

**Submission of the Equality Rights Alliance to the
Parliamentary Joint Committee on Human Rights
Regarding the *Religious Discrimination Bill 2021***

21 December 2021

Equality Rights Alliance (ERA) welcomes the opportunity to provide this submission on the *Religious Discrimination Bill 2021* (Cth).

ERA is Australia's largest network advocating for women's economic security, women's leadership and recognition of women's diversity. We bring together 66 national-level or subject specialist organisations with a focus on the impact of federal policy or service delivery on women and the achievement of gender equality in Australia.

We are one of the six [National Women's Alliances](#) funded by the Commonwealth Office for Women, and are auspiced by YWCA Australia.

ERA believes the advancement of women and the achievement of equality are matters of fundamental human rights and advocates for gender equality, women's leadership and government policy responses that support women's diversity.

This submission is supported in whole or in part by the following ERA members:

- Aboriginal Legal Rights Movement
- Alevi Federation of Australia
- Amnesty International Australia
- Australasian Council of Women and Policing
- Australian Baha'i Community – Office of Equality
- Australian Centre for Leadership for Women
- Australian Council for International Development - Gender Equity Community of Practice
- Australian Federation of Medical Women
- Australian National Committee for UN Women
- Australian Women Graduates
- Australian Women's Health Network
- CARE Australia
- Children by Choice
- COTA Australia
- FECCA Women's Committee
- Feminist Legal Clinic Inc
- Fitted for Work
- Gender Equity Victoria
- Girl Guides Australia
- Good Shepherd Australia New Zealand
- Homebirth Australia
- Human Rights Law Centre
- Immigrant Women's Speakout Association NSW
- International Women's Development Agency
- Jessie Street National Women's Library
- Justice Connect
- Marie Stopes Australia
- Maternal Scholars Australia
- Maternity Choices Australia
- Maternal Health Matters
- Migrant Women's Lobby Group of South Australia
- National Association of Services Against Sexual Violence
- National Council of Jewish Women of Australia
- National Council of Single Mothers and Their Children
- National Foundation for Australian Women
- National Older Women's Network
- National Union of Students (Women's Department)
- NGO Women's Rights & Gender Equality Network
- NSW Council of Social Services
- Of One Mind
- Project Respect
- Public Health Association of Australia (Women's Special Interest Group)
- Reproductive Choice Australia
- Sexual Health and Family Planning Australia
- Sisters Inside
- Soroptimist International
- United Nations Association of Australia Status of Women Network
- Victorian Immigrant and Refugee Women's Coalition
- VIEW Clubs of Australia
- Violence Prevention Australia
- Women in Adult and Vocational Education
- Women in Engineering Australia
- Women on Boards
- Women Sport Australia
- Women With Disabilities Australia
- Women's Electoral Lobby Australia

- Women's Equity Think Tank
- Women's Housing Ltd
- WIRE (Women's Information Referral Exchange)
- Women's International League for Peace and Freedom
- Women's Legal Services Australia
- Women's Property Initiatives
- Working Against Sexual Harassment
- YWCA Australia
- Zonta International Districts 22, 23 & 24

This submission is also endorsed in whole or in part by the following non-member organisations:

- Professor Sara Charlesworth, Centre for People, Organisation & Work, RMIT University
- Ending Violence Against Women Queensland

and by:



Recommendations

Recommendation 1: Consolidate federal discrimination legislation into a single Act.

Recommendation 2: The consolidated Federal Anti-Discrimination Act should include religious and other belief as a prohibited ground of discrimination and should contain a mechanism which allows courts to fairly balance competing rights to non-discrimination.

Recommendation 3: The Federal Government should initiate a national conversation about the need for a Federal Human Rights Act which incorporates all the international human rights which Australia has ratified to date.

Executive Summary

ERA is strongly in favour of the domestic implementation of all international human rights instruments ratified by Australia, including the right to freedom of thought, conscience and religion as articulated in the International Covenant on Civil and Political Rights.

