

Religious Freedom Review

Legal Aid NSW submission to the
Expert Panel

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323 CASTLEREAGH ST

HAYMARKET NSW 2000 / DX 5 SYDNEY

Legal Aid
NEW SOUTH WALES 

Table of Contents

Protection from discrimination on the grounds of religion	3
<i>Commonwealth law</i> 3	
Australian Human Rights Commission Act 1986 (Cth) 3	
Fair Work Act 2009 (Cth) 4	
<i>New South Wales law</i> 5	
<i>Protection from discrimination on the grounds of religion in other states and territories</i> 5	
<i>Our practice experience</i> 6	
<i>International law</i> 7	
Exemptions from discrimination law on the ground of religion	7

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 discrimination law. Grants of

legal aid are available for discrimination matters. In addition to civil law litigation, discrimination law issues regularly arise in the provision of civil law advice and outreach services. Legal Aid NSW also provides a number of specialist programs addressing systemic discrimination.

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

Legal Aid NSW welcomes the opportunity to make a submission to the Expert Panel's Religious Freedom Review. Should you require any further information, please contact

Bridget Akers
Senior Solicitor
Employment Law
Civil Law Division
(02) 4725 4609
Bridget.akers@legalaid.nsw.gov.au

or

Robyn Gilbert
Law Reform Solicitor
Strategic Law Reform Unit
Policy, Planning and Programs
(02) 9213 5207
robyn.gilbert@legalaid.nsw.gov.au

Introduction

Legal Aid NSW welcomes the opportunity to contribute to the Religious Freedom Review. We consider that in two fundamental respects, Australian discrimination law does not provide adequate protection from discrimination on the ground of religion.

First, at a federal level, there is no enforceable protection from discrimination on the ground of religion in employment and no protection at all from discrimination on the ground of religion in other areas of public life. In New South Wales, there is protection from discrimination on the ground of 'ethno-religious origin', which has been interpreted narrowly, but no protection from discrimination on the ground of religion.

Second, there are exemptions in discrimination laws in order to balance the right to freedom of religion with the right to be free from discrimination. Legal Aid NSW is of the view that these exemptions are broader than is necessary to appropriately strike the balance between the competing rights.

Details of our concerns about these two issues are set out below.

Protection from discrimination on the grounds of religion

Commonwealth law

Australian Human Rights Commission Act 1986 (Cth)

Legal Aid NSW considers that the *Australian Human Rights Commission Act 1986 (Cth)* (**AHRC Act**) does not adequately protect religious freedom because complaints that are not successfully conciliated cannot be dealt with by a court.

The AHRC draws a distinction between 'discrimination' and 'unlawful discrimination.' 'Discrimination' in the AHRC Act is defined to include any distinction, exclusion or preference made on the basis of religion that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. In contrast, 'unlawful discrimination' is defined to include acts or practices that are unlawful under the *Racial Discrimination Act 1975 (Cth)*, the *Sex Discrimination Act 1977 (Cth)*, the *Disability Discrimination Act 1992 (Cth)* and the *Age Discrimination Act 2004 (Cth)*.¹

The Australian Human Rights Commission (**AHRC**) may inquire into any act or practice that may constitute discrimination and, if the Commission considers it appropriate to do so, endeavour by conciliation to effect a settlement of the matters that gave rise to the inquiry.²

¹ *Australian Human Rights Commission Act 1986 (Cth)* (**AHRC Act**) s 3.

² AHRC Act s 31(b).

Where the AHRC has inquired into an act or practice that may constitute discrimination and the matter has not been settled, if the AHRC is of the opinion that the Act or practice constitutes discrimination, the AHRC may report to the Minister in relation to the inquiry.³

Just as with complaints of 'discrimination', the AHRC may inquire into and attempt to conciliate complaints of unlawful discrimination.⁴ However, if a complaint of unlawful discrimination cannot be resolved, the applicant may pursue his or her claim of unlawful discrimination in the Federal Court of Australia or the Federal Circuit Court.⁵

Thus, unlike complaints of discrimination on the ground of race, age, sex, sexuality or disability, if the AHRC is unable to settle a complaint of discrimination on the ground of religion, the applicant cannot pursue such a claim in court. If a complaint does not settle and the applicant does not wish to withdraw his or her complaint, the only possible outcome is that the AHRC may report to the Minister where it is of the opinion that discrimination has occurred. The AHRC has produced twenty nine reports concerning equality of opportunity in employment, including one report concerning discrimination on the ground of religion.⁶

Further, the protection from discrimination on the ground of religion is confined to discrimination in employment or occupation and does not apply to other areas of public life such as education or the provision of goods and services.

