

A federal Religious Discrimination Act - why, what, where to next?

Freedom For Faith Conference
5 August 2024

Mark Sneddon, Board member of Freedom for Faith
Director Sneddon Legal

mark@sneddonlegal.com

Director, Institute for Civil Society

www.i4cs.com.au

marks@i4cs.com.au

Important Notice:

This presentation is in the nature of general information and does not constitute professional or legal advice. While care has been taken in its preparation you should not act on the basis of this material without seeking appropriate professional or legal advice.

The logo for Sneddon Legal, featuring the text "SNEDDON" in a bold, sans-serif font, followed by a diagonal slash and the word "LEGAL" in a smaller, all-caps, sans-serif font. The logo is contained within a light blue rectangular box with a white background.

SNEDDON / LEGAL

The logo for the Institute for Civil Society, featuring a circular icon composed of small dots on the left, followed by the text "INSTITUTE FOR CIVIL SOCIETY" in a bold, sans-serif font. The logo is contained within a teal rectangular box with a white background.

INSTITUTE FOR
CIVIL SOCIETY

Agenda

- ▶ History of efforts to get a federal Religious Discrimination Act (not a Religious Freedom Act) and current ALP govt position
- ▶ Why do we need a federal RD Act?
- ▶ What should the RD Act contain?
- ▶ Getting it done

Religious Discrimination Laws

- ▶ The Ruddock Review in 2018 (post SSM religious freedom review) recommended a RD Act but not a Religious Freedom Act
- ▶ A RD Act would prohibit *discrimination against* persons or organisations on the basis of the religious belief (or unbelief) or religious activities of those persons or organisations.

‘Pro-Palestinian’ Officeworks staffer refuses to laminate Jewish newspaper for kippah-wearing man - The Australian 1 August 2024

- ▶ a Jew is refused service at Officeworks because of their religion (and see <https://www.ecaj.org.au/antisemitism-report/>)
- ▶ a Christian is demoted or sacked at work or loses the right to practise their profession or is suspended from university for expressing their religious views on social media - see multiple documented cases at <https://www.hrla.org.au/our-cases>
- ▶ a Muslim woman is refused entry to a hotel because they are wearing a hijab or burka and see <https://islamophobia.com.au/publications/our-reports/>
- ▶ an incorporated church or Islamic association is refused permission to use a school or council hall to meet because of their religious views
- ▶ There are laws prohibiting religious discrimination against individuals (not incorporated bodies) in all States and Territories *but not NSW or SA*. Federal Fair Work Act prohibits religious discrimination at work unless the relevant State law does not, so its general protections don't apply in NSW or SA. There is limited FWA protection for unjust *termination* anywhere in Australia on the basis of religion (which Israel Folau (NSW) was able to use to get a settlement from Rugby Australia).

Religious Discrimination not widely recognised as bad

- ▶ Officeworks example, HRLA cases
- ▶ Andrew Thorburn was sacked by Essendon Football Club in Victoria as their chair in October 2022 because he was chair of City on a Hill church and in 2013 and 2016 sermons at the church expressed orthodox religious but unpopular views that gay sex and abortion are sins.
- ▶ “As soon as the comments relating to a 2013 sermon from a pastor at the City of the Hill church came to light this morning, we acted immediately to clarify the publicly espoused views on [City on a Hill’s] official website, which are in direct contradiction to our values as a club,” the Essendon president said.
- ▶ “The board made clear that, despite these not being views that Andrew Thorburn has expressed personally and that were also made prior to him taking up his role as chairman, he couldn’t continue to serve in his dual roles at the Essendon football club and as chairman of City on the Hill.”
- ▶ “Essendon is committed to providing an inclusive, diverse and safe club, where everyone is welcome and respected”.
- ▶ This was a clear case of discrimination on the basis of imputed religious beliefs contrary to Vic Equal Opportunity Act but the Commissioner for VHREOC Ro Allen when asked on radio whether this was religious discrimination said: “It’s definitely a values conflict to employ someone who’s not just a passive member of a church [but on the board]“ and “Good on Essendon for standing up for their values”
- ▶ Thorburn did not go to VHREOC but brought legal proceedings and achieved a settlement including apology from Essendon.



Why do we need a federal Religious Discrimination Act?

