

TO: Committee Secretary
Parliamentary Joint Committee on Human Rights
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600
AUSTRALIA

Inquiry regarding Religious Discrimination Bill 2021 and related bills

Introduction

1. I refer to the current inquiry relating to the government's religious discrimination legislative package, including the *Religious Discrimination Bill 2021* ("the Bill"), and thank you for the opportunity to make this submission.
2. I am an academic philosopher with a specialization in legal and political philosophy, including issues relating to liberal theory, secular government, and traditional civil and political liberties such as freedom of religion and freedom of speech. I have published widely on these topics. In particular, my published books include *Freedom of Religion and the Secular State* (Wiley-Blackwell, 2012) and *The Tyranny of Opinion: Conformity and the Future of Liberalism* (Bloomsbury Academic, 2019). My formal qualifications include an LLB with First Class Honours from the University of Melbourne and a PhD in philosophy from Monash University, where my doctoral dissertation applied ideas from liberal theory and philosophy of law to certain topical issues in bioethics.
3. I also have extensive practical experience as an industrial advocate working in the federal jurisdiction and as a workplace relations solicitor with a major commercial firm in Melbourne. I have considerable expertise in workplace relations and employment law, and in anti-discrimination law.
4. I currently hold an appointment as Conjoint Senior Lecturer in Philosophy at the University of Newcastle, though I do not, of course, purport to represent the views of the university.

Scope of submission

5. The draft Bills are complex and much of their content deals with issues arising from tensions between different strands of public policy. As a result, there is much room for argument about the values and priorities that have shaped the current legislative package. It is noteworthy that the Bills do not generally deal with the topic of freedom of religion, which is a freedom from persecution or imposition of religion by state power. They do not, for

example, seek to strengthen and extend the protection given by s. 116 of the Australian Constitution. Instead, they are a contribution to anti-discrimination law.

6. In this brief submission, I will confine myself to just two key areas of concern: first, the definition in the Bill of “religious belief or activity”; second, the nature of a “statement of belief” and the importance of allowing vigorous public discussion and debate about religion.

Religious belief or activity

7. Fundamental to the legislative package is protection against discrimination in employment, and in various other domains of public life (education, accommodation, provision of goods and services to the public, etc.), based on religious belief or activity as defined. The definition of “religious belief or activity” is as follows:

- (a) holding a religious belief; or
- (b) engaging in religious activity; or
- (c) not holding a religious belief; or
- (d) not engaging in, or refusing to engage in, religious activity.

8. The first problem with this definition is that it does not clearly include the *communication* (or *expression*) of religious beliefs. An employer might, for example, claim that it has not unlawfully discriminated against an employee because of the mere fact that she is known or understood to hold a certain belief, or because of her participation in clearly religious activities such as ritual and worship. The employer might argue that it has lawfully discriminated against the employee because of her *communication* of her belief, or because of some aspect of her communication of it, such as its time, place, tone, or manner. In response, a court might hold that the communication of religious beliefs falls within “religious activity” or that it is implicit within “religious belief”. However, that is not clear and it cannot be assumed.

9. For reasons that are unclear to me, the Bill currently protects communication of religious beliefs in relation to the rules of qualifying bodies, but not in relation to areas such as employment. Compare s. 15 with, for example, s. 19. At best, this is confusing.

10. The legal effect of this difference is open to more than one interpretation. On one construction, however, it suggests that communicating religious beliefs is *not* included within the definition of religious belief or activity, but is a separate topic. If so, s. 15 provides that the rules of a qualifying body cannot generally forbid communication of religious beliefs, but it seems that an employer’s code of conduct probably *can* prevent communication of religious beliefs, even outside the workplace (or to use the language of the Bill, outside of practising the employee’s profession, trade, or occupation). In that case, this anomaly should be corrected.