Fair Work Act 2009 (Cth)

Under the *Fair Work Act 2009 (Cth)* (**FW Act**) a person must not take adverse action against an employee or prospective employee because of the person's religion.⁷ However, there is no protection from discrimination where the action in question is not unlawful under any anti-discrimination law in force in the place where the action is taken.⁸

As discussed below, there is limited protection from discrimination on the ground of religion in New South Wales. This means that the apparent protection from discrimination on the ground of religion conferred by the FW Act on employees and potential employees in New South Wales is, in effect, significantly limited.⁹

The FW Act also contains protection from termination of employment on the ground of religion.¹⁰ While this protection is not confined by the scope of protection from discrimination available under state or territory law, it does not apply to other types of adverse action on the ground of religion.

³ AHRC Act s 32A.

⁴ AHRC Act s 46PF.

⁵ AHRC Act s 46 PO.

⁶ Australian Human Rights Commission, *Swamy v Percival* [2013] AusHRC 66, Report No 66 (2013).

⁷ *Fair Work Act 2009 (Cth)* (**FW Act**) s 351.

⁸ FW Act s 351(2)(a).

⁹ See *McIntyre v Special Broadcasting Services Corporation* [2015] FWC 6768 [29].

¹⁰ FW Act, s 772(1)(f).

New South Wales law

The Anti-Discrimination Act 1977 (NSW) (**NSWAD Act**) provides inadequate protection of religious freedom, because it only prohibits discrimination on the ground of 'ethno-religious origin'.¹¹

When enacted, the NSWAD Act provided that racial discrimination was unlawful and stated that race included colour, nationality and ethnic or national origin.¹² In 1994 the NSWAD Act was amended to provide that the definition of race includes 'colour, nationality, descent and ethnic, ethno-religious or national origin'.¹³

The Attorney General's Second Reading Speech when introducing the amending Bill makes clear that the amendment was not intended to provide a freestanding protection from discrimination on the ground of religion. The protection was limited to avoid interference with religious freedoms.¹⁴

There is a lack of clarity about the meaning of the term 'ethno-religious origin'. For example, despite Islam being expressly mentioned in the explanatory memoranda as an example of an 'ethno-religion',¹⁵ this has not been reflected in the findings made by the the New South Wales Administrative Decisions Tribunal.¹⁶

Protection from discrimination on the grounds of religion in other states and territories

The discrimination laws of other Australian states and territories provide greater protection from discrimination on the ground of religion than that provided by the NSWAD Act. Notably:

- Discrimination on the ground of 'religious conviction' is unlawful in the in the Australian Capital Territory and Western Australia.¹⁷
- Discrimination on the ground of 'religious belief or activity' is unlawful in Queensland, the Northern Territory and Victoria.¹⁸

¹¹ *Anti-Discrimination Act 1977* (NSW) (**NSWAD Act**) Part 2 and s 4, as amended by *Anti-Discrimination (Amendment) Act 1994* (NSW) Sch 1 Item 1.

¹² NSWAD Act No 48 of 1977.

¹³ NSWAD Act No 28 of 1994.

¹⁴ New South Wales, *Parliamentary Debates*, Legislative Council, 4 May 1994, 1828 (Mr John Hannaford); New South Wales, *Parliamentary Debates*, Legislative Council, 11 May 1994, 2259 (Mr John Hannaford).

¹⁵ New South Wales, *Parliamentary Debates*, Legislative Council, 4 May 1994, 1828 (Mr John Hannaford).

¹⁶ In *Jones and Harbour Radio Pty Limited v Trad* (No 2) (EOD) [2011] NSWADTAP 62 [50] – [51] it was not enough that the Appellant was targeted as a Muslim religious leader. There needed to be a clear link between his religion and ethnicity.

¹⁷ *Discrimination Act 1991* (ACT) s 7(1)(u); *Equal Opportunity Act 1984* (WA) Part IV.

¹⁸ *Anti-Discrimination Act 1991* (Qld) s 7(i); *Anti-Discrimination Act 1992* (NT) s 19(1)(m); *Equal Opportunity Act 1995* (Vic) s 6(j).

