



Law Council  
OF AUSTRALIA

## A flawed bill is no way to protect precious rights

**Arthur Moses SC, Published in the *Daily Telegraph*, 12 Dec 2019**

This year we have had an important national discussion about religious freedom in Australia. Following the settlement of the case between Israel Folau and Rugby Australia it will be critical that next year when we continue that discussion, we do not let individual cases dictate policy.

We need to be guided by what makes us strong as a nation. On the eve of Australia Day 2013, the now Prime Minister observed that factors such as race, ethnicity and religions do not “define or limit who we are as Australians”.

“We can see ourselves as Australians beyond the limits and experience of our own ethnic group or culture, and embrace a more inclusive national identity,” Mr Morrison said.

What defines us as a nation is the strength of our commitment to protecting the rights and freedoms we all enjoy.

Any law that seeks to preference one right over another should be of concern to all Australians. It undercuts what we value as Australians. That is a very real impact of the Government’s proposed Religious Discrimination Bill, a new draft of which was released for consultation this week.

As a result, the truth is that the Government will fail to get consensus from all stakeholders on the Bill.

Rather than waste further energy on this flawed Bill, the Government should start a mature consideration of a Charter of Rights.

Rights and obligations need to be set out clearly in one place through a Charter of Rights so they are properly understood by Australians.

Rather, there is an ad hoc approach to protection of rights risking confusion and conflict.

We can see some improvements in the new Bill. For example, protections are extended to “associates” of religious individuals and the unusual definition of ‘persons’ to include body corporates has been removed. The ability of health professionals to conscientiously object to providing services has at least been narrowed.

But significant problems remain and new ones have been created.

Of course, there are opportunities to strengthen federal protections against religious discrimination.

But it is difficult to see how the Bill can be justified in proposing new and unorthodox protections that prioritise freedom of religious expression over other human rights well-recognised in law, such as the right not to be discriminated against on the grounds of race, gender, sexual orientation, disability, or age.

The draft legislation contains novel concepts, such as “statements of belief”, that are not well understood and will lead to considerable uncertainty.

The Bill also includes some significant and concerning departures from the established model adopted in current Commonwealth anti-discrimination laws.

The Bill departs from the well-established test of ‘reasonableness’ in indirect discrimination law to resolve tensions between conflicting rights.

This includes preventing employer conduct rules that restrict a worker from making a “statement of belief” other than in the course of their employment. The provision only applies to large employers without sufficient justification.

The exception to this restriction is based on financial hardship which will create considerable complexities and depend on commercially-driven circumstances. It makes no sense to say you have the right to express religious beliefs but not if causes your boss to lose money.

A new concerning departure involves restricting qualifying bodies (such as for lawyers and builders) from making rules that limit people expressing statements of belief, other than in the course of their work.

One of the most troubling aspects is that the Bill makes lawful a statement of belief which would otherwise constitute unlawful discrimination under Commonwealth, state or territory law.

The proposed exceptions are narrow and may not capture discriminatory statements that have an origin in religious texts.

For example, it is possible that the statement “that women are ‘deficient in intelligence and religion’ could be protected, given its origin in religious texts even though such a statement is plainly offensive.

At the heart of this issue is the fact that this Bill provides an opportunity for a national discussion that is long overdue about what type of Australia our community wants to be.

The Law Council believes a charter of rights would offer a more coherent legal framework to express, balance and protect all rights and freedoms.

Let’s have that discussion.

Arthur Moses SC is President of the Law Council of Australia