

ACL Submission on Religious Discrimination Bill 2021 (with amending Bills)

SUBMISSION:
Religious Discrimination Bill 2021
(with amending Bills)

AUSTRALIAN CHRISTIAN LOBBY

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About Australian Christian Lobby

Australian Christian Lobby's vision is to see Christian principles and ethics influencing the way we are governed, do business, and relate to each other as a community. ACL seeks to see a compassionate, just and moral society through having the public contributions of the Christian faith reflected in the political life of the nation.

With more than 220,000 supporters, ACL facilitates professional engagement and dialogue between the Christian constituency and government, allowing the voice of Christians to be heard in the public square. ACL is neither party-partisan nor denominationally aligned. ACL representatives bring a Christian perspective to policy makers in Federal, State and Territory Parliaments.

acl.org.au

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Committee Secretary
Parliamentary Joint Committee on Human Rights
PO Box 6100
Parliament House
Canberra ACT 2600

religionbills@aph.gov.au
human.rights@aph.gov.au



16 December 2021

Dear Committee Secretary

On behalf of the Australian Christian Lobby (ACL), thank you for the opportunity to make a submission on the *Religious Discrimination Bill 2021 (Cth)* with amending Bills.

Please find attached our submission on this important issue.

I am available to discuss any issues which may arise from this submission.

Yours sincerely,

Wendy Francis
National Director / Politics

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INTRODUCTION

The Australian Christian Lobby (the **ACL**) supports the proposed *Religious Discrimination Bill 2021* (the **Bill**) and submits that, subject to some minor amendment, the Bill should be enacted.

EXECUTIVE SUMMARY

1. The Bill should include provisions within the Objects and elsewhere giving explicit effect to relevant international instruments, in accord with best practice as followed in all other Federal discrimination legislation.
2. The Bill fails to include a burden of proof on a discriminator to show their differential treatment was reasonable. We presume this omission is an oversight and will be rectified.
3. The core protected attribute of “religious belief or activity” should be amended to adopt the “sincerity” test in accordance with international law and provide an expansive definition of religious activity.
4. Employee personal speech protections should be included in the Bill to stop employers targeting employees for personal statements of religion outside of work hours.
5. A “reasonable adjustments” test should be added to the Bill to require a person to give reasonable accommodation to religious beliefs provided it does not cause undue hardship.
6. The test for “reasonableness” for limitation of religious belief and activity should be amended consistent with the standard in Article 18 of the *International Covenant on Civil and Political Rights (ICCPR)*.
7. The Bill should not amend the *Sex Discrimination Act (SDA)* to remove protections around sexual orientation and gender identity (**SOGI**). Changes to the SDA on SOGI issues is a separate and complex issue the subject of review by the Australian Law Reform Commission.

SPECIFIC SUBMISSIONS

The Case for the Religious Discrimination Bill

The Bill is necessary. The Bill will address a longstanding gap in federal discrimination law and provide much-needed protections to Australians of all or no religious beliefs within public life. It implements Recommendation 15 of the 2018 Expert Panel on Religious Freedom, which highlighted that religious freedom has patchwork protection in the States and Territories and recommended the enactment of a Religious Discrimination Bill.

Religious discrimination is currently legal in NSW and SA. The Bill will extend long-overdue protection to religious belief.

Religious freedom faces increasing hostility in Australia. Recent polling from McCrindle Research reveals that almost 30% of Australians have experienced discrimination of some kind for their religion or religious views. In 2017, the United Nations Human Rights Committee expressed concern at the lack of legal protections for religious freedom in Australia. The website www.australiawatch.com.au catalogues a wide range of cases of hostility towards Christians in the public square in Australia which demonstrate the need for this law.

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The Bill is a conventional and unremarkable piece of legislation that will go some way to addressing the need for protection of religious freedom. Nonetheless, the Bill remains deficient in numerous areas which we address below, all of which derive from its failure to give explicit effect to Australia's international law obligations within Article 18 of the ICCPR or the Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR (**Siracusa Principles**).

Implementation of ICCPR Article 18

Recommendation 3 of the Expert Panel – accepted by the Commonwealth government – requires the government to “*consider the use of objects, purposes or other interpretive clauses in anti-discrimination legislation to reflect the equal status in international law of all human rights, including freedom of religion*”.

