

Religious Freedom Bills 2019 - Second Exposure Drafts

Legal Aid NSW submission to the
Attorney-General's Department

18 February 2020

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Legal Aid 
NEW SOUTH WALES

About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 24 offices and 221 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with LawAccess NSW, community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 29 Women's Domestic Violence Court Advocacy Services.

Legal Aid NSW has significant expertise in the area of employment and discrimination law. Grants of legal aid are available for such matters.

The Legal Aid NSW Domestic Violence Unit (DVU) is a specialist unit helping clients who have experienced domestic and family violence with both their legal and non-legal needs. The DVU is made up of specialist lawyers and social workers who connect with clients at crisis point. The DVU provides legal advice and representation in a range of areas including: apprehended domestic violence orders, family law, care and protection, housing, social security, credit/ debt problems, victims' support, financial assistance matters and criminal law.

This submission draws on the casework experience of our civil lawyers and DVU in providing these services.

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Introduction

Legal Aid NSW is pleased to provide a submission to the Attorney-General's Department regarding the Religious Discrimination Bill 2019 – Second Exposure Draft (**Bill**). We have limited our comments to issues not discussed in our previous submission on the First Exposure Draft Bill.

Legal Aid NSW reiterates our in-principle support for legal protection from religious discrimination. However, we are concerned by the extent to which the Bill would permit religious bodies to discriminate on the basis of religion in employment and the provision of services, and the extent to which the Bill would allow religious hospitals, aged care facilities and accommodation providers to discriminate on the basis of religion in employment. In our view, this is particularly problematic given that many religious organisations are large employers who receive significant amounts of federal and/or state and territory government funding.

We do not support the broad scope of these provisions and submit that religious organisations (including religious charities, schools, hospitals, aged care facilities and accommodation providers) should only be able to discriminate on the basis of religion in connection to employment where religion is an inherent requirement of the role. We also submit that religious bodies should not be able to discriminate on the basis of religion in connection with the provision of services that are funded by federal, state and territory governments. In our view, these provisions undermine the object of the Bill “*to eliminate, so far as possible, discrimination against persons on the ground of religious belief or activity in a range of areas of public life*” (clause 3(1)(a)).

We provide the following comments on the specific provisions in the Bill.

Preferencing by religious bodies, hospitals, aged care and accommodation providers

Clause 11 and clause 32(8)

Clause 11 of the Bill provides that a religious body, such as a charity or school, does not discriminate against a person by engaging in conduct in good faith, that a person of the same religion could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of that religion (clause 11(1)), or in conduct to avoid injuring religious susceptibilities of adherents of that religion (clause 11(3)). Such conduct includes preferencing people of the same religion (clauses 11(2) and 11(4)) and applies in all areas of public life.

‘Religious body’ is broadly defined in clause 11(5) to include educational institutions, registered public benevolent institutions (**PBI**) and any other bodies (other than those engaged solely or primarily in commercial activities) that are conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion. The definition does not

include hospitals, aged care providers or organisations that solely or primarily provide accommodation.

Religious hospitals, aged care facilities and accommodation providers are dealt with separately in clause 32(8) of the Bill. This clause provides an exception to unlawful discrimination in connection with employment, and permits religious hospitals, aged care facilities and accommodation providers to engage in conduct in good faith, that a person of the same religion could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of that religion, or in conduct to avoid injuring religious susceptibilities of adherents of that religion. Such conduct includes preferencing people of the same religion.

Subclauses 11(5)(b) and 11(5)(c) of the Bill include in the definition of 'religious body' PBIs and other organisations (not engaged primarily or solely in commercial activities) with purposes other than religion. This definition is significantly broader than the definition of religious body in the *Sex Discrimination Act 1984* (Cth) (**SDA**) and *Age Discrimination Act 2004* (Cth) (**ADA**), which refer to "a body established for religious purposes."¹ This creates complexity and confusion. In practice, an organisation regarded as a 'religious body' under the Bill, may not meet the definition under the SDA or ADA, making the organisation's obligations under discrimination laws unclear. In our view the definition of religious body in subclauses 11(5)(b) and 11(5)(c) of the Bill is too broad. We consider that the definition of religious body should be consistent with the definitions in the SDA and ADA, to be limited to organisations with a religious purpose.

