



# Religious freedom reforms

The Religious Discrimination Bill will protect against discrimination on the basis of religious belief or activity in key areas of life. This Bill is part of a package of legislation to implement the recommendations of the Expert Panel on Religious Freedom (the Religious Freedom Review).

The Religious Freedom Review recognised an opportunity to enhance the statutory protection of the right to freedom of religion in Australian law.

In response, the Australian Government committed to a range of measures to give effect to the Religious Freedom Review's recommendations. This included developing a legislative package to better protect the right to freedom of religion in Australian law. This package includes the:

- Religious Discrimination Bill 2019
- Religious Discrimination (Consequential Amendments) Bill 2019, and
- Human Rights Legislation Amendment (Freedom of Religion) Bill 2019.

## Overview of the legislative package

The **Religious Discrimination Bill 2019** prohibits discrimination on the ground of religious belief or activity in key areas of public life. It also creates the new office of the Freedom of Religion Commissioner in the Australian Human Rights Commission.

This Bill implements recommendations 3, 15 and 19 of the Religious Freedom Review.

The **Religious Discrimination (Consequential Amendments) Bill 2019** makes consequential amendments necessary to support the implementation of the Religious Discrimination Bill.

This Bill amends existing Commonwealth legislation to reflect the new prohibition of discrimination on the basis of religious belief or activity, as well as the new office of the Freedom of Religion Commissioner.

Together with the Religious Discrimination Bill, this Bill implements Recommendations 3, 15 and 19 of the Religious Freedom Review.

The **Human Rights Legislation Amendment (Freedom of Religion) Bill 2019** amends existing Commonwealth legislation to better protect the right to freedom of religion.

These amendments will bring certainty to charities, religious educational institutions, and the community at large, by clarifying ambiguities in the *Charities Act 2013* and the *Marriage Act 1961*. These amendments will also ensure that existing Commonwealth anti-discrimination legislation gives appropriate weight to all human rights, including the right to freedom of religion.

This Bill implements Recommendations 3, 4 and 12 of the Religious Freedom Review.

# Overview of the Religious Discrimination Bill

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.

The provisions in this Bill are broadly consistent with existing federal anti-discrimination law. In particular, the:

- *Age Discrimination Act 2004*
- *Disability Discrimination Act 1992*
- *Sex Discrimination Act 1984.*

However, due to the distinct nature of religious belief or activity, there are some features of this Bill that differ from those Acts.

Complaints of discrimination under this Bill can be made to the Australian Human Rights Commission. The Commission may inquire into and attempt to conciliate complaints under this Bill. Where a complaint cannot be successfully conciliated, an individual may apply to the Federal Court or Federal Circuit Court.

Under this 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, and
- conduct is covered by this Bill and an exception does not apply.

## Religious belief or activity

The Bill will protect against discrimination on the grounds of **religious belief or activity**. 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

This definition implements Recommendation 15 of the Religious Freedom Review. It recommended that the proposed Religious Discrimination Act make it unlawful to discriminate on the basis of a person's religious belief or activity, including on the basis that a person does not hold any religious belief.

This broad definition of religious belief or activity is necessary to ensure the religious beliefs and activities of all religions are captured by the Bill. This will also ensure that beliefs that are defined by reference to a lack of religious belief, such as atheism and agnosticism, will be protected by this Bill.

## Religious belief

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. However, it is not intended to capture beliefs caused by mental illness or that are motivated by criminal intent.

## Religious activity

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.

## Discrimination on the basis of religious belief or activity

Discrimination on the basis of religious belief or activity for the purposes of this Bill includes both direct discrimination and indirect discrimination.

### Direct 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

**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.

For example, it may be indirect discrimination for an employer to require all employees to attend meetings on Friday afternoons, if that requirement is unreasonable in all the circumstances. This requirement could disadvantage Jewish employees who leave early on Fridays to observe the Sabbath.

For the purpose of the test of indirect discrimination under the Bill, the assessment of reasonableness will involve weighing up:

- the nature and extent of the disadvantage imposed on the person subject to alleged discrimination
- the feasibility of overcoming or mitigating the disadvantage caused by the condition
- the proportionality of the disadvantage to the objective sought by the person imposing the condition, and
- if an employment condition relates to standards of dress, appearance or behaviour of employees, the extent to which the condition limits the ability of an employee to have or engage in their religious belief or activity.

### Employer conduct rules – indirect discrimination

For the purpose of the test of indirect discrimination, the Bill imposes additional requirements on large businesses relating to standards of dress, appearance or behaviour which limit religious expression.

If a large business imposes a condition relating to the standards of dress, appearance or behaviour of their employees, and that condition would restrict or prevent an employee from making statements of belief in their private capacity, the business is required to prove that compliance with the condition is necessary to avoid unjustifiable financial hardship to the business.