While the Bill includes wording to this effect in paragraph 3(1)(b) of the Objects, the Expert Panel's recommendation should not be understood to apply merely to the repetition of particular wording, but to ensure that the objects and other clauses should indeed *reflect* rather than merely *state* the equal status of human rights. In this regard, the Bill falls far short of the recommendation as follows:

In the *Human Rights Legislation Amendment Bill 2021*, tabled alongside the Bill in Parliament, paragraph 7 would insert the following provision into the *Racial Discrimination Act 1975* (Cth) (**RDA**) as subsection 2A(1)(a), specifying as an object of the Act: “*to give effect to certain provisions of the International Convention on the Elimination of All Forms of Racial Discrimination*”.

This additional subsection would bring the RDA into line with all the other discrimination Acts (the SDA, the *Disability Discrimination Act* and the *Age Discrimination Act*) which include an explicit statement in their objects and/or elsewhere that they give effect to international law. The Bill does not contain a similar statement, placing it out-of-step with the other Federal discrimination laws. We presume this is an oversight and propose that the Bill should be amended to add a new s3(1)(aa):

- (aa) to give effect to certain provisions of the International Covenant of Civil and Political Rights, the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion and Belief and to provisions of other relevant international instruments.

Without this defect being remedied, there will be clear unequal treatment of rights within Federal discrimination laws.

Indirect Discrimination and the Burden of Proof of Reasonableness

All previous public versions of the Bill (and all other State, Territory and Federal discrimination laws) include a standard discrimination law provision providing that, where a purported discriminator considers that a condition imposed on a religious adherent is “reasonable”, then it bears the onus of proving that the condition is reasonable. We presume this omission is an error and that such a clause will be restored to the Bill by amendment.

The Explanatory Memorandum to the second exposure draft of the Bill sets out the rationale for why this clause is in all other discrimination legislation and needs to be reinserted into the Bill:

- Placing the burden of proof on the person imposing or proposing to impose the condition, requirement or practice is appropriate as that person would be in the best position to explain or justify the reasons for the condition in all the circumstances, and would be more likely to have

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access to the information needed to prove that such a condition is reasonable. Conversely, requiring a complainant to prove that conduct is unreasonable is a significant barrier to successfully proving a complaint of indirect discrimination, particularly as the complainant is unlikely to have access to the information required to prove that an action is unreasonable.

Definition of “Religious Belief and Activity”

The core attribute protected from discrimination under the Bill is “religious belief and activity”. Yet the Bill gives no substantive definition of what a “religious belief” is and what a “religious activity” is or how a religious adherent is required to establish their religious belief or activity. The only relevant qualification is that such religious belief must be “lawful” (clause 5(2) of the Bill).

For determining what is a “religious belief”, the Court then becomes an arbiter of theology and religious adherents will need to adduce significant expert evidence to establish that a particular belief is part of their religion. These deficiencies in defining the nature of a “religious” belief or activity significantly weaken the protections afforded to those who seek to live and act in a way consistent with their religious beliefs, a right reflected in Article 18(1) of the ICCPR.

The Bill should provide that the sincerity or genuineness test applied by courts in the United Kingdom and in Canada (as well as in the Australian *Scientology case*) is the appropriate test for determining a religious belief. Curiously, the Bill uses the genuineness test in determining the “statement of belief” definition in clause 5, but inexplicably does not include the genuineness test for “religious belief” generally.

By not defining what constitutes a “religious activity”, the Bill risks courts adopting a narrow test that will greatly limit the Bill’s effective protection of religious Australians. We propose an expansive and inclusive definition of religious activity should be included in the Bill as follows:

religious activity includes:

- (a) engaging in religious activity of worship, observance, practice or teaching; and
- (b) conduct, refusal, omission, expression, and association carried out in accordance with, in connection with, based upon, constitutive of, supportive of or a corollary of a religious belief; and
- (c) seeking, receiving and imparting religious beliefs either orally, in writing or in print, in the form of art or through any other media; and
- (d) any activity or manifestation motivated by a religious belief,

whether in public or in private, and whether individually or in community with others, but does not include any activity that would constitute a serious offence under Commonwealth or State Law.

Employee Speech Protection - The ‘Folau clause’

The Bill deleted protections for religious employees against employer overreach into their personal expressions of faith outside work, colloquially known as the ‘Folau clause’. The removal of the Folau clause sends a clear message to employers that the religious private lives of their employees are not worthy of legal protection from unlawful discrimination.

Such employee protections are necessary, reasonable and proportionate and should be included in the Bill. The purpose of the Folau clause was to clearly establish that a moderate expression of faith by an employee in their own time is their own business, and that an employer cannot impose an unnecessary code of conduct that will restrict employees’ personal expressions of faith.

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For the government to permit such restrictions to go unchallenged would amount to a serious compromise of employees' rights under Article 18(1) of the ICCPR, and would in practice allow Article 18(3) to be substantially undermined by allowing unwarranted restrictions to be imposed in relation to the fundamental need of all people to be able to work and earn a living.

We recommend that moderate protection be included in the Bill by inserting into clause 19 of the Bill the following:

- (3) If an employee conduct rule is applied by an employer to restrict or prevent a person from making, or impose a detriment on a person for making a statement of belief, that application of the rule is unlawful discrimination unless it is proven that:
 - (a) the rule was necessary to achieve a reasonable result concerning the employer's business or activity and no rule with a less restrictive effect on the employee's freedom of expression would have achieved that result; and
 - (b) the application of the rule to the particular statement of belief was necessary to achieve a reasonable result concerning the employer's business or activity and there was no other means available with a less restrictive effect on the employee's freedom of expression to achieve that result.

Discrimination in Employment – Reasonable Adjustments

The Bill should include a "reasonable adjustments" requirement that mirrors the equivalent provisions in the *Disability Discrimination Act 1992* (Cth) (**DDA**). This would provide that a person discriminates against a religious adherent if they could make reasonable adjustments to a rule or condition to accommodate the religious belief or activity, but they have not done so.

The Bill should include a "reasonable adjustments" requirement, as its application and utility to religious belief is readily apparent, particularly in the workplace. Muslim employees who require time for their daily prayers, Christian employees who have a conscientious objection to working on Sundays and Jewish employees who are required to abide by certain kosher dietary requirements would all benefit from such a provision, which would impose a reasonable balance between the needs of an employer and the rights of religious Australians not to be discriminated against.

Accordingly, The ACL advocates that "reasonable adjustments" provisions identical to the DDA (along with all applicable exceptions for unjustifiable hardship) should be replicated in the Bill.

Indirect Discrimination – the correct standard for limiting religious belief

Recommendation 2 of the Expert Panel – accepted by the Commonwealth government – requires the government to "have regard to the [Siracusa Principles] when drafting laws that would limit the right to freedom of religion".

Currently the Bill sets a low bar for allowing indirect discrimination that is "reasonable". The "reasonable" standard and test is out of step with Australia's obligations under international law. This test does not reflect the high standard of international law for protection of religious belief prescribed in Article 18(3) of the ICCPR, and reaffirmed in Principle I.A.1 of the Siracusa Principles:

*Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are **necessary** to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.*

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The ACL submits that the test of “reasonableness” in clause 14(2) should be amended to reflect the standard set out in Article 18 of the ICCPR and the recommendation of the Expert Panel.

Proposed Changes to the Sex Discrimination Act

Various members of parliament have publicly reported that they have secured government agreement that the religious discrimination legislative package will amend the SDA to remove subsection 38(3) to remove protection for religious schools that balance protections of SOGI attributes and a school’s ability to teach and uphold their religious beliefs and maintain their religious ethos.

The ACL cannot support a religious discrimination legislative package that includes last-minute changes to the SDA which have not been subject to proper review and consideration, and which would have the effect of dangerously curtailing the rights of all Australians under Article 18(1) of the ICCPR.

As the Bill does not address or modify any existing legal protections of SOGI attributes, it is inappropriate to deal with SOGI issues in this Bill or to try and link the Bill with changes to the SDA which has been sent to the Australian Law Reform Commission for considered review.

CONCLUSION

The ACL supports the Bill and welcomes its introduction by the Government. We advocate for a refining and strengthening of the Bill, and we welcome an opportunity to present to the Committee about this Bill.

Wendy Francis
National Director / Politics