



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 holds or engages in a religious belief or activity, or they are associated with someone who holds or engages in a religious belief or activity
- the person has been subject to direct or indirect discrimination on the basis of their religious belief or activity, or the religious belief or activity of their associate
- the discrimination occurs in a specified area of public life, and
- the 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 and Indigenous spirituality. 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, and is not confined to religious observances (such as prayers, fasting, ceremonies or religious holidays). Religious activities may also include:

- 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 or making statements of belief, 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 prohibited by Commonwealth, state or territory law, including those which may constitute criminal conduct. For the purposes of determining whether religious activities are lawful, local by-laws will not be taken into account.

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 late 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 or a condition imposed by a qualifying body relates to standards of behaviour, the extent to which the condition limits the ability of a person 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, and does not include the Commonwealth, state or territory public sector. As such, these requirements will not affect small business.

Qualifying body conduct rules – indirect discrimination

For the purpose of the test of indirect discrimination, the Bill provides that standards of behaviour imposed by qualifying bodies which restrict or prevent persons from making statements of belief in their private capacity are not reasonable unless the condition is an essential requirement of the profession, trade or occupation.

A qualifying body is a body which grants authorisations or qualifications that are required to practice a profession, trade or occupation. Examples of qualifying bodies include bodies which register or regulate professionals or trades, such as lawyers, accountants, health practitioners or tradespeople.

Conscientious objections by health practitioners – indirect discrimination

For the purpose of the test of indirect discrimination, the Bill clarifies that rules imposed on health practitioners that have the effect of restricting or preventing a health practitioner from conscientiously objecting to providing or participating in a particular kind of health service on the basis of their religious belief or activity are not reasonable in certain circumstances.

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

This provision only applies to conscientious objections to the provision of, or participation in, a particular kind of health service (such as abortion or voluntary assisted dying). It does not apply to objections to treating a particular person, or group of persons, on the basis of their personal attributes.

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:

- work (including employment, partnerships, qualifying bodies, registered organisations and employment agencies)
- education
- access to premises
- goods, services and facilities
- accommodation
- land
- sport
- clubs
- requesting or requiring information, 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 are able to engage in conduct, in good faith, that a person of the same religion could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of their religion or to avoid injury to the religious susceptibilities of adherents of the same religion. This includes conduct by religious bodies which gives preference to adherents of their religion. Whether or not conduct falls within the scope of the provision is an objective test, determined by reference to a person of the same denomination as the religious body, which recognises that courts are not well-suited to decide matters of faith.

Removing this conduct from the scope of the Bill 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 engage in unlawful discrimination on the grounds of 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**' includes:

- an educational institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion
- a registered public benevolent institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion, 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
- religious public benevolent institutions, such as the St Vincent de Paul Society in Australia, and
- other bodies that are conducted in accordance with the doctrines, tenets, beliefs or teachings of a religion.

Other bodies that are religiously motivated but are primarily engaged in 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 a disadvantage experienced by people of a particular religious belief or activity on the basis of that 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:

- advocacy of conduct that would constitute a serious offence under Australian law
- the conferral of charitable benefits
- conduct undertaken in direct compliance with Commonwealth, state and territory legislation
- conduct reasonably necessary to perform or exercise Commonwealth law enforcement, national security or intelligence functions or powers, and
- conduct in direct compliance with court and tribunal orders and determinations.

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

- domestic duties (offers of employment)
- inherent requirements of work (employment, partnerships, qualifying bodies and employment agencies)
- religious hospitals, aged care facilities and accommodation providers (employment and partnerships)
- accommodation providers, where residing on premises
- religious camps and conference sites (accommodation)
- 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 religious belief and in doing so 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 individuals or the community at large, is not protected by anti-discrimination law.

Inherent requirements of work

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, an organisation hiring for a chaplain position may require that the chaplain be of a particular religious belief or activity, and a catering company that services religious clients might require the staff involved in food preparation to be of a particular faith. These requirements must be objectively related to the role; employers cannot sidestep the obligation not to discriminate on religious grounds by 'deeming' obligations or policies to be inherent requirements, or through the imposition of contractual or other requirements.

This exception also recognises that employers should not be required to employ (or continue to employ) persons who cannot actually do the job for which they are engaged because of their religious belief or activity. For example, an employer would not be required to hire a person because their faith prevented them from adhering to health and safety requirements in the workplace.

Religious hospitals, aged care facilities and accommodation providers

The Bill provides that religious hospitals, aged care facilities and accommodation providers can make decisions in certain areas of public life in accordance with their faith. Such bodies can engage in conduct in relation to the areas of employment and partnerships, in good faith, that a person of the same religion could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of their religion or conduct to avoid injury to the religious susceptibilities of adherents of the same religion. This covers the staffing arrangements of both long-term residential accommodation providers, such as religious retirement homes, and short-term accommodation providers, such as religious youth camps.

This provision recognises the importance of ensuring that these bodies can maintain their religious ethos through staffing decisions.

This provision will not allow religious hospitals, aged care facilities or accommodation providers to discriminate in the provision of services. As such, a religious hospital, aged care facility or accommodation provider could not turn away a patient or resident, or treat them less favourably, because of the patient or resident's religious belief or activity.

Religious camps and conference sites

The Bill provides that religious camps and conference sites may make decisions in relation to accommodation in accordance with their faith, recognising the unique role that these institutions play. The Bill makes clear that, provided it is in accordance with a publicly available policy, it is not unlawful discrimination for these bodies to engage in conduct in the provision of accommodation, in good faith, that a person of the same religion could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of their religion or conduct to avoid injury to the religious susceptibilities of adherents of the same religion.

This provision recognises the importance of ensuring that religious camps and conference sites are able to provide accommodation in accordance with their religious beliefs, including by determining to whom and the manner in which that accommodation is provided.

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, in and of itself, 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 written or oral statements made in good faith that are:

- of a religious belief held by the person making the statement that a person of the same religion could reasonably consider to be 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 that a person who does not hold a religious belief could reasonably consider to relate to the fact of not holding 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, threaten, seriously intimidate or vilify 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 equal status of all 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 a 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 the view that marriage is the union between a man and a woman by charitable institutions will not disqualify the charitable institution from being a charity.