If the business is unable to demonstrate that the condition is necessary to avoid unjustifiable financial hardship, the condition is not reasonable, and is therefore discriminatory, whether or not it would otherwise be reasonable under the general reasonableness test.

These provisions only apply to any employer with revenue of at least \$50 million in the current or previous financial year, but does not include the Commonwealth, state or territory public sector. As such, these requirements will not affect small business.

### **Conscientious objections by health practitioners – indirect discrimination**

For the purpose of the test of indirect discrimination, the Bill clarifies 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.

The Bill clarifies that health practitioner conduct rules are reasonable if necessary to avoid an unjustifiable adverse impact on the person imposing the rule or any other person who would otherwise be provided the health service.

A health practitioner conduct rule means a condition, requirement or practice that relates to the provision of a health service by a health practitioner.

Health service is defined in the Bill to mean a service provided in the practice of a health profession including medical, nursing, midwifery and pharmacy.

### **Areas of public life**

The Bill will protect against discrimination on the grounds of religious belief or activity in the following key areas of public life:

- employment (including partnerships, qualifying bodies, registered organisations and employment agencies)
- education
- access to premises
- goods, services and facilities
- accommodation
- land
- sport
- clubs, and
- Commonwealth laws and programs.

### **Conduct not covered by the Bill**

The Bill provides that certain conduct is not covered by the Bill.

#### **Conduct by religious bodies**

The Bill provides that religious bodies do not discriminate on the basis of religious belief or activity by engaging in conduct, in good faith, that may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of their religion. Removing this conduct reflects the importance for religious bodies to be able to freely manifest their religious beliefs. It is also consistent with the principle that legitimate differential treatment is not discrimination.

The Bill does not provide religious bodies with a broader defence or exemption from other Commonwealth anti-discrimination legislation, such as the Sex Discrimination Act. The Bill only provides that certain religious bodies do not discriminate on the grounds of their religious belief or activity when acting in accordance with their faith. Discrimination on the basis of sexual orientation or gender identity continues to be regulated by the Sex Discrimination Act.

The term '**religious body**' is defined to include:

- an educational institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion
- a registered charity conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion (other than those charities that engage solely or primarily in commercial activities), 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).

Whether a body constitutes a religious body will depend on a range of circumstances. This includes how the relevant body is structured or constituted and the kinds of activities it undertakes. However, it is intended that the definition of 'religious bodies' will cover:

- essentially religious institutions, such as churches and mosques
- all forms of religious education, including religious schools and universities, and
- religious charities, whether or not they have the charitable purpose of advancing religion, provided they do not engage solely or primarily in commercial activities.

The conduct of bodies or charities that are religiously motivated or affiliated but are primarily engaged in undertaking commercial activities are not covered by this provision. For example, a Christian bookstore, or a Muslim florist, would not be covered by this provision.

### **Beneficial measures intended to meet a need or reduce disadvantage**

The Bill provides that reasonable conduct that is intended to meet a need arising out of a person's religious belief or activity or reduce disadvantage on the basis of religious belief or activity does not constitute discrimination and is therefore not covered by the Bill.

This will ensure that beneficial conduct, such as providing prayer rooms or flexible scheduling or uniform requirements, is not discrimination under this Bill. This approach aligns with the concept of legitimate differential treatment.

### **Exceptions and exemptions**

The Bill contains general and specific exceptions which provide that certain conduct does not amount to unlawful discrimination. This approach is consistent with the current framework of exceptions in federal anti-discrimination law.

**General exceptions** apply across all areas of public life covered by the Bill. The Bill includes general exceptions for:

- certain beliefs that, when expressed, would be considered by a reasonable person to counsel or promote conduct that would constitute a serious offence against an Australian law
- the conferral of benefits by registered charities
- conduct undertaken in direct compliance with Commonwealth legislation
- conduct reasonably necessary to perform or exercise Commonwealth law enforcement, national security or intelligence functions or powers
- conduct in direct compliance with state and territory legislation, and
- conduct necessary to comply with court and tribunal orders and determinations.

**Specific exceptions** relate to particular areas of public life. The Bill includes specific exceptions for:

- domestic duties (employment)
- inherent requirements of work (employment)
- accommodation providers, where residing on premises
- the disposal of land by will or gift
- membership of religious clubs, and
- religious voluntary bodies.

### Counselling, promoting etc. a serious offence not protected

The Bill includes a general exception for discrimination against a person where a reasonable person would conclude that the person has expressed a particular belief that is counselling, promoting, encouraging or urging conduct that would constitute a serious offence. Serious offence means an offence involving harm (within the meaning of the Criminal Code), or financial detriment that is punishable by imprisonment for 2 years or more under a law of the Commonwealth, a state or a territory.

This provision ensures that the expression of certain beliefs, which are inconsistent with Australian values and would cause harm to the individuals or the community at large, is not protected by anti-discrimination law.

### Work exception – inherent requirements

The Bill provides an exception for discrimination on the basis that a person is unable to carry out the inherent requirements of the work because of their religious belief or activity.

This ensures that organisations can employ persons who have or engage in a particular religious belief or activity, where that religious belief or activity is an inherent requirement of the work. For example, a hospital hiring for a chaplain position may require that the chaplain be of a particular religious belief or activity.

This exception also recognises that employers should not be required to employ, or continue to employ, persons who are unable to carry out the inherent requirements of the work due to their religious belief or activity. For example, it would not be unlawful for an employer to not hire a prospective employee because they could not abide by workplace health and safety requirements due to their religious dress.

### Temporary exemptions

The Bill also provides the Australian Human Rights Commission the power to grant temporary exemptions. Exemptions may be made upon application by a person, body or group of persons and bodies and may be granted for up to 5 years.

An exemption may be varied or revoked by the Commission or the Attorney-General. The Administrative Appeals Tribunal can review the Commission's or Attorney-General's decisions in relation to temporary exemptions.

## Statements of belief

The Bill ensures that the ability of people to express their religious beliefs in good faith is protected from the operation of Commonwealth, state and territory anti-discrimination law. The Bill provides that a statement of belief does not constitute discrimination under Commonwealth, state or territory anti-discrimination law and does not contravene subsection 17(1) of the Tasmanian *Anti-Discrimination Act 1998*.

This protection only applies to statements made in good faith that are:

- of a religious belief held by the person making the statement that may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the person's religion, or
- made by a person who does not hold a religious belief and are of beliefs about religion held by the person that arise directly from the fact that person does not hold a religious belief.

As such, this provision equally protects the expression of atheist and agnostic beliefs, as well as religious beliefs.

This provision will mean that a person cannot be found to have discriminated against a person under any anti-discrimination law for merely expressing their genuinely held religious beliefs in good faith. This could include, for example, merely stating a biblical view of marriage or an atheist view on prayer.

However, this provision does not protect statements that are malicious, would harass, vilify or incite hatred or violence against a person or group or which advocate for the commission of a serious criminal offence. Accordingly, this provision will not affect federal, state or territory protections against harassment, vilification and incitement to hatred or violence.

## Freedom of Religion Commissioner

The Bill creates the statutory position of Freedom of Religion Commissioner in the Australian Human Rights Commission. The Commission is an independent statutory body with various functions.

The Commissioner will have similar functions to the existing Commissioners and will focus on:

- strengthening the understanding and protection of freedom of religion in Australia through community outreach
- advocating for and inquiring into issues relating to freedom of religion, and
- promoting understanding and compliance with the Religious Discrimination Act.

There is currently no dedicated advocate in the Australian Human Rights Commission for freedom of religion issues. Establishing a standalone Freedom of Religion Commissioner will better protect and promote this important attribute, in line with the approach taken to protect other attributes.

A standalone position of Freedom of Religion Commissioner is consistent with the model for all other Commonwealth anti-discrimination legislation. Each Commonwealth anti-discrimination Act currently has an associated standalone Commissioner: the Age Discrimination Commissioner, Disability Discrimination Commissioner, Race Discrimination Commissioner, and Sex Discrimination Commissioner.

## Overview of the Religious Discrimination (Consequential Amendments) Bill

The Religious Discrimination (Consequential Amendments) Bill makes amendments to support the implementation of the Religious Discrimination Bill.

This Bill amends existing Commonwealth legislation to reflect the new prohibition of discrimination on the basis of religious belief or activity and the new office of the Freedom of Religion Commissioner.

Most significantly, the Bill will amend the *Australian Human Rights Commission Act 1986* to extend the Australian Human Rights Commission's functions to inquire into and attempt to conciliate complaints of unlawful discrimination under the Religious Discrimination Act (as enacted).

# Overview of the Human Rights Legislation (Freedom of Religion) Bill

The Human Rights Legislation Amendment (Freedom of Religion) Bill amends existing Commonwealth legislation to better protect the right to freedom of religion.

The Bill will implement:

- recommendation 3 of the Religious Freedom Review by updating the objects clauses in existing anti-discrimination legislation including the *Racial Discrimination Act 1975*, *Sex Discrimination Act 1984*, *Disability Discrimination Act 1992* and *Age Discrimination Act 2004*, to recognise the indivisibility and universality of human rights
- recommendation 12 of the Religious Freedom Review by amending the *Marriage Act 1961* 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
- recommendation 4 of the Religious Freedom Review by amending the *Charities Act 2013* to clarify that the advocacy of traditional views of marriage by charitable institutions will not disqualify the charitable institution from being a charity.