



Australian
Human Rights
Commission

Guide to the protections for freedom of religion

FACTSHEET

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Guide to the protections for freedom of religion

There are a number of protections for freedom of religion in Australian law.

At the federal level, a person may make a complaint to the Australian Human Rights Commission or to the Fair Work Commission about discrimination on the basis of religion that occurs in the context of employment.

The Australian Human Rights Commission can also inquire into complaints about acts done or practices engaged in by, or on behalf of, the Commonwealth or under a Commonwealth law that are contrary to freedom of religion or belief.

At the State and Territory level, there are protections against discrimination on the basis of religion in all jurisdictions other than New South Wales and South Australia. Complaints may be made to relevant discrimination bodies in each jurisdiction. Queensland, Victoria and the ACT also have protections for freedom of religion in their respective Human Rights Acts.

Religious bodies and educational institutions also have protections for freedom of religion provided by way of the exemptions to the federal discrimination laws. The *Sex Discrimination Act 1984* (Cth) and the *Age Discrimination Act 2004* (Cth) allow religious bodies to discriminate against people in certain circumstances on grounds including their sex and age if the act conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents to that religion. The *Sex Discrimination Act* also allows religious educational institutions to discriminate on grounds including sexual orientation, gender identity, marital or relationship status or pregnancy in employment and the provision of education.

Discrimination in employment (AHRC)

The Australian Human Rights Commission can inquire into a complaint that a person has suffered discrimination in employment on the basis of religion. The Commission's role is to inquire into and attempt to reach a settlement of such complaints through conciliation.

The Commission has received 67 complaints of discrimination in employment on the basis of religion in the last five years. The kinds of complaints received by the Commission include complaints about workplace harassment on the basis of religion, discrimination because of religious dress, and discrimination because of the lack of a religious belief.

If a matter cannot be successfully conciliated, the Commission will conduct an inquiry into whether or not the alleged conduct amounted to discrimination in employment. For the conduct to amount to discrimination, it must be a distinction, exclusion or preference made on the basis of religion. However, conduct will not amount to discrimination if:

- it is based on the inherent requirements of the job, or
- the job is at an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, and the distinction, exclusion or preference was made in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

If the Commission finds that there was discrimination in employment on the basis of religion, the Commission can issue a notice to the parties setting out the action that it recommends be taken to remedy the act of discrimination. These recommendations are not binding on the parties, but may form part of a public report to the Attorney-General.

Case study: Wearing religious articles or clothing at work

A woman told the Commission that she was a convert to the Muslim faith and recently wore a head scarf to work. She claimed that her boss then asked to see her and threatened to try to remove her from the front desk as the head scarf made her uncomfortable. She made a complaint to the Commission.

The Commission was advised that the complainant resolved the complaint internally by speaking directly to her employer who apologised for her reaction and advised that the complainant was welcome to wear the head scarf.

Commonwealth acts or practices contrary to freedom of religion

The Australian Human Rights Commission can also inquire into a complaint about acts or practices of the Commonwealth that are inconsistent with or contrary to:

- the right to freedom of thought, conscience and religion in article 18 of the *International Covenant on Civil and Political Rights* (ICCPR)
- the right to non-discrimination, including on the basis of religion, in article 26 of the ICCPR
- the *Declaration on the Elimination of all forms of Intolerance and of Discrimination based on Religion or Belief*, proclaimed by General Assembly of the United Nations on 25 November 1981.

These instruments provide for an absolute right to have or adopt a religion and to hold religious beliefs.

While the right to hold religious beliefs is absolute and not subject to any limitations, the right to manifest one's religion may be subject to limitations in some circumstances. Any limitations must be prescribed by law and must be necessary to protect one or more other important goals. The ICCPR identifies these other public goals as the protection of public safety, order, health, or morals or the fundamental rights and freedoms of others. When the achievement of one of these other goals interferes with the right to manifest one's religion, it is necessary to conduct a proportionality analysis to determine whether the right to manifest one's religion has been impermissibly infringed.

The manifestation of religion may be done individually or in community with others and in public or private. It includes the following freedoms:

- to worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes
- to establish and maintain appropriate charitable or humanitarian institutions
- to make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief
- to write, issue and disseminate relevant publications in the area of religion or belief
- to teach a religion or belief in places suitable for these purposes
- to solicit and receive voluntary financial and other contributions from individuals and institutions
- to train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief
- to observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief
- to establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels.

Again, when a complaint is made to the Commission, the Commission's role is to inquire into and attempt to reach a settlement of such complaints through conciliation.

The Commission has received 9 complaints about acts or practices of the Commonwealth that are contrary to freedom of religion or belief in the last five years.

If a matter cannot be successfully conciliated, the Commission will conduct an inquiry into whether or not the act or practice was contrary to human rights.

If the Commission finds that there was an act or practice of the Commonwealth that was contrary to the human rights protected by these instruments, the Commission can issue a notice to the parties setting out the action that it recommends be taken to remedy the breach of human rights. These recommendations are not binding on the parties, but may form part of a public report to the Attorney-General.

Towards better protections under the *Australian Human Rights Commission Act 1986*

The existing protections under the *Australian Human Rights Commission Act 1986* (Cth) are very limited, which may help to explain the relatively small number of complaints. Individuals cannot seek to enforce these rights at Court.

The protections are significantly different from the protections available under federal discrimination laws—including the *Racial Discrimination Act 1975*,¹ the *Sex Discrimination Act 1984*, the *Disability Discrimination Act 1992* and the *Age Discrimination Act 2004*. The federal discrimination laws give individuals a pathway to Court, if their complaint cannot be resolved at the Commission.

The Commission has advocated for over 20 years for freedom of religion or belief to be brought under federal discrimination law.²

Fair Work Commission

Under the *Fair Work Act 2009* (Cth), employers are prohibited from:

- taking adverse action against an employee or prospective employee on the basis of a number of specified protected attributes, including religion
- including terms in a modern award that discriminate against an employee for a number of reasons, including religion
- terminating an employee's employment for reasons including their religion.

For more information about the powers of the Fair Work Commission, see <https://www.fwc.gov.au/resources>.

State and Territory bodies

The anti-discrimination laws of each State and Territory, with the exception of New South Wales and South Australia, contain a prohibition against discrimination on the ground of religious belief. In New South Wales, it is prohibited to discriminate against a person on the basis of their 'ethno-religious origin'. In South Australia, there are protections from discrimination in employment and education on the grounds of religious dress.

Where those laws prohibit discrimination or vilification on the basis of a person's religion, an individual complainant may make a complaint to a specialist anti-discrimination or human rights body.

More information about making a discrimination complaint at a State and Territory level can be obtained from the following bodies.

Jurisdiction	Body	Website
Australian Capital Territory	ACT Human Rights Commission	https://hrc.act.gov.au/
New South Wales	Anti-Discrimination Board of NSW	http://www.antidiscrimination.justice.nsw.gov.au/
Northern Territory	Northern Territory Anti-Discrimination Commission	http://www.adc.nt.gov.au/
Queensland	Queensland Human Rights Commission	https://www.qhrc.qld.gov.au/
South Australia	South Australian Equal Opportunity Commission	https://eoc.sa.gov.au/
Tasmania	Equal Opportunity Tasmania	https://equalopportunity.tas.gov.au/
Victoria	Victorian Equal Opportunity & Human Rights Commission	https://www.humanrightscommission.vic.gov.au/
Western Australia	Western Australian Equal Opportunity Commission	http://www.eoc.wa.gov.au/

Queensland, Victoria and the Australian Capital Territory have also enacted statutory charters of human rights, which each include freedom of religion. Each of these laws requires that for every proposed draft law (such as a bill), the executive branch of government must produce a statement that assesses the

compatibility of the draft law with human rights. The laws also allow the Supreme Court of the relevant jurisdiction to make a declaration that an existing law cannot be interpreted consistently with a human right. In those circumstances, the declaration is provided to the responsible Minister for them to consider whether to amend the draft law.

From 1 January 2020, the Queensland Human Rights Commission will be able to take complaints under the *Human Rights Act 2019* (Qld) about conduct by public entities after that date that is not compatible with human rights, including freedom of thought, conscience, religion and belief.

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- ¹ Religious discrimination is not, per se, made unlawful by the *Racial Discrimination Act 1975* (Cth). However, the term 'ethnic origin' has been interpreted broadly in a number of jurisdictions to include Jewish and Sikh people.
- ² Australian Human Rights Commission, *Religious Freedom Review, Australian Human Rights Commission submission to the Expert Panel* (2018) <<https://www.humanrights.gov.au/our-work/legal/submission/religious-freedom-review-2018>>.