

Religious Discrimination Bill is a mess that risks privileging people of faith above all others

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

The federal government [released](#) its draft Religious Discrimination Bill yesterday.

The [idea behind the bill is sound](#) : add the protected ground of “religious belief or activity” to existing federal discrimination protections for race, sex, disability and age.

Read more: [**The government has released its draft religious discrimination bill. How will it work?**](#)

Most would agree it’s wrong to discriminate against someone for the reason that they are of a certain faith – or, indeed, of no faith.

But this bill goes much further than other discrimination laws and weakens existing protections for LGBTIQ+ people, women, people with disabilities, and those from diverse racial and cultural backgrounds.

The month-long [consultation process](#) for the bill must be used to make key changes, or our discrimination laws will end up privileging people of faith above all others.

Special provisions for the ‘Folau case’

The [Israel Folau case](#) has clearly been front and centre in the drafting of the Religious Discrimination Bill.

If this bill had been law when Rugby Australia sacked Folau, he might have chosen to pursue a federal discrimination case.

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Like all other discrimination laws, the bill prohibits indirect discrimination. This occurs where a condition or requirement is imposed in a general sense and this has the effect of disadvantaging people of a certain religious belief.

In all discrimination laws in Australia, a condition or requirement will not be discriminatory where it is “reasonable” in the circumstances. This is a general release valve that allows all sorts of everyday requirements to be imposed even where it might disadvantage certain group. One example is being required to work certain hours or at a specific location.

Under this provision, it would have been up to Folau to prove that Rugby Australia’s code of conduct disadvantaged people who held religious beliefs.

Rugby Australia would then have a defence if it could prove the requirement was “reasonable” in the circumstances.

This would be the same if a gay rugby player spoke out in support of marriage equality and was then sacked because Rugby Australia banned players from expressing views on marriage equality. The gay player would have to prove this ban disadvantaged gay players; Rugby Australia could then seek to prove it was reasonable as a defence.

Read more: [**Explainer: does Rugby Australia have legal grounds to sack Israel Folau for anti-gay social media posts?**](#)

However, the Religious Discrimination Bill goes well beyond this general indirect discrimination provision. It contains a separate specific provision dealing with “employer conduct rules” for employers with annual revenue over A\$50 million.

This provides that a rule restricting or preventing an employee from making a religious

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“statement of belief” outside of work is *not* reasonable. This would mean such rules are likely to be unlawful discrimination.

The only way for an employer to escape this finding under the bill is if they can prove the rule was needed to avoid “unjustifiable financial hardship to the employer”. They can also escape liability if the statement the employee made was malicious or would harass, vilify or incite hatred towards a person or group.

Both of these are very high standards to meet. Rugby Australia may have struggled to meet the “unjustifiable financial hardship” test, even with the threat of [key sponsors dropping out](#) .

To harass, vilify or incite hatred are also high bars to meet – much higher than Australian vilification laws usually set.

No other discrimination law in Australia has this “employer conduct rule”.

This means an employer could sack you for expressing almost all views *except* those that are religious.

Overriding existing protections

The Religious Discrimination Bill also explicitly overrides existing discrimination protections for other groups.

The bill provides that a religious “statement of belief” made in good faith will not constitute discrimination under any Australian discrimination law.

It also provides that a statement of belief will not breach Tasmania’s strong anti-vilification protections. Tasmanian law prohibits people from offending, humiliating, intimidating, insulting or ridiculing others on the basis of attributes such as race, disability, sex, sexual orientation and

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gender identity.

Read more: [Why Australia does not need a Religious Discrimination Act](#)

This means a person in Tasmania could lawfully make a statement that humiliates, intimidates or ridicules people of a certain race, as long as they can prove there is some religious basis for that statement.

If someone was to make such a statement with no religious basis, it would remain unlawful.

This bill also appears to be the first and only example of a federal discrimination law explicitly overriding other discrimination laws.