However, ERA does not support the present Bill, as it has the capacity to impinge on the human right to non-discrimination of others without any provision for assessing the relative effects and implications of the competing rights. It is accepted internationally that the right to manifest one's beliefs is not absolute, and should be limited where it impacts the rights or freedoms of others. The current Bill does not embody this principle. In particular, section 12 of the Bill in its current form is not compatible with Australia's obligations to ensure non-discrimination under the Convention on the Elimination of Discrimination Against Women (CEDAW), the Convention on the Elimination of all Forms of Racial Discrimination, the Convention on the Rights of Persons with Disability and other human rights treaties.

In its current form, the Bill has the unfortunate effect of pitting the freedom to manifest one's religious belief against the right to freedom from discrimination for women, girls, First Nations people, people of colour, people with disability and others. Protecting the right to freedom of thought, conscience and religion does not have to happen at the expense of other rights. In our view, the Committee should find that the Bill is in contravention of Australia's obligations under CEDAW (among others), recommend that it not proceed and further recommend:

- the consolidation of all federal anti-discrimination legislation into a single Act;
- the inclusion of religious belief as a protected ground of discrimination in that consolidated Act; and
- the inclusion of a mechanism in the consolidated Act which would allow courts to fairly balance competing rights to non-discrimination.

A much-needed subsequent step would be to enact a national human rights act, which could incorporate a clearly defined right to freedom of speech, in addition to all the other rights to which Australia has committed by ratifying human rights treaties.

1. The right to freedom of thought, conscience, and religion

The right to freedom of thought, conscience and religion is set out in article 18 of the International Covenant on Civil and Political Rights (ICCPR):

1. *‘Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.*
2. *No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.*
3. *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.*
4. *The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.’*

The right to freedom of thought, conscience and religion is further explored in the [UN Human Rights Committee’s General Comment no. 22](#), which specifies that the concept of ‘belief’ should be construed broadly, to encompass theistic, atheistic and non-theistic beliefs.¹

The General Comment also confirms that the right to freedom of thought, conscience and religion has two aspects:

- the right to hold, not hold or change beliefs; and
- the right to put thoughts and beliefs into action (‘manifestation’).

Under the ICCPR, the right to hold, not hold or change beliefs is an absolute right – that is, it cannot be qualified or reduced for any reason. So, for example, a government must not legislate to require all citizens to join a particular religion or to punish people for holding certain beliefs, regardless of the reasons for the legislation.

However, the ICCPR states that the manifestation of thoughts and beliefs can be qualified if necessary, to *‘protect public safety, order, health or morals or the fundamental rights and freedoms of others* [emphasis added]’. The extent of the allowable qualification depends on the nature of the right affected and on the severity of the effects of the breach.

One clear limitation on the manifestation of beliefs is set out in article 20(2) of the ICCPR, which states that *‘...any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.’* Thus, Australia is obligated to prohibit people from advocating for or inciting discrimination against a second person or group because of their nationality, race or religion, even if the provocateur is acting in accordance with their own beliefs. Other limitations on the manifestation of beliefs can be identified via the operation of art. 18(3) in conjunction with other rights to non-discrimination

¹ The right to hold opinions (as opposed to beliefs) is specified in art 19.1 of the ICCPR.

under international human rights conventions, such as the prohibition on discrimination on the basis of sex and the obligation to address discriminatory cultural norms in CEDAW.²

The right to manifest thought, conscience and religion should be subject to appropriate limitations where it conflicts with the rights of others. Unfortunately, as we will see, the present Bill erroneously treats religious speech as an absolute right.

2. Section 12 – protecting statements of belief

Section 12(1) of the Bill states that a statement of belief does not constitute discrimination for the purposes of any of the existing State, Territory and Federal anti-discrimination legislation, or any legislation included in subsequent regulations.

Section 12(2) states that this ‘deemed legality’ of a statement of belief does not apply to a statement of belief that is malicious, threatens, intimidates, harasses or vilifies a person or group.

