

**AUSTRALIAN COUNCIL FOR THE DEFENCE OF
GOVERNMENT SCHOOLS
PRESS RELEASE 915
RELIGIOUS FREEDOM:
FEDERAL / STATE CONFLICT
OVER RELIGIOUS DISCRIMINATION BILL**

Some, but by no means all, employers of religious educational institutions, want protection from laws which require them to treat people equally. So they want exemptions from equal opportunity laws, claiming ‘religious freedom’. No mention has ever been made in the recent debate of Section 116 of the Australian Constitution, or the DOGS case, in which religious school representatives

1. tried to prove for 26 days in the High Court that they were NOT religious institutions.
2. Persuaded the Barwick High Court that the words ‘any religion’ really meant ‘a particular religion,’ thus making a nonsense of a strong Bill of Rights religious liberty section of the Constitution.

BUT

[The debate about religious discrimination is back, so why do we keep hearing about religious 'freedom'?](#)

When same-sex marriage was legalised in late 2017, conservative religious groups were promised a “religious freedom” review as a consolation prize. That [review](#), led by former Liberal MP Phillip Ruddock, found Australia does not have a religious freedom problem, but did recommend new legislative protections against religious discrimination. In [response](#), in December 2018, the Morrison government promised a Religious Discrimination Act.

Conservative religious groups, and religious educational administrators who wish to have power to sack teachers whose personal lifestyle conflicts with their values, are concerned by State laws which make religious discrimination illegal.

For example, In Victoria, the Andrews government is [seeking to reform religious exemptions](#) to prevent schools discriminating against students and teachers on the basis of personal characteristics such as sexuality. Under that bill, currently before parliament, schools would only be able to discriminate where

“religious belief is an inherent requirement of the job”, meaning it could be a requirement for a school principal but not a maths teacher or cleaner.

The changes in the Coalition bill have been [vigorously opposed](#) by the Australian Christian Lobby and Christian Schools Australia. And the National Catholic Education Commission has called for the federal Coalition bill to be passed “as quickly as possible” to ensure religious schools’ ability to set their own ethos was protected against state legislation, including Victoria’s proposed reforms. They hope that the Victorian legislation can then be challenged under the ‘Conflict of law’ Section 109 of the Australian Constitution.

But the history of the federal Bill to date indicates that it is not so simple. There has been a shift in community attitudes in the last few decades, and various community groups, including religious and private school teacher groups, have been fighting back. The Independent Education Union, for example, has warned that the Coalition’s religious discrimination bill could strip states of the power to regulate religious institutions’ hiring practices, equality advocates .Equality Australia and the IEU have said provisions of the bill designed to [allow institutions such as schools to hire staff on the basis of faith](#) could interfere with imminent changes in Victoria seeking to limit religious exemptions to equal opportunity law. On 23 November there was a full Advertisement placed in the Age signed by 250 organisations - including Christian, Islamic, Buddhist Sikh and Hindu and secularist groups.

This is what the Advertisement said:

Open letter to Prime Minister Scott Morrison

Dear Prime Minister,

Our laws should protect all of us, equally.

We are organisations representing a diverse range of stakeholders.

We support fair and equal discrimination laws which protect all of us, including people of faith and those who are not religious, equally alongside other groups. **However, previously released drafts of the Morrison Government’s Religious Discrimination Bill failed to protect all of us, equally.**

Among our concerns are a bill that would:

- override existing discrimination protections, including for women, people with disability, LGBTIQ+ people and people with different or no religious beliefs;
- make it harder for employers, educators, and professional and licencing bodies to foster inclusive cultures and protect their employees, students, customers and clients from offensive and derogatory comments based on religion;
- allow health professionals to put their religious beliefs ahead of their patient’s health.

