



# Special Feature 1: Why the Proposed Australian Religious Discrimination Bill will do more harm than good

## The proposed Religious Discrimination Bill 2021 (the 'Bill')

As a lawyer practising in workplace relations for 30+ years I have significant interest in the effectiveness of Australia's anti-discrimination legislation because most discrimination complaints relate to employment. Scott Morrison, the Australian Prime Minister, who is a staunch member of the Hillsong Pentecostal Church, personally introduced the Bill to the Australian Parliament and promised to have it passed by Parliament before the next Federal election which is due to take place in a couple of months. The controversial Bill was widely criticised by many, including the Australian Law Council, the Human Rights Law Centre as well as both employer groups and Unions of employees. Realising that his Bill won't pass without significant changes, Mr Morrison withdrew the Bill with the intention to reintroduce it after the election.

I have grave concerns that if the Bill is reintroduced and becomes law, it will result in an increase in discrimination complaints rather than a decrease and it will hamper employers' ability to provide safe and healthy workplaces. In this short paper I'll identify key concerns.

We all agree that the right to freedom of thought, expression, religion or belief is a fundamental right under international law in accordance with the *International Covenant on Civil and Political Rights*, to which Australia became a signatory in 1966. The Australian government has an obligation to guarantee all people are equal and to provide effective protection against discrimination on grounds of not only religion, but also race, sex, age, political opinion, social origin, etc. However, it should never be a freedom to discriminate because human rights belong to all people equally and no one right can trump another right.

The interaction of religious freedom and anti-discrimination laws are complex matters, and the appropriate balance must be found which requires a detailed consultation process which has not occurred in relation to this Bill.

## Is the Bill necessary or are there existing protections under Australia's Federal and State law to prevent discrimination on the ground of religion?

Most Australian State and some Federal legislation already contain protection against religious and other forms of discrimination. Every worker has the right to a safe, healthy and respectful workplace regardless of religion, race, sex, age, gender identity, political opinion, social origin, or other personal attributes.

Section 351 of the *Fair Work Act 2009* (the 'FW Act') already prohibits an Australian employer from taking adverse action against an employee or prospective employee because of the person's personal attributes such as race, sexual orientation, age, disability, marital status, pregnancy, **religion**, political opinion, social origin, etc.

The *Sex Discrimination Act 1984* (the 'SDA') goes further and permits religious organisations to discriminate against any staff member or student on the ground of a person's sex, gender identity, marital status or pregnancy

if discrimination is “*necessary to avoid injury to the religious susceptibilities of adherence of that religion*” (Section 37).

The FW Act (Section 153), the *Australian Human Rights Commission Act 1986* as well as State Acts contain similar exemptions and permit discrimination against a staff member of a religious institution as long as it is done “*in good faith*” and “*to avoid injury to the religious susceptibilities of adherence of that religion*”.

So therefore, not only are there Federal and State legislative protections to prevent religious discrimination but religious bodies already have broad exemptions from complying with anti-discrimination laws across the country, which should be narrowed, not expanded.

## What are the key concerns with the Bill?

Protections against discrimination are not controversial, but the Bill goes much further and includes very troubling provisions that will enable and encourage discrimination against people on the grounds of their religion as well as their sex, race, gender identity and other personal attributes.

It grants a far-reaching license to Australian religious bodies including schools and charities to discriminate against others based on religion, not only in relation to employment but also in relation to service delivery against people seeking help such as home-based aged care, social welfare and healthcare services (Section 9). The Bill allows discrimination against employees even where religion is not relevant to the role.

The Bill creates a lower threshold for unfavourable treatment based on religion by excluding the word “*necessary*” from the current “*religious susceptibilities*” test as found in the SDA mentioned above.

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The Bill introduces protection for “*statements of belief*” (Section 12). A ‘statement of belief’ is defined as a statement of religious belief held by a person made in good faith by written or spoken words that the person generally considered to be in accordance with the doctrines, tenets, beliefs, or teachings of that religion.

It requires only the person who makes the statement themselves to genuinely consider it to be in accordance with those doctrines or beliefs. This ‘**test of one**’ contains no objective test at all, which is unprecedented in Australian law. It introduces untested concepts into discrimination law which will create confusion and conflict.

If the Bill is passed by the Australian Parliament, employers will have to navigate three different levels of religious exemptions under the SDA, the FW Act and the Bill which will be increasing complexity.

The right to make a religious ‘statement of belief’ over the right to equality and non-discrimination, particularly for women, LGBTIQ persons and single mothers will have significant negative implications for Australian workplaces.

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Section 11 of the Bill is deeply concerning as it explicitly overrides human rights protections under Australian State legislation and is contrary to the basic principles of human rights law. For example, Tasmania only permits religious educational institutions to discriminate in employment on the grounds of religious belief if religious observance or practice is a genuine occupational requirement of the position. Section 11 of the Bill will simply override such State protections even if those ‘statements of belief’ are hostile, offensive, inappropriate, and harmful. This is unwarranted and unacceptable.

There is no need to protect discriminatory statements that will impact negatively on the rights and freedoms of others. The ‘statement of belief’ provisions in the Bill are likely to reduce tolerance for religious diversity in workplaces by protecting a broad range of statements of belief about religion including statements that are degrading and harmful. This means that conduct that previously constituted discrimination will no longer be discrimination if the Bill becomes law.



*The House of Representatives inside the Australian Parliament House, Canberra (Image: dreamstime)*

In practice statements of belief could include notices left on a staff noticeboard or on a person's desk, social media posts, emails, or text messages. It creates significant scope for very hostile and harmful statements to be made at work which may no longer constitute discrimination and Australian employers' ability to prevent such statements would be hampered.

Examples of such statements:

'unholy' education of girls; divorcees and gay couples are living in sin and will go to hell; a moderately expressed statement by a white supremacist about the inferiority of people of colour; white people are God's chosen people; God made Adam and Eve not Adam and Steve.

Such statements will potentially undermine workplace health and safety and there could be significant costs if businesses are unable to prevent employees from making 'statements of belief' that are degrading and harmful to other employees. Disputes about these matters will almost certainly lead to litigation in the Australian Federal Court which will be time consuming, costly, and disruptive for everyone involved.

All that the person making these comments needs to show is that their statement was made in good faith in accordance with what they consider to be in accordance with their religion. Although a complainant would be able to make a discrimination complaint if they were able to prove that the comments were malicious or threatened or intimidated, harassed or vilified, but it would not be sufficient to show the comments were hostile, degrading, harmful inappropriate or offensive.

A footnote to Section 15 states that "A moderately expressed religious view that does not incite hatred or violence would not constitute vilification". However, statements of belief, no matter how politely expressed, will cause serious harm and the Bill will undermine industry efforts to promote diversity and inclusion in Australian workplaces. No wonder employer associations, Unions of employees, the Law Council of Australia, Human Rights Law Centre and even some minority religious bodies are all opposed to the Bill.

It will seriously affect employers' ability to prevent degrading and harmful statements at Australian workplaces and it will give religious employers the right to discriminate against employees for their beliefs even when it has no significance or relevance to their job. In my view the Bill is unjustified and unnecessary and should be vigorously opposed if reintroduced.

### **Is there a better alternative?**

No one right should be privileged over another, and this is where the Bill fails. Human rights are indivisible and have equal status and the Australian government should rather enact a legislative *Charter of Human Rights*, which should include a proportionality test incorporating concepts such as reasonableness and necessity where special measures are taken to balance competing rights in anti-discrimination law.

Author: Johnny Brits

Published on [theconflict.org.au](https://theconflict.org.au) on 20 March 2022