Section 12(1) of the Bill reverses the limitation on the manifestation of belief as set out in the ICCPR. The ICCPR states that the manifestation of a belief can be subject to *such limitations as are prescribed by law and are necessary to protect ... the fundamental rights and freedoms of others*, such as the right to freedom from sex discrimination under CEDAW and the *Sex Discrimination Act 1984* (SDA). Section 12(1) specifically **removes** protections under existing discrimination laws. Rather than limiting the right to manifest beliefs to protect the rights of others, section 12(1) actually limits the human rights of others to freedom from discrimination, in order to protect the right to manifest beliefs. This is an exact reversal of the actual limits to the right to freedom of thought, conscience, and religion.

Section 12(2) excludes from the exemption those statements of belief which are malicious or which a reasonable person would consider would threaten, intimidate, harass or vilify a person or group. However, s. 12(2) does not exclude statements of belief which would make a person feel demeaned, judged or deeply uncomfortable. It does not exclude statements which would encourage others to adopt views which are racist, ableist, sexist, queerphobic or transphobic, provided no actual vilification, harassment or threat occurred. The notes to s. 12(2) make clear that a ‘moderately expressed’ belief does not constitute vilification.

In its current form, this Bill is capable of protecting sexist, racist and other discriminatory statements as long as they constitute a religious belief and are politely or benevolently expressed, regardless of the seriousness of the outcome to the person affected.

3. The critical role of culture in achieving gender equality

One of the greatest barriers to gender equality is tackling unconscious bias and discriminatory assumptions, norms, and cultures. Women are more likely to engage in the workforce and to be promoted to leadership if workplaces are supportive.³ Unconscious bias has been identified as key to the persistence of the gendered wage gap.⁴ Addressing cultures of racism, ableism and sexism within institutions such as the police and courts is critical to improving reporting rates for sexual and gendered violence.⁵ Challenging

² See articles 2 and 5(a) of the Convention on the Elimination of All Forms of Discrimination Against Women

³ McKinsey & Co, The Business Council of Australia and the Workplace Gender Equality Agency “Women in Leadership: Lessons from Australian Companies Leading the Way” Nov 2017 https://www.wgea.gov.au/sites/default/files/documents/Women-in-Leadership%20report-BCA_0.pdf

⁴ KPMG, the Diversity Council of Australia and the Workplace Gender Equality Agency “She’s Price(d)less – The Economics of the Gender Pay Gap” 22 August 2019 https://www.wgea.gov.au/sites/default/files/documents/She%27s-Price%28d%29less-2019-Summary-report_0.pdf

⁵ Mills, Tammy “Police undergoing a ‘significant cultural shift’ on family violence” The Age 28 March 2021

<https://www.theage.com.au/national/victoria/police-undergoing-a-significant-cultural-shift-on-family-violence-20210325-p57dw0.html>

those cultural norms which condone gendered violence is central to lowering overall rates of violence against women.⁶ Enabling environments are key to improving the participation of women and girls in STEM subjects and careers.⁷ Girls report not considering a career in politics because the dominant political culture is seen as unsafe.⁸

In short, culture is key to achieving gender equality.

In its current form, the Bill is capable of providing protection to people who express views which contribute to sexist cultures in workplaces and in public through the provision of goods and services. The effect of 'moderately expressed' negative views on the ability of marginalised people to break barriers to equality is well documented, but 'benevolent' or 'friendly' statements will not be caught by s. 12(2).

Benevolent sexism is a key reinforcing factor in cultures which are unsupportive to gender equality. Identifying benevolent sexism as harmful can be difficult even for those who do not share the belief system of the individual. As academics Małgorzata Mikołajczak and Janina Pietrzak explain:

*While the negative effects of hostile sexism are undisputed, there is less social acknowledgement of the negative consequences of benevolent sexism. These effects are documented in research, but remain obscured, to their perpetrators and targets alike, by the fact of their indirect influence.*⁹

It is important to note that the term 'benevolent' is intended here to convey the speaker's intention, rather than the effects of the statement, which are far from benevolent. The most concerning element of benevolent sexism is that its effects are slow but deep, like the dripping of water on stone. Regular, low-level reiteration of well-intentioned sexism wears away at an individual's ability to envisage and implement change. For an individual in a workplace or seeking access to goods and services, tackling deliberately hostile sexism is difficult enough, but tackling benevolent sexism requires a high level of insight, energy and perseverance, a job that will be made significantly harder under this Bill if the sexism is expressed as a religious belief and is therefore protected. Consider the position of:

- ... the woman who would like to apply for a leadership role in her workplace but is contending with an environment in which an influential manager is telling their peers that he believes that women should be subservient to men.
- ...the single mother who is told by her landlord that he believes marriage is for life and that her ex has rights to her.
- ... the victim-survivor of domestic violence who has to sit next to a co-worker who expresses the belief that women should not be able to refuse their husbands sex in marriage.
- ...the young woman who wants to report a sexual assault but knows that the local police sergeant in her rural community believes that women who drink alcohol in public have sinned.

⁶ Our Watch "Change the Story. A Shared Framework for the primary prevention of violence against women in Australia - Summary' 2nd ed.

<https://media-cdn.ourwatch.org.au/wp-content/uploads/sites/2/2021/11/23140128/Change-the-story-exec-summary-AA.pdf>

⁷ Champions of Change "Harnessing our Innovation Potential: Gender Equality in STEM" Aug 2019 p25

https://championsofchangecoalition.org/wp-content/uploads/2019/08/Harnessing-Our-Innovation-Potential_Stem-Survey-Report-2019.pdf

⁸ Plan International "We Can Lead: Young People in Australia Share their views on sexism and misogyny in Politics in 2021 – and what needs to change" 2021 https://www.plan.org.au/wp-content/uploads/2021/04/PIA0149_YAS_MediaReport_WeCanLead_FINAL.pdf

⁹ Mikołajczak, Małgorzata, and Janina Pietrzak. "Ambivalent Sexism and Religion: Connected Through Values." *Sex roles* vol. 70,9 (2014): 387-399. doi:10.1007/s11199-014-0379-3

The situation is even more complicated for women and girls who face multiple and intersecting forms of discrimination, who find themselves having to address benevolent sexism alongside or in complex combination with racism, ageism, ableism etc. Consider the position of:

- ... the woman with a disability who finds concentrating on their work difficult because their co-worker keeps bringing coffee to their desk as a kind gesture to the person who has been abandoned by God.
- ...the Aboriginal woman who is considering asking for a raise but knows the decision will be made by someone who has stated the belief that God made white people superior to Black people.

In each of these examples the damage done by the statement of belief is in its contribution to a culture which is unsupportive of women. In such a culture, there is a real risk that women will self-censor or self-limit, i.e.: avoid taking risks or trying to break the mould, because the expression of belief makes her consider a positive outcome is unlikely and because the benevolence of the expressed belief makes opposing the sentiment socially and emotionally difficult.

The Bill will make it significantly more difficult for an individual to draw attention to or complain about inappropriate comments made at work, school or in the provision of goods and services or in complaints to qualifying bodies which confer professional qualifications, and may have the unintended effect of actively working against efforts to address unconscious bias and other cultural barriers to women's human rights. Section 12 means that neither the *Sex Discrimination Act 1984* nor any of the equivalent State or Territory legislation will protect women in these situations.

4. The effect of the Bill on employers

The Bill also has the potential to place employers in impossible situations, caught between a desire to improve gender equality in the workplace and a desire to avoid discriminating against an employee on the ground of their religious beliefs. Under this Bill, employers may find themselves having to make judgement calls on highly subjective matters before being able to act. The Bill provides that employers may not impose a rule or policy on employees which will disadvantage people with a particular belief unless the rule or policy is reasonable¹⁰. For example:

- An employer has been working with the Workplace Gender Equality Agency to develop a policy intended to increase the proportion of women in its executive team. One of the employer's managers is of the view that women should not be in positions where they give instructions to men. He says this is a religious belief and that it prevents him from carrying out the policy. He says that this means that the direction to comply with the policy indirectly discriminates against him. If his position is a genuine religious belief, then he is protected by the Bill. If it is not a genuine religious belief, then the employer might end up falling foul of the *Sex Discrimination Act 1984* if it allows the manager to continue to refuse to carry out the policy to the detriment of female employees. There is no realistic way that the employer can objectively determine whether the religious belief is genuine. Furthermore, although the employer can defend itself against the allegation of indirect discrimination by arguing that the policy is reasonable, it cannot do so until the matter reaches the Federal Court.