Legal Aid NSW considers that the connection between religion and the conduct permitted by clauses 11 and 32(8) is also drafted too broadly. The SDA and ADA refer to conduct that "**conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to religious sensitivities of adherents of that religion**"² [Legal Aid NSW emphasis]. This creates another tension between the Bill and the SDA and ADA, with clause 32(8) potentially permitting conduct that does not fall within the exemption for religious bodies in the SDA and ADA.³ We submit that the wording used in the SDA and ADA should be adopted in the Bill.

In addition, we consider that the test in clauses 11 and 32(8) of whether the conduct engaged in by the religious organisations conforms to the religion is unclearly drafted. Clauses 11 and 32(8) refer to 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.*" The Explanatory Notes state that an:

objective reasonableness test [that] will ensure that courts are not required to determine whether particular conduct is in accordance with the doctrines, tenets,

¹ *Sex Discrimination Act 1984* (Cth), s 37 ('SDA') and *Age Discrimination Act 2004* (Cth), s 35 ('ADA'). The SDA does not include educational institutions established for religious purposes in the definition of 'religious body', and they dealt with separately in SDA, s 38.

² SDA (n 1), s 37(1)(d) and ADA (n 1), s 35.

³ SDA (n 1), s 37 and ADA (n 1), s 35.

*beliefs or teachings of a particular religion, but rather whether members of the same religion would reasonably consider that to be so.*⁴

We note that the Explanatory Notes refer to “*the relevant reasonable person*”,⁵ however, the Bill does not refer to a “reasonable person” but rather to “*a person of the same religion as the religious body*” and whether they could “*reasonably consider*” the conduct to be in accordance with the religion. If clauses 11 and 32(8) are intended to include an objective reasonable person test, we submit that the wording should be clarified.

Preferencing in employment

Clauses 11 and 32(8) would permit a large number of religious organisations to make employment decisions based on the religious adherence of employees and potential employees.

Religious bodies, charities, schools, hospitals, aged care facilities and accommodation providers are very significant employers in Australia, and the majority of individuals who work for them perform roles with no religious content. Many of these organisations receive significant amounts of federal and/ or state and territory government funding.

Religious organisations are large employers

Approximately 30 per cent of all schools in Australia are affiliated with a religion, including 94 per cent of private schools.⁶

There is a significant number of religiously affiliated hospitals in Australia, including public hospitals such as St Vincent’s Hospital Sydney and St Vincent’s Hospital Melbourne.

40 per cent of residential aged care places are provided by religious organisations.⁷

In 2017, the most recent year for which the Australian Charities and Not-for-profits Commission’s Australian Charities Report is available, Australian charities whose main purpose was religion employed over 56,000 people, or 46 per cent of the 1.23 million people employed by charities in Australia. This does not include people employed by faith-based charities whose main purpose was not religion. In addition, 640,000 people volunteered for Australian charities whose main purpose was religious.⁸

⁴ Explanatory Notes, 30 [237].

⁵ Explanatory Notes, 30 [239]

⁶ Emma Rowe, ‘Religion in Australian schools: an historical and contemporary debate’, *The Conversation* (online, 24 August 2017) <<https://theconversation.com/religion-in-australian-schools-an-historical-and-contemporary-debate-82439>>.

⁷ Australian Institute of Health and Welfare, *Aged Care Data Snapshot 2019*, (Online, September 2019), <https://gen-agedcaredata.gov.au/Resources/Access-data/2019/September/Aged-care-data-snapshot—2019>.

⁸ Australian Charities and not-for-profit Commission, *Australian Charities Report 2017 Data Overview*, (Report, May 2019).

Legal Aid NSW does not support the breadth of these provisions. We consider that religious organisations including charities, schools, hospitals, aged care facilities and accommodation providers should be permitted to discriminate in connection with employment in respect only of those individuals with specific religious roles or functions. In these instances, the religion of the employee could be considered an inherent requirement of the role. However, religious organisations should not be able to discriminate in relation to employment generally.

Clause 32(2) of the Bill provides an exception to religious discrimination in connection with employment where religious belief or activity is an inherent requirement of the role. In our view this clause is appropriate and sufficient, without the addition of clauses 11 and 32(8).

Legal Aid NSW considers that the broad scope of clauses 11 and 32(8) undermine Australia's obligations under the *ILO Discrimination (Employment and Occupation) Convention 1958*,⁹ which provides that workers should not be subject to religious discrimination. This convention is scheduled to the *Australian Human Rights Commission Act 1986* (Cth) and various provisions of the Fair Work Act are intended to give effect to it.¹⁰

Provision of public services

Many religious bodies now receive federal, state and territory government funding to provide essential public services in the areas of child welfare, adoption, education, employment, counselling and support services. Legal Aid NSW is concerned about discrimination by religious bodies that are using public funds to provide public services.

We are particularly concerned about the impact that clause 11 may have on vulnerable people affected by domestic and family violence (**DFV**), including children. Numerous government-funded, religious bodies provide vital services to people affected by DFV such as emergency food and financial assistance, counselling, family relationship centres, drug and alcohol support and men's behaviour change programs.

Clause 11 would permit religious bodies to preference people of the same religion in providing these services, over other vulnerable clients who may be experiencing more high-risk and urgent situations. There is limited funding in the DFV sector for frontline services, and clause 11 may further limit the availability of services to vulnerable people at the intersection of multiple forms of disadvantage. We consider that clients who experience DFV should be prioritised based on risk factors and need, not religious beliefs.

It is Legal Aid NSW's strongly held position that clause 11 of the Bill should not apply to the provision of government funded public services.

⁹ International Labour Organization, *Discrimination (Employment and Occupation) Convention (C111)* (entered into force 15 June 1960).

¹⁰ See for example, *Fair Work Act 2009* (Cth), s 771.

Need for transparency

If clauses 11 and 32(8) are maintained, in our view there is a need for transparency regarding religious organisations' use of these clauses. This would provide scrutiny, and allow employees, potential employees, students, potential students and their families, and the general public to make informed decisions about their interactions with religious organisations.

We submit that all religious bodies that prefer people of the same religion (or discriminate against people of other or no religion) in employment under clause 11, and religious hospitals, aged care facilities and accommodation providers that rely on the exception to religious discrimination in connection with employment in clause 32(8), should be required to have a publicly available policy outlining their position on this matter and explaining how it will be enforced. They should also be required to provide this policy to current and prospective employees.

Religious schools that preference people of the same religion should similarly be required to have a publicly available policy outlining their position on this matter and explaining how it will be enforced, and to provide this in writing to current and prospective students and their families.

Religious bodies that preference people of the same religion in other areas of public life under clause 11, such as in the provision of services, should also be required to have such a policy publicly available and provide it in writing on request.

In our view, religious organisations that rely on religious exemptions in the SDA and ADA should also be required to have such a policy.¹¹

We note that the Religious Freedom Review recommended that the SDA be amended to require religious schools that discriminate against employees or contractors on the basis of sexual orientation, gender identity or relationship status, to have a publicly available policy outlining their position on this matter and explaining how the policy will be enforced, and to provide the policy in writing to current and prospective employees and contractors.¹² The Australian Government referred this recommendation to the Australian Law Reform Commission.

¹¹ Renee Baker, 'Religions should be required to be transparent about their use of exemptions in anti-discrimination laws' (2019) 44(3), *Alternative Law Journal*, 191. Dr Baker advocated for increased transparency regarding religious bodies' use of religious exemptions and suggested transparency could be achieved through a publicly available policy, a statement in job advertisements, and/or for registered charities, in their reporting to the Australian Charities and Not-for-profits Commission.

¹² Recommendation 5, *Religious Freedom Review* (Report. May 2018) 2.

Broader reforms to federal discrimination law

Legal Aid NSW has previously expressed concerns regarding the effectiveness of the complaints-based model in federal discrimination law and associated issues including litigation costs, time limits, recording of settlement outcomes and community legal education. We have made a detailed submission on these issues to the Australian Human Rights Commission (**AHRC**) consultation on priorities for federal discrimination law reform.