Indeed, Australian discrimination law is largely premised on there being [concurrent federal and state systems](#), neither of which overrides the other.

All other federal discrimination laws contain a specific provision noting that they are not intended to exclude or limit the operation of state laws that can operate concurrently.

In the Religious Discrimination Bill's version of this clause, it explicitly draws attention to the override provisions for statements of religious belief. Those statements of belief retain priority over other discrimination laws.

No other groups protected by discrimination law are provided with this type of exclusion or override.

Broad exclusions for religious bodies

The bill also contains broad provisions on what is *not* religious discrimination.

One prominent example is found in section 10. Under this provision, where religious bodies act in good faith in conduct that “may reasonably be regarded” as being in accordance with their religious beliefs, these acts cannot be unlawful discrimination.

The definition of “religious body” includes religious schools, religious charities and any other body that is conducted in accordance with the teachings of a particular religion.

Read more: [Why Australia needs a Religious Discrimination Act](#)

Some aspects of this provision are uncontroversial – for example, that a religious school should be allowed to prioritise entry for students of the same faith.

However, section 10 is drafted so widely that it could, on the face of it, allow religiously affiliated charities to refuse to assist people of a different faith or of no faith. A Catholic-affiliated soup kitchen could, in theory, refuse to provide food to a Muslim person.

This provision is, again, far broader than clauses found in other federal discrimination laws.

The Sex Discrimination Act, which also protects LGBTIQ+ people, contains a provision stating that some religious acts are not discrimination. However this provision requires that the religious body’s act must “conform to” the beliefs of the religion or be “necessary” to avoid injury to religious sensibilities.

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That test is much harder to satisfy than the Religious Discrimination Bill's test of whether conduct "may reasonably be regarded" as being in accordance with religious beliefs.

More expansive than other discrimination laws

The bill contains various other provisions that go far beyond the scope of existing discrimination laws.

Section 8 prohibits any rule imposed by an employer on a health practitioner that would require them to perform services to which they have a religious objection. This could allow doctors to refuse to perform abortions or to perform any services for LGBTIQ+ people.

No such provision is found in any other discrimination law. This means that, under discrimination law, a doctor could refuse to perform services on religious grounds but not on the basis of any other attributes.

Section 11 provides that any reasonable conduct that is intended to "meet a need arising out of a religious belief" or reduce disadvantage based on religious belief will not be unlawful discrimination.

Other discrimination laws also have provisions that allow for positive measures to be taken to further opportunities. For example, women-only gyms are allowed even though this discriminates against men.

However, the provision in the Religious Discrimination Bill is far wider than other discrimination laws and could capture any number of unforeseen situations.

The government released another bill yesterday as part of its religious freedom package: the [Human Rights Legislation Amendment \(Freedom of Religion\) Bill](#)

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This bill amends all federal discrimination laws so that each contains a new “objects” provision. This provision would require judges, in assessing discrimination claims, to take into account the importance of all human rights, not just non-discrimination rights.

The [explanatory memorandum](#) to this bill notes that this provision is intended to ensure freedom of religion is taken into account when assessing any discrimination claims. Other rights could also be taken into account, such as freedom of speech.

This would mean an increased role for religious freedom when discrimination claims are brought on the basis of sex, or race, or LGBTIQ+ status. Over time, this would likely water down protections for other groups.

Amendments urgently needed

Overall, the draft Religious Discrimination Bill goes too far in prioritising religious rights over all others.

The idea behind the bill is a good one: to prohibit discrimination on the basis of religious belief or non-belief.

But, in its current form, the bill provides too many broad and special protections to those of religious faith. The consultation period provides an appropriate, if short, window in which to make necessary changes.

The bill should be scaled back so it matches the model and scope of federal discrimination laws protecting race, sex, disability and age. It should also be made clear that it does not override any existing protections for other groups under state laws.

We should not have one model of special protection for religious faith and a lesser model of protection for all other people.

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