11. Even if it were clear that communicating religious beliefs falls within “religious belief or activity”, consider the situation of a person who does not hold any religious belief or engage in any religious activity, but who does hold philosophical beliefs that are critical of religion and/or provide a non-religious alternative worldview, such as some form of secular humanism or philosophical naturalism. This person might communicate her beliefs about religion in public discussion and might engage in other activities that are aimed at undermining the credibility of religious doctrines, or at opposing the social and political

influence of religious organizations. For example, she might be affiliated with a secular humanist organization, or the like, and take part in its activities.

12. This person should receive the same protection for her relevant beliefs, communications, and lawful activities as an adherent to a religion receives for her religious beliefs and communications and her lawful religious activities. Any other approach would be intolerably discriminatory. However, despite what is stated in paragraph 41 of the explanatory notes to the Bill in the Explanatory Memorandum, the current definition does not appear to have that effect. As worded, it protects only passively *not* holding a religious belief and passively *not* engaging in (or refusing to engage in) religious activity.

13. Accordingly, the definition of religious belief or activity needs to be modified so that it clearly includes communicating religious beliefs, and so that it includes holding and/or communicating beliefs that are actively critical of religion or are philosophical alternatives to religious beliefs. Furthermore, the definition needs to be modified to include not just non-participation in religious activity but also positive engagement in activity related to worldviews that are critical of religion and/or stand as alternatives to religious beliefs.

14. All of the problems identified under the current heading can be solved by adding the following to the current definition of religious belief or activity (perhaps with consequential amendments elsewhere in the Bill):

[(d) ...]; or

(e) communicating a statement of belief; or

(f) engaging in any activity reasonably connected with a lack of religious belief, or of a particular religious belief, or reasonably connected with a critical attitude to religious belief generally or to a particular religious belief.

Statements of belief and public discussion of religion

15. If enacted, the legislative package will have the effect that a statement of belief is deemed not to be, solely in itself, discrimination under any of a list of federal and state anti-discrimination statutes. As far as it goes, this is welcome. It provides a valuable protection for one kind of speech, namely (subject to certain conditions) speech that expresses or communicates a religious belief, and speech that communicates a belief that the individual concerned genuinely considers related to his or her not holding a religious belief.

16. I expect that the courts would interpret the definition of a statement of belief broadly to include speech that communicates a critical attitude to religious belief or to a particular religious belief. Here, paragraphs 171 and 172 of the relevant section of the Explanatory Memorandum appear to be correct. Although this issue should be kept under review as case law develops, the proposed definition is probably broad enough to be workable and acceptable.

17. However, Note 1 inserted after sub-s. 12(2) is a matter of concern. This note also appears after sub-s. 15(3) (and see also paragraph 192 of the relevant section of the Explanatory Memorandum). It states: “A moderately expressed religious view that does not incite hatred or violence would not constitute vilification.” As far as it goes, this statement is correct. However, it is seriously misleading.

18. First, even an *anti*-religious view, or a view severely critical of religion or a particular religion, would not constitute vilification unless it incited hatred or violence. Though not defined in the Bill, hatred is an extreme emotion involving animosity, detestation, and calumny. Second, and more importantly, even statements of belief that are discourteous, disrespectful, satirical, mocking, or uncivil, or otherwise immoderate in their expression, would not constitute vilification unless they rose to the level of inciting either the extreme emotion of hatred or outright violence. While that much is clear as a matter of statutory interpretation, it is important not to create confusion with a note that conveys a contrary and misleading impression.

19. Thus, the note should be reworded to reflect the intention and meaning of the Bill. The note would be accurate – and more reassuring – if it stated as follows: **Robustly expressed statements of belief that do not incite hatred or violence do not constitute vilification. This guarantees a broad zone for vigorous public discussion of religion.**

20. In that regard, compare the broad zone for academic discussion and debate recently identified by a unanimous High Court in *Ridd v. James Cook University* (13 October 2021). Here, the judges explained that ideas of academic or intellectual freedom provide a broad zone for vigorous discussion that rightly includes much that inevitably cannot be expressed with courtesy and respect.

21. Outside the relatively genteel environment of the academy, this idea applies even more strongly to certain kinds of discussion and debate conducted in the public sphere. These include political, cultural, moral, and, most importantly for current purposes, religious discussion and debate.