¹⁰ See section 14 of the Bill

5. Conclusion

Religious speech and other manifestations of religious belief should not be absolutely protected at the cost of the human rights of others. This principle is recognised in the framing of art 18 of the ICCPR and should be recognised in the framing of this Bill. At present, the Bill removes existing protections for discriminatory behaviour in the form of statements of religious belief and makes no provision for balancing the freedom of religion against rights to non-discrimination.

In its current form, the Bill therefore has the unfortunate effect of pitting the freedom to manifest one's belief against the right to freedom from discrimination of women, girls, First Nations people, people of colour, people with disability and others. Protecting the right to freedom of thought, conscience and religion does not have to happen at the expense of other rights or other people.

Recommendation 1: Consolidate federal discrimination legislation into a single Act.

The push for protection for religious belief in Australia presents an excellent opportunity to solve another key problem in Australian discrimination law. There is an urgent need to consolidate all federal anti-discrimination legislation into a single Act. The current structure of separate legislation for different classes of grounds of discrimination makes complaints about intersectional discrimination very difficult to successfully prosecute. While it is possible to bring a complaint on the basis that a prohibited ground was one of the factors in the less favourable treatment, this approach increases the complexity of the complaint and obscures the reality that persecution of a Muslim woman for wearing a hijab is a different and more complex experience than being discriminated against because you are either a woman or a Muslim. Consolidating the existing federal acts and including religious belief as a protected ground of discrimination would make it easier for a woman to complain about intersectional discrimination, for example on the basis of being a woman of a particular religion.

Recommendation 2: The consolidated Federal Anti-Discrimination Act should include religious and other belief as a prohibited ground of discrimination and should contain a mechanism which allows courts to fairly balance competing rights to non-discrimination.

The *Religious Discrimination Bill 2021* should be rejected in favour of including religious or other belief as a protected ground in a new consolidated Federal Anti-Discrimination Act. The combined Anti-Discrimination Act could then more easily include a mechanism which would allow courts to fairly balance competing rights to non-discrimination, including but not limited to cases where the rights to express religious beliefs conflicts with a right to non-discrimination. This mechanism could consider factors such as the relative status and personal attributes of the individuals, the seriousness of the breach of the right to freedom from discrimination and the level of personal damage or other harm likely to accrue to each as a result of the breach. Such a mechanism would permit the consideration of community standards of behaviour and community values and would remove the unfortunate tendency of the present Bill to pit people of faith against others by negating existing rights.

Recommendation 3: The Federal Government should initiate a national conversation about the need for a Federal Human Rights Act which incorporates all the international human rights which Australia has ratified to date.

Ultimately a Bill which limits protection of people of faith to protection from discrimination is selling people of faith short. Like all human rights, the right to freedom of thought, conscience and religion encompasses more than a simple prohibition on discrimination. Human Rights provide a framework and ground rules for the way we construct our social, legal and political systems.

Much of the difficulty and complexity in the current Bill is caused by trying to use anti-discrimination legislation to do much more than simply prohibit discrimination. In some ways, it feels as though the present Bill is attempting to provide a right to freedom of speech for a very limited portion of the Australian population. To properly protect people of faith (and people of no faith) while providing fair outcomes to our community in general, another instrument is needed.

Australia's lack of a human rights act sets us apart from our international peers. The current experience of pandemic has shown us that much needed clarity on the human rights of people in Australia is missing from our legal and political frameworks. It would have been useful over the last 24 months to have a clearer, community-level understanding of the interaction between individual human rights and government actions to address the health crisis, particularly in relation to vaccine mandates and limits on the right to freedom of movement. A more mature and developed human rights culture in Australia could have helped to address some individual hostility to government actions and helped to build trust between local communities and State or Federal decision-makers by recognising and enshrining fundamental rights. Our lack of a human rights act will become increasingly problematic as previously unknown challenges arise in the context of climate change and an increasingly volatile international environment.

A patchwork approach to human rights is no longer appropriate for Australia. It's time for Australia to have a Human Rights Act.