

## The government has released its draft religious discrimination bill. How will it work?

Written by Liam Elphick, Honorary Research Fellow, Law School, University of Western Australia

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Federal Attorney-General Christian Porter has [released](#) a draft package of religious freedom bills, including the much-anticipated Religious Discrimination Bill.

These bills respond to earlier [inquiries](#) into the protection of religious freedom under Australian law. They implement some of the [recommendations](#) of the Expert Panel on Religious Freedom (known as the Ruddock review).

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The government has committed to considering any [submissions](#) received by October 2 2019 in its development of these bills. It plans to introduce final draft legislation to parliament later in October.

The government reportedly wishes to pass this legislation before [Christmas](#) .

### What do these bills seek to achieve?

The Religious Discrimination Bill forms the crux of the legislative package.

This bill does not create a positive right to freedom of religion – often termed a “sword”.

Instead, it aims to provide a “[shield](#)” by prohibiting discrimination on the basis of religious belief or activity in the following areas of public life:

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- work
- education
- access to premises
- goods, services and facilities
- accommodation
- land
- sport and clubs.

The Australian Human Rights Commission would be empowered to inquire into and conciliate complaints of unlawful discrimination on the grounds of religious belief or activity.

Porter represents these proposed reforms as [complementary and similar](#) to existing federal laws that prohibit discrimination on the grounds of race, sex, disability and age.

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In one sense, this is true. The bill prohibits discrimination largely in the same terms as existing discrimination laws, but adds the “religious belief or activity” ground.

This means that, for example, it would be unlawful to terminate a person’s employment on the basis of them being Catholic or Muslim or Jewish.

Such protection already exists in all state and territory laws except in South Australia and New South Wales.

“Religious belief or activity” is also defined symmetrically in the bill. It includes holding a religious belief or engaging in religious activity, as well as *not* holding a religious belief or *not*

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engaging in religious activity.

This is important because it provides equal protection to people of a religious faith and those of no religious faith. Your boss would also be prohibited from firing you on the basis that you are *not* religious.

### What are the key differences?

The differences from other federal discrimination laws are mostly contained in section 8 of the bill.

First, section 8(3) clearly targets an [Israel Folau-type situation](#).

This section prohibits indirect discrimination, which is standard practice in discrimination law. This is where the imposition of a condition or requirement disadvantages a certain group of people and is not reasonable.

For example, an employer could impose a rule that all employees must attend work from 9-11am on Sundays, because the employer happens to find this a productive time to work. This would disadvantage those who may wish to practise their faith at that time, and appears to have no reasonable basis.

However, the section goes on to focus on employer conduct rules, which are not mentioned in any other federal discrimination laws.

An employer conduct rule under this section is not reasonable if it would restrict or prevent an employee “from making a statement of belief at a time other than when the employee is performing work”, unless the statement is malicious or would harass, vilify or incite hatred against a person or group.

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A code of conduct prohibiting employees from making offensive comments on social media outside of work could therefore be unlawful discrimination.

This provision only applies, though, to employers with annual revenue of at least A\$50 million.

Second, there is a provision in section 8(5) allowing conscientious objections by health practitioners.

This means that where a health practitioner is required by their employer to provide a service to which they object on religious grounds, this requirement will likely be unreasonable – and therefore discriminatory.

This could allow individual doctors to refuse to perform a wide range of services on religious grounds, including abortion, assisted suicide and procedures for transgender patients. The Trump administration [introduced a similar rule](#) earlier this year.

Third, despite [Porter previously stating](#) that the Religious Discrimination Bill was not intended to override state laws, it does just that.

[Section 17\(1\)](#) of the Tasmanian Anti-Discrimination Act prohibits people from offending, humiliating, intimidating, insulting or ridiculing others on the basis of attributes such as disability, sex, sexual orientation and gender identity.

Section 41 of the Religious Discrimination Bill states that “a statement of belief does not contravene section 17(1)” of the Tasmanian Act unless it is malicious or is likely to harass, vilify or incite hatred or violence against a person or group of persons.

It also provides that a statement of belief does not constitute discrimination for the purposes of any discrimination law in Australia – whether at federal, state or territory level.

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This is rare in discrimination law, where federal and state systems are [usually seen to be](#) separate and concurrent.

It would mean statements based on religious belief that offend, humiliate, insult or intimidate women, LGBTIQ+ people or persons with disabilities would be lawful, regardless of what state laws provide.

The only way such statements would be unlawful under any discrimination law is if they met the higher threshold of harassment, vilification or incitement of hatred.

### Short consultation limits capacity for scrutiny

Prior to the bills' release, the shadow attorney-general, Mark Dreyfus, [accused](#) the government of seeking to rush the bill through parliament without sufficient consultation. He said:

The Liberals have been arguing about religious discrimination for more than two years but appear to want to give the rest of the country just weeks to debate it.

The attorney-general notes that the proposed reforms reflect an [election commitment](#) .

Yet there will be just four weeks of community consultation, and just 16 parliamentary sitting days remain until the end of the year. This provides a short window in which to consider complex changes to Australian law.

In contrast, the [Australian Law Reform Commission](#) has been given 12 months to consider the question of religious organisations' exemptions from discrimination law – which form just a handful of provisions. It won't report until April 2020, including on matters that cut across some of the proposals in these bills.

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**Read more:** [Ruddock report constrains, not expands, federal religious exemptions](#)

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One issue with the brief consultation period is that it limits scrutiny of how today's proposals vary from the recommendations of the Ruddock review.

For example, the Religious Discrimination Bill establishes a position of Freedom of Religion Commissioner in the Australian Human Rights Commission. The commissioner would be responsible for strengthening community understanding of religious freedom, advocating for religious freedom issues, and promoting compliance with the anticipated Religious Freedom Act.

Yet the [Ruddock report](#) recommended that protection of religious freedom should occur within the existing commissioner model, not by spending an [estimated](#) A\$1.25-1.5 million a year on a new commissioner.

Considering the unique aspects of the proposed Religious Discrimination Bill, a longer consultation period should be provided to ensure appropriate evaluation.

But, however long the consultation process, any drastic departures from existing discrimination law models should be carefully scrutinised to assess why and how religion should be given any special status.

*The authors do not work for, consult, own shares in or receive funding from any company or organisation that would benefit from this article, and have disclosed no relevant affiliations beyond their academic appointment.*

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**Read more** <http://theconversation.com/the-government-has-released-its-draft-religious-discrimination-bill-how-will-it-work-122618>