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- Discrimination on the ground of ‘religious belief or affiliation’ is unlawful in Tasmania.¹⁹
 - Discrimination on the basis of religious appearance or dress is unlawful in South Australia.²⁰

Further, in Queensland and Victoria it is unlawful to discriminate on the basis of an absence of religious belief or a refusal to participate in religious activity.²¹ In Queensland and Victoria religious vilification is also unlawful,²² and ‘serious religious vilification’ is an offence.²³ In Tasmania, a person cannot incite hatred towards a person or group of persons on religious grounds.²⁴

Our practice experience

Legal Aid NSW provides advice to many clients who have been discriminated against because of their religion, rather than their ethno-religious origin. If the discrimination occurs in the area of employment, these clients can lodge a complaint with the AHRC. However, if the complaint cannot be resolved, the client has no enforceable remedy. If the discrimination occurs in another area of public life (involving the provision of goods and services, access to housing, or as in the example below, education) these individuals have no legal remedy. The inadequacies of the current legal protections against discrimination on the ground of religion is demonstrated in the following case study.

Case Study: lack of legal remedy for discrimination on the ground of religion

Our client was an Australian citizen and a devout Muslim. He was in custody but had a security clearance that allowed him to attend TAFE. Our client’s religion required him to pray five times per day and our client wished to pray while he was at TAFE. Our client and other Muslim students started praying in a public area of the TAFE and security guards told our client that he was not permitted to pray in the public area of the TAFE. The TAFE permitted students of other religions to pray in the public area. Our client made a complaint to TAFE about the failure to allow him to pray in the public area. As a result of our client’s complaints about not being permitted to pray in the public area of the TAFE, his permission to attend TAFE was revoked.

¹⁹ *Anti-Discrimination Act 1998* (Tas) s 16(p).

²⁰ *Equal Opportunity Act 1984* (SA) s 85T(1)(f).

²¹ *Anti-Discrimination Act 1991* (Qld) Schedule; *Equal Opportunity Act 1995* (Vic) s 4.

²² *Anti-Discrimination Act 1991* (Qld) s 124A; *Racial and Religious Tolerance Act 2001* (Vic) s 8.

²³ *Anti-Discrimination Act 1991* (Qld) s 131A; *Racial and Religious Tolerance Act 2001* (Vic) s 25.

²⁴ *Anti-Discrimination Act 1998* (Tas) s 19.

International law

Legal Aid NSW considers that Australian and New South Wales laws should be amended to provide a legal remedy for unlawful discrimination on the ground of religion. This would reflect Australia's obligations under international law. Australia has ratified the *International Covenant on Civil and Political Rights (ICCPR)*²⁵ and the ICCPR is scheduled to the AHRC Act. Article 18 of the ICCPR protects the right to freedom of thought, conscience and religion.

It is consistent with Australia's obligations under international law to provide enforceable protection from discrimination on the ground of religion under Federal and State anti-discrimination law. Consistent with the terms of Article 18, which protects freedom of thought and conscience, we also submit that the protection should cover discrimination on the basis of an absence of religious belief or a refusal to participate in religious activity.

In light of the above concerns, Legal Aid NSW makes the following recommendations:

Recommendation 1 – that the AHRC Act is amended to provide enforceable legal protection from discrimination on the ground of religious belief or activity, the absence of religious belief or a refusal to participate in religious activity in all areas of public life.

Recommendation 2 – that the NSWAD Act is amended to provide enforceable legal protection from discrimination on the ground of religious belief, the absence of religious belief or a refusal to participate in religious activity in all areas of public life.

Exemptions from discrimination law on the ground of religion

The right to freedom of religion and belief is not an absolute right and may be subject to permissible limitations.²⁶ Those limitations must be provided by law, and be 'necessary to protect public safety, order, health, or morals or the fundamental rights or freedoms of others'.²⁷

A key aspect of the balancing of the right to freedom of religion and belief and other human rights is the exemptions that exist in federal and state discrimination law which protect freedom of religion and belief. However, and for the following reasons, Legal Aid NSW considers that the current exemptions go beyond what is necessary to protect freedom of religion at the expense of allowing discrimination on grounds such as sex, sexuality and marital status.

²⁵ *International Covenant on Civil and Political Rights (ICCPR)*, signed 18 December 1972 [1980] ATS 23 (entered into force 28 January 1993).

²⁶ ICCPR article 18.

²⁷ ICCPR article 18(4).

There are exemptions in the *Sex Discrimination Act 1984* (Cth) (**SD Act**), *Age Discrimination Act 2004* (Cth) (**AD Act**) and the NSWAD Act for the activities of bodies 'established for religious purposes'²⁸ and bodies 'established to propagate religion'.²⁹

There are also exemptions in the SD Act, AHRC Act and FW Act for the activities of religious educational institutions.³⁰ The NSWAD Act contains a number of exemptions relating to