The proposed Religious Discrimination Bill – and the package of religious freedom bills -- is either unnecessary or itself discriminatory.

Religious rights and freedoms are derivative rights and freedoms. The basic rights and freedoms on which they depend are right and freedoms of attitude, expression and association. Those basic rights and freedoms are universal (as are all basic rights). The religious and non-religious alike have the same basic rights and freedoms of attitude, expression and association.

If there are no legislative inadequacies in our protection of fundamental rights and freedoms of attitude, expression and association, then there are no legislative inadequacies in our protection of religious rights and freedoms. In that case, the proposed Religious Discrimination Bill -- and the package of religious freedom bills -- is unnecessary.

If there are legislative inadequacies in our protection of fundamental rights and freedoms of attitude, expression and association, then it is discriminatory to introduce new legislation that seeks to redress those legislative inadequacies by providing legislative protection for some but not all. In particular, if the non-religious are treated less favourably than the religious under the new legislation, then that legislation is clearly discriminatory. But the proposed Religious Discrimination Bill -- and the package of religious freedom bills -- does treat the non-religious less favourably than the religious.

In Section 5 of the proposed Religious Discrimination Bill, there is a definition of ‘religious belief or activity’: ‘holding a religious belief, or engaging in lawful religious activity, or not holding a religious belief, or not engaging in, or refusing to engage in, lawful religious activity’. [This definition is both circular and vacuous. It is circular because it defines ‘religious belief’ in terms of ‘religious belief’ and ‘religious activity, in terms of ‘religious activity’. It is vacuous because it defines ‘religious belief’ as ‘holding or not holding religious belief’ -- a condition which everything satisfies -- and ‘religious activity' as ‘engaging or not engaging in lawful religious activity -- again, a condition which everything satisfies.]

In Section 5 of the proposed Religious Discrimination Bill, there is a definition of ‘statement of belief’: (a) 'a statement of a religious belief made in good faith and reasonably regarded as being in accordance with the doctrines, tenets, beliefs or teachings of a religion' or (b) 'a statement made by person who does not hold a religious belief that arises directly from that person’s not holding a religious belief, made in good faith, and about religion'. [This definition is manifestly asymmetrical. A statement of belief for a religious believers is anything they say in good faith that is reasonably regarded as being in accordance with the doctrines, tenets, beliefs or teachings of a religion. However, statement of belief for religious non-believers is merely anything they say in good faith that (a) arises from their lack of religious belief; and (b) is about religion.
To the extent that the Act is extending new legislative freedom in connection with statements of belief, it is extending much more far-reaching freedom to religious believers that it does to non-religious believers.]

In Section 10 of the proposed Religious Discrimination Bill, we are told that 'a religious body does not discriminate against a person 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' (where a religious body is 'any body conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion, other than for solely or primarily commercial purposes').

In Section 41 of the proposed Religious Discrimination Bill, we are told that 'statements of belief do not constitute discrimination, etc.'

Given that there is no definition of 'religion' provided in the proposed Religious Discrimination Bill, and given the manifest inadequacies in the definition of 'religious belief' and 'religious activity', it is hard to be sure exactly how the expression 'religious body' ought to be interpreted in Section 10. In order that this section not be discriminatory against the non-religious, what is intended must, I think, be something like this: that a body -- religious or non-religious -- does not discriminate against a person by engaging in good faith in conduct that may reasonably be regarded as being in accordance with its doctrines, tenets, beliefs and teachings. If this is not what is intended, and if the proposed Bill is necessary, then the proposed Bill treats non-religious people less favourably than religious people and so, by its own lights, is discriminatory.

Given the definition of 'statement of belief' in Section 10, the effect of Section 41 is discriminatory: it entails that a much wider class of speech is not discriminatory when produced by the religious than when produced by the non-religious. On the one hand, anything that is in accordance with the doctrines, etc. of the religious is given a pass (subject to exceptions, etc.); but, on the other hand, only what follows from non-belief and is about religion is given a pass for the non-religious. If there is a need for new legislation here, what it should say is that, for the religious and non-religious alike, anything that is in accordance with their doctrines, etc. is given a pass (subject to the same range of exceptions, etc.) Fixing the definition of 'statement of belief' would be a first step towards clearing this up.

In case the [potential] discrimination in the proposed Bill is not obvious, perhaps it will help to provide an example. Pretend that, under the Bill--but only under the Bill--it turns out that it is not discriminatory for religious believers to say that doctors who carry out abortions are low-life scum (because (a) this is reasonably regarded as being in accordance with their doctrines, tenets, beliefs, teachings, etc. and (b) this is not deemed to harass, vilify or incite hatred or violence against doctors who carry out abortions). Since the claim that doctors who carry out abortions are low-life scum is neither about religion nor a claim to which commitment is generated by mere lack of religious belief, the Bill provides no protection for non-religious people who make this claim, even if it is in accordance with their doctrines, tenets, beliefs, teachings, etc.

I suspect that any attempt to make the proposed Bill non-discriminatory will make it clear that the Bill is unnecessary. But, at the very least, the drafters of the Bill should go back to their drawing board and endeavour to produce a Bill that is not discriminatory against the non-religious.