22. To expect that public discussion and debate about religion should, or could, typically proceed in a “moderately expressed” way is to fail to take the issues of disagreement seriously. For example, adherents of some religions sincerely regard other religions as not merely false but actually demonic. Some religions sincerely view themselves as engaged in a cosmic struggle of good versus evil against other religions and/or against unbelief. Some religions sincerely regard a wide range of conduct as sinful, and hence conducive to spiritual damnation or an equivalent, even though the conduct might be essentially harmless in its visible effects, and thus not a good candidate for legal prohibition or for ordinary kinds of social condemnation. Religious leaders and adherents often feel called upon by God to speak prophetically, using forceful rhetoric to call their society back to its traditional moral ideas and forms of worship. Conversely, many people with non-religious or anti-religious philosophies view religious beliefs as ill-founded, false, socially harmful, and damaging to the welfare of individuals in the everyday, empirical world. Such people might well be motivated to engage in satire, ridicule, and denunciation in the tradition of Voltaire.

23. It follows that, even more than with academic discussion and debate, there is a limit to how far public discussion and debate about religion can be universally, or typically, moderate in its expression. There is, for example, a limit to how courteously, respectfully, and otherwise moderately religious leaders can express the view that certain conduct is wicked, sinful, and abhorrent to God. There is a limit to how moderately rival views can be identified and opposed as heresy, or as the products of malevolent spiritual intelligences active in the universe. Likewise, there is a limit to how moderately one could affirm that some or all religious beliefs are illusory and harmful. Public disputation over these and similar issues is inevitably passionate, robust, and marked by a sense of great urgency.

24. While some viewpoints might lead to ugly and hostile speech appearing within the sphere of public discussion and debate, the general policy that has developed in recent centuries, as part of the emergence of Western liberal democracies, has been to tolerate rival viewpoints and their vigorous assertion. Since the seventeenth century, supporters of secular government and freedom of religion have hoped that the harshest attitudes would soften in an environment where, at least, no one need fear persecution with “fire and sword” for holding and communicating their religious or philosophical views. By and large, that approach has been successful, and there has been a discernible softening of attitudes over the past, say, 350 years, and even within current lifetimes. It remains prudent to allow vigorous discussion and debate to continue in the public sphere, with minimal interference from the government or from others with lawful authority such as employers. Participants in public discussion and debate about religion should not have to fear legal sanctions, or adverse social outcomes such as termination of their employment, for insufficiently “moderately expressed” views.

25. This is not to suggest that statements of religious or philosophical belief should lie entirely beyond the law, allowing a total free-for-all in this area. Although it is difficult to identify with exactitude, there is an outer boundary to toleration of vigorous discussion and debate about religion or anything else.

26. Within the present Bill, the boundary is set by reference to statements of belief that are malicious, threatening, intimidating, harassing, or vilifying, or which incite serious crime. It is worth emphasizing that nothing in the Bill protects anyone from a civil suit for defamation, should she communicate a statement of belief that includes defamatory content. Nothing protects an employee who has confronted a workmate, colleague, customer, client, patient, etc., with a statement of belief that is, in context, malicious, threatening, intimidating, or harassing. Again, nothing in the Bill protects an individual who has committed one of the crimes in s. 80 of the Commonwealth *Criminal Code* – see especially ss. 80.2A and 80.2B, where the essence of the relevant offences is intentional urging of force or violence against groups or their members. Such boundaries provide more than adequate limits to toleration of vigorous discussion and debate about religion.

Conclusion

27. In summary, I have offered and defended two specific recommendations for amendment of the *Religious Discrimination Bill 2021*:

- First, amend the definition of religious belief or activity as I have set out in paragraph 14 above. This may require some consequential amendments.
- Second, as per paragraph 19 above, delete the first note to sub-ss. 12(2) and 15(3) of the Bill, and replace it with more accurate wording as follows: “Robustly expressed statements of belief that do not incite hatred or violence do not constitute vilification. This guarantees a broad zone for vigorous public discussion of religion.”

Yours sincerely,

Russell Blackford
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