- ▶ To protect individuals in NSW and SA from religious discrimination and individuals across Australia from religious discrimination by Australian government agencies and funding bodies
- ▶ To protect religious incorporated bodies from religious discrimination on the basis of the religious beliefs or activities of individuals associated with those bodies (e.g. in renting premises, supply contracts, grants and funding, accreditation).
 - ▶ If an incorporated religious body can be subject to religious discrimination without recourse, that hurts the individual religious people who express their religion in community with other believers through that body, without recourse.
- ▶ To help educate Australians that religious discrimination is as wrong and illegal as discrimination on the grounds of sex, race, age or sexual orientation.
- ▶ To give a federal complaints alternative to potentially biased State and Territory AD bodies
- ▶ To make it clear that religious bodies and schools have a *positive right to preference re staff and volunteers and members* on the basis of conformity of their religious beliefs with those of the body.
- ▶ Right to preference is just like political parties have the right to preference staff and volunteers and candidates on the basis of conformity of political views. This is not “bad” religious or political discrimination but necessary to enable the religious body or political party to maintain its character and ethos and advance its mission with people who believe and live the ethos and mission.

Coalition Religious Discrimination Bill 2021

- ▶ Federal Coalition's RD Bill banned discrimination against individuals and their organisations on the basis of their religious beliefs (or unbelief) and religious activity.
- ▶ Bill permitted religious bodies (e.g.. church, mosque, charity) and schools to preference people of the same religious beliefs in employment like political parties.
- ▶ RD Bill *overrode* a 2021 Victorian Religious Exceptions Law limiting the right of religious schools to preference in employment.
- ▶ RD Bill did NOT authorise discriminatory acts against any person on the basis of other attributes like sex, sexual orientation, gender identity which are covered in Sex Discrimination Act and State law and not affected by RDB.
- ▶ Strong campaign run against the Bill which tried to tie in alleged SDA discrimination by religious schools against LGBTI teachers and students. Referred SDA to ALRC.
- ▶ Go to www.i4cs.com.au for Video explainers on the Religious Discrimination Bill and its fate
- ▶ The RD Bill was a reasonable and balanced law. Recommended to pass by 2 all party Parliamentary Committees on Feb 4 2022, supported by the ALP (not clause 12) and passed House of Reps 90 votes to 6 on 7 February 2022.
- ▶ But an accompanying Bill was amended against government by ALP, Greens, crossbenchers and 5 Liberal MPs crossing the floor to remove provisions in Sex Discrimination Act which allowed religious schools to teach their doctrine and manage student conduct without facing claims of SDA discrimination on grounds of relationship status, sexual orientation or gender identity. Govt pulled both Bills fearing Senate would vote same way - stalemate - no RD Act.

Election 2022 and the long march since

- ▶ Coalition promised to reintroduce same RD Bill and try to pass it again without amending SDA schools protections.
- ▶ ALP promised to address religious discrimination “as a priority” but did not say how. Religious bodies can preference people with same religious beliefs in hiring *but not after hiring* (e.g.. promotion, dismissal) and can’t discriminate in employment on any other grounds (e.g.. relationship status and sexual orientation).
- ▶ ALP elected May 2022. Provided new reference to ALRC on how to change SDA so that religious educational institutions (schools, colleges, theological, missionary and chaplaincy colleges etc):
 - ▶ must not discriminate against a student or staff on the basis of sex, sexual orientation, gender identity, marital or relationship status or pregnancy; and
 - ▶ can continue to build a community of faith by giving preference, in good faith, to persons of the same religion as the educational institution in the selection of staff.
- ▶ ALRC report in March 2024 to abolish all protections for religious schools in SDA re students and teachers - major backlash from religions. But on April 12 Commissioner Stephen Rothman in speech to Notre Dame Law School says he was constrained by terms of reference and he believed the law should give a positive right to a religious body/education institution to discriminate in favour of a person on the basis of their religious beliefs or adherence to religious tenets.
- ▶ April 2024 PM promises faith leaders that religious freedom protections for faith groups "Will not go backwards while I'm Prime Minister of Australia".
- ▶ Then ALP Govt begins confidential consultation with some religious leaders about a draft RDA

What should be in a federal Religious Discrimination Act

Faith leaders key asks:

1. All the content of the prior Govt's RD Bill for which ALP voted in 2022. This includes:

Positive right (and therefore it is **not *religious discrimination***) for a religious body to engage, *in good faith*, in conduct that a person of the same religion as the religious body could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of that religion.