Previous drafts of the Religious Discrimination Bill included provisions which allowed each of the above to occur. **A Religious Discrimination Bill which contains any of the above offending provisions would not attract our support.**

We urge the Government to ensure that any Religious Discrimination Bill it introduces does not remove existing discrimination protections or undermine Australians' access to non-judgemental healthcare. It must ensure all our workers, students, customers and clients are equally protected from discrimination, no matter who they are, whom they love or what they believe. It must not privilege the rights and beliefs of one group over another. It must be alive to the real harm caused by divisive and discriminatory rhetoric that undermines the inclusive organisations and society that we have attempted to build together. It must not take us backwards.

Unless the Religious Discrimination Bill protects all of us, equally, we cannot support it.

We urge you to ensure that any Religious Discrimination Bill is put to a public inquiry so that Parliament can hear from those directly impacted by these laws.

Analysis by Luke Beck:

The following analysis by Professor Luke Beck, Associate Professor of Constitutional Law, Monash University in the Conversation of 23 November 2021 will bring our readers up to date:

Third time lucky? What has changed in the latest draft of the religious discrimination bill?

November 23, 2021 5.32pm AEDT

Disclosure statement

Luke Beck is a member of the Australian Labor Party and is on the board of the Rationalist Society of Australia Inc. This article reflects only his personal views.

The Morrison government has finally provided details of the third draft of its religious discrimination bill. This prompted [heated discussion](#) in a meeting of Coalition MPs on Tuesday, but Prime Minister Scott Morrison still wants to see the bill introduced in this final sitting fortnight of 2021.

What is the bill trying to do? What has changed since the last time we saw it? And will it be enough to satisfy the critics?

Why do we have this bill?

When same-sex marriage was legalised in late 2017, conservative religious groups were promised a “religious freedom” review as a consolation prize. That [review](#), led by former Liberal MP Phillip Ruddock, found Australia does not have a religious freedom problem, but did recommend new legislative protections against religious discrimination. In [response](#), in December 2018, the Morrison government promised a Religious Discrimination Act.

Former Attorney-General Christian Porter released a draft religious discrimination bill in [late 2019](#) and a [second draft](#) in early 2020.

Both were [roundly criticised](#). Human rights groups complained the bill weakened other human rights protections and created a licence to discriminate. Conservative groups complained it did not give adequate protections to people of faith.

What's in the third draft?

Current Attorney-General Michaelia Cash's third draft is effectively in two parts.

The first part is a legal "shield" protecting people from being discriminated against on the basis of their religion or lack of religion. This isn't really controversial, as it simply adds religious discrimination to the existing suite of federal race, sex (also covering LGBTQIA+ status), disability and age discrimination laws. All states and territories, other than NSW and South Australia, already have laws prohibiting religious discrimination.

The second part of the bill is a more of a legal "sword" and is more controversial.

Some of the controversial features of earlier drafts, such as the ability of healthcare providers to [refuse to provide treatment](#), are gone. But the current draft still includes a range of provisions overriding federal, state and territory anti-discrimination laws to allow people to be discriminated against.

The right to be a bigot

Perhaps the most controversial aspect of the bill is the "statements of belief" provision. This provision overrides every federal, state and territory anti-discrimination law to make "statements of belief" immune from legal consequences under those laws.

Statements of beliefs are things like comments from a boss to a female employee that "women should not hold leadership positions" or comments from a doctor to a patient that "disability is a punishment for sin".

In order to gain immunity, the statement has to be a religious belief that the person genuinely considers to be in accordance with the doctrines, tenets, beliefs or teachings of that religion. For non-religious people, the statement has to be of a belief that the person genuinely considers to relate to the fact of not holding a religious belief.

There are three limitations. A statement of belief will not be protected if it is malicious, if a reasonable person would consider the statement would threaten, intimidate, harass or vilify a person or group, or if the statement would promote or encourage the commission of an offence punishable by at least two years' imprisonment.

This is an extraordinary departure from standard practice in federal anti-discrimination law. Standard practice is to ensure state and territory laws are not overridden.

This provision is bad for everyone. It will protect those who are nasty to Christians, as well as those who are nasty to LGBTQIA+ people, women or people with disabilities.

One key change from previous drafts is statements that intimidate will not be protected. Earlier drafts only excluded "serious intimidation".

A mini Folau clause

Earlier drafts of the bill also included the so-called "[Folau clause](#)", named after the incident in which Israel Folau parted ways with Rugby Australia as a result of comments he posted on social media about gay people. That clause would have made it unlawful for employers to have codes of conduct that limit a person's ability to make statements of belief. This provision is gone in the current draft.

But there is still a mini Folau clause. Qualifying bodies (like a medical board) that licence professions and occupations are banned from setting professional conduct rules that prohibit making statements of belief, unless compliance with the rule is an essential requirement of the profession, trade or occupation.

So while an employer can discipline an employee for making a statement of belief, a professional association cannot.

'Preferencing' with hiring

The bill would mean it is not religious discrimination for bodies such as religious schools, hospitals or aged care facilities to seek to preserve a "religious ethos" among staff by making faith-based decisions in relation to employment.

For example, a Catholic hospital would be able to have a Catholics-only hiring policy. The bill simply requires religious bodies to have publicly available policies if they want to take advantage of this rule.

The bill specifically overrides state and territory anti-discrimination laws to ensure that such "preferencing" in employment is allowed in religious schools, even in those states where this is unlawful.

Constitutional concerns

There are some complex constitutional issues with the bill. Here are three of them:

First, federal parliament might not have constitutional power to enact all parts of the bill. The government says it is relying on the "external affairs power", which allows federal parliament to pass laws implementing treaty obligations, like article 18 of the [International Covenant on Civil and Political Rights](#) about the right to freedom of thought, conscience and belief.

But [international human rights](#) law is clear that religious freedom cannot be used to interfere with other rights, which is exactly what some parts of the bill do.

Second, overriding state laws throws the state tribunal systems into an unholy mess. State anti-discrimination cases are usually heard by state tribunals, which are quicker and cheaper than courts. But for constitutional reasons, state tribunals cannot consider federal laws.

If the bill passes, many state anti-discrimination cases will now also involve the federal "statement of belief" exemption, which means these cases will need to be heard by a court. Because court cases are very expensive, it is likely many of these cases simply won't happen and people who have been discriminated against will be left without a remedy.

Third, the "statement of belief" provision overriding state and territory laws appears to change definitions in those laws rather than simply overriding the operation of those laws. While federal parliament has the power to override the operation of state laws, it does not have power to amend or change the content of those laws. Recent indications are the [bill will be referred](#) to a Senate inquiry – as per the normal process for an important piece of legislation.

If that happens, there's almost no chance of a vote on the bill this year and the heated debate will continue.

But given the ongoing complexities and far-reaching consequences of the bill a proper Senate investigation is essential.

DOGS POSITION

DOGS repeat what we said in Press Release 914:

The religious men in charge of religious schools were given the opportunity in 1979-1981, to protect religious liberty under Section 116 of the Constitution in the DOGS case. They chose to accept and become dependent upon funds from the public Treasury rather than be truly independent. They persuaded the High Court to read Section 116 down, making a mockery of the intentions of the original framers of the Constitution. In 1981, Mammon proved a greater temptation than religious liberty. So much then for the integrity of their religious beliefs. (See High Court section on our website)

Since that time, the behaviour of private religious schools has reached ever greater heights of mendaciousness. Every version of the Needs policy introduced by Governments has been distorted by religious lobbyists at both federal and State level. Australian educational levels of inequality, like climate change policies are at an international low.

Religious groups, genuine and otherwise, are now paying the price for the loss of religious liberty they promoted in 1981.

Religious freedom depends upon being independent of the State and its largesse. All citizens, regardless of their sexual orientation, pay taxes.

He who pays the piper is now calling the tune.

**LISTEN TO THE DOGS PROGRAM
855 ON THE AM DIAL: 12.00 NOON SATURDAYS
<http://www.3cr.org.au/dogs>**