. The vast majority of cases (more than 80%) are currently handled at the state level.

The draft Bill will treat claims of religious discrimination differently from any other type of discrimination action by providing a federal defence to protect a statement of religious belief.

As human rights barrister Simeon Beckett⁽³⁾ states:

A person who claims in a state tribunal they have been discriminated against may now be dragged by a person countering with a statement of religious belief defence into a federal court or a state supreme court. Both parties face the cost and delay of running two cases. No one wins from such a legal quagmire. This will happen because the proposed defence fractures the way in which discrimination claims have been managed for over 30 years.

The legal situation resulting from the Bill as drafted will be that:

1. Religious discrimination claims are handled differently from other kinds of discrimination claim; and
2. Claims of religious discrimination cannot be handled at a lower state level and will instead consume resources of both state and federal tribunals.

Neither of these outcomes is desirable.

The impossibility of enforcing competing “freedoms” fairly

This Bill will be a minefield in terms of protecting competing rights. For example, in cases where the rights of people of two opposing religions come into conflict, deciding an outcome will necessarily require legal entanglement and favouring one religion over another. This contravenes the essential point and meaning of the Bill.

Privileging protection of religion over other protections

All existing discrimination laws prohibit “indirect discrimination” -- when an employment condition or requirement is imposed generally with the side effect of disadvantaging certain groups -- but such a condition is deemed *not* discriminatory where it is “reasonable” in the circumstances.

However, the Religious Discrimination Bill contains an employer conduct clause in section 8(3) that other discrimination laws don’t, meaning that, for larger companies (where annual revenue is more than \$50 million), limiting employee expression on religious grounds is *never* “reasonable”.

This legal protection covers *only* religious expression, not expression based on any other motivation, placing religious expression in a privileged position.

As Law Researchers Liam Elphick and Alice Taylor state⁽⁴⁾:

“...this bill goes much further than other discrimination laws and weakens existing protections for LGBTIQ+ people, women, people with disabilities, and those from diverse racial and cultural backgrounds.”

“We should not have one model of special protection for religious faith and a lesser model of protection for all other people.”

Enshrining religious privilege in law

Section 10, as a whole, effectively enshrines religious privilege in law:

“A religious body does not discriminate against a person under this Act by engaging, in good faith, in conduct that may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion in relation to which the religious body is conducted.”

“This section applies despite anything else in this Act.”

In other words, where religious bodies act “in good faith” in ways that can be justified as being in accordance with their beliefs, such acts cannot be deemed to be unlawful discrimination under *any* Australian discrimination law.

This places religion squarely in a position of legal privilege above and beyond any other discrimination legislation.

Requiring a religious test for employment

Sections 10(1) and 10(2) allow religious bodies to discriminate based on their faith.

Church-run institutions are collectively the *largest non-government employers in the nation*. Hiring and firing in a considerable number of employment positions may now be based on a religious test, in accordance with the governing organisation's faith.

In addition, all faith-based service providers either receive government funding or are exempt from paying the full range of federal or state taxes. These taxpayer-funded institutions should not have the power to hire and fire based on their religious faith.

This essentially creates a form of legalised, government-sponsored "employment apartheid", where a significant proportion of the population is barred from employment at the largest non-government employer in the country.

A broad privilege to lawfully discriminate

The wording of section 11 makes it a blanket excuse for any religious person or organisation to discriminate -- based on it being "reasonable" or that it is "intended to meet a need arising out of a religious belief".

This, combined with the allowances granted under section 10, means that any atheist or agnostic, any person of differing beliefs, any LGBTI+ person, any person in a de-facto relationship, any unwed mothers and any divorcees may legally be subjected to discriminatory behaviour under the guise of religious freedom.

This Bill purports to protect non-believers but it provides exemptions and privileges only for faith-based institutions. These are the very groups most likely to discriminate against those of other faiths or of no faith at all.

Unduly blocking public access to medical procedures

Section 8(5) of the Bill allow religious professionals in the health sector (for example) to refuse certain services to patients when those services conflict with a practitioner's religious beliefs. It also allows them to refuse to refer patients on to an alternative service provider.

At the moment, in states such as Victoria and NSW, health professionals may conscientiously object to performing abortions but must refer women to another service.

As RMIT Business and Law scholars Elizabeth Shi and Ariella Gordon state⁽⁵⁾, this Bill may override state laws or private hospital workplace policies that require practitioners to refer patients to alternative services in cases where the practitioner has a conscientious objection to providing the service:

“This bill ... elevates the protection of religious freedom above other rights, such as the right to health care for women seeking an abortion.”

According to Adrienne Walters, senior lawyer at the Human Rights Law Centre⁽⁵⁾:

“The bill will undermine women’s reproductive health. In some jurisdictions, like South Australia and Western Australia, it will allow doctors to abandon their patients. The bill unjustifiably prioritises a doctor’s personal religious beliefs over the right of women to access the healthcare they need.”

With faith-based organisations operating such a large proportion of health and care facilities in Australia, these allowances have serious potential to limit access to some medical procedures, especially in rural or disadvantaged areas where there is not always a comprehensive choice of service providers.

In this way, “religious freedom” is privileged above the right of the general public to obtain access to medical and health care.

Promoting Canon law rather than Australian law

The Vatican has reaffirmed⁽⁶⁾ that Catholic priests cannot reveal to outsiders what they learn in confession, as “this duty comes directly from God.” This openly defies the mandatory reporting laws now enacted in various Australian states and territories requiring priests to report all knowledge of child sex abuse -- even if gained through confession.

Priests, then, have a choice of either following Canon law or Australian law – *it cannot be both*. And indeed, we are now faced with high-level church leaders from multiple states openly saying that they will ignore Australian law in favour of Canon law.

Granting religions legal privilege will exacerbate this problem, resulting in people of different religions following different laws in preference to Australian law, based on their beliefs and the teachings of their religious leaders.

Religious expression used to reduce equality and freedom

The Bill would allow a person to use their religious belief as a cover for launching sexist and prejudiced attacks against women, and to undermine laws granting rights to women. Its unnecessarily complex clauses provide new avenues for religious “anti-choice” conservatives to attack access to abortion, promote patriarchal agendas and advance other forms of gender bias.

Misalignment with existing anti-discrimination legislation

The Religious Discrimination Bill is out of step with all other existing anti-discrimination legislation in that it protects a conscious choice (the conscious and changeable choice of belief over non-belief) rather than an innate trait (such as age, race, gender, disability or orientation) – and moreover, does so by reducing these other protections.

A Religious Freedom Commissioner is unnecessary

In his religious freedom review, Philip Ruddock found there is no systemic religious discrimination in Australia, and he did not recommend the introduction of a ‘Religious Freedom Commissioner’. In fact, Ruddock recommended against it:

“The Australian Human Rights Commission should take a leading role in the protection of freedom of religion, including through enhancing engagement, understanding and dialogue. This should occur within the existing commissioner model and not necessarily through the creation of a new position.”

Summary

In our view, the Religious Discrimination Bill as currently drafted can only be described as misguided. It goes further than any other discrimination legislation in its reach and powers to over-ride existing law. It encompasses protections that are not needed and privileges that are harmful, overly complicated, open to abuse, socially divisive and morally wrong. It will doubtless result in a legal quagmire that will serve only to complicate and corrupt the very protective processes it seeks to elucidate.

It is apparent that this Bill cannot be “fixed” through amendments and must instead be rethought or abandoned altogether, and some more appropriate mechanism of protection be found.

We submit that the Bill in its current form is unworkable and should be scrapped.

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Footnotes

- (1) The National Secular Lobby: <https://www.nationalsecularlobby.org/>
- (2) The ICCPR: <https://www.austlii.edu.au/au/other/dfat/treaties/1980/23.html>
- (3) Simeon Beckett, *Key protection in religious discrimination bill is fatally flawed* (<https://www.smh.com.au/national/key-protection-in-religious-discrimination-bill-is-fatally-flawed-20190917-p52s3n.html>)
- (4) Liam Elphick and Alice Taylor, *Religious Discrimination Bill is a mess that risks privileging people of faith above all others* (<https://theconversation.com/religious-discrimination-bill-is-a-mess-that-risks-privileging-people-of-faith-above-all-others-122631>)
- (5) Elizabeth Shi and Ariella Gordon, *Women may find it tougher to get an abortion if the religious discrimination bill becomes law* (<https://theconversation.com/women-may-find-it-tougher-to-get-an-abortion-if-the-religious-discrimination-bill-becomes-law-123089>)
- (6) Reuters: <https://www.reuters.com/article/us-vatican-confession-abuse/vatican-says-laws-cannot-force-priests-to-break-seal-of-confession-idUSKCN1TW2AC>