This includes giving preference to a person with the same religious beliefs as those of the religious body e.g.. in membership, employment, volunteer role, services. **But:**

- ▶ If body is a religious hospital, religious aged care facility, religious accommodation provider or religious disability service provider it cannot discriminate on basis of religion as to whom or how it provides health care, aged care, accommodation etc services
- ▶ If body is a religious education institution, religious hospital, religious aged care facility, religious accommodation provider or religious disability service provider, it can use the positive right in making **employment** decisions on the basis of its religious beliefs **but** those decisions must be in accordance with a publicly available policy which outlines the religious body's position in relation to particular religious beliefs or activities and how its position will be enforced.

2. *Incorporated religious bodies* should be protected from religious discrimination in order to protect the religious individuals who use those bodies to express their religious faith in community

3. If good faith conduct of a religious body is not religious discrimination under the federal RD Act, it is not unlawful discrimination under State or Territory laws prohibiting religious discrimination. i.e. inconsistent State/Territory religious discrimination laws are displaced to the extent they would take away freedoms given by federal religious discrimination law.

4. Religious bodies and schools that hold a traditional view of marriage cannot lose their charity status because of that belief.

Other Matters

Religious Vilification - ALP policy is to include a civil prohibition on religious vilification of a person or group on the basis of their religious belief or activity.

- ▶ Interfaith leaders support this in principle **but only if** the prohibition is limited to conduct a reasonable person would consider would intimidate, harass or vilify the other person or group [NOT insult or offend] AND there is a defence for any conduct engaged in for a genuine religious purpose AND there is no requirement that the religious purpose or belief be “reasonable”

Overlap of Religious Discrimination and SDA Discrimination is unresolved

E.g. a youth minister or religious school teacher engages in extramarital sexual relations (straight or gay) and tells youth or students there is nothing wrong with that (contrary to beliefs of religious body/school). The body or school disciplines the person in good faith and consistently with religious beliefs. Under federal RDA that would not be religious discrimination. Under the SDA it could be discrimination on grounds of relationship status.

The proposed RDA and SDA should be reconciled by providing that if good faith conduct by a religious body on grounds of its religious belief about the morality of an attribute under the SDA is not religious discrimination under RDA it is also not discrimination on the basis of that attribute under the SDA.

Where to Next?

- ▶ Govt is stalling on advancing the RDA (and any changes to SDA) by saying it wants feedback from the Opposition. The Opposition says Govt already has detailed feedback from faith leaders and should respond to that feedback.
- ▶ Faith leaders are seeking to break the delaying tactic by calling on PM to give a detailed response to faith leaders' detailed submissions made in May 2024 and then meet with faith leaders and opposition to see if a bipartisan approach can be achieved on RDA or on RDA and SDA.
- ▶ There is not a big difference in positions on RDA. There is more difference on SDA. *Uncouple the RDA from the focus on politics of SDA and religious schools.*
- ▶ Govt could get bipartisan support with opposition and faith leaders on RDA fairly readily and pass RDA now and leave SDA changes to next Parliament. Without an RDA people and organisations of faith are exposed esp in NSW/SA
- ▶ Or Govt could engage with faith leaders and opposition on both RDA and SDA and do both in this Parliament.
- ▶ If nothing happens this Parliament that is a temporary relief for religious schools on the SDA. But the issue is just deferred to the next election and whatever majorities are elected then. And there is no progress on an RDA.
- ▶ The PM promised faith leaders would not go backwards (on SDA and religious schools) but neither are we going forward on an RDA.

Religious leaders and people of faith need to tell politicians forcefully that:

- ▶ they want federal RDA protection now whether or not SDA changes are agreed
- ▶ they only want the SDA changes faith leaders have requested and Justice Rothman outlined, not what ALRC recommended.

A federal Religious Discrimination Act - why, what, where to next?

Freedom For Faith Conference
5 August 2024



Mark Sneddon, Board member of Freedom for Faith
Director Sneddon Legal

mark@sneddonlegal.com

Director, Institute for Civil Society

www.i4cs.com.au

marks@i4cs.com.au



Important Notice:

This presentation is in the nature of general information and does not constitute professional or legal advice. While care has been taken in its preparation you should not act on the basis of this material without seeking appropriate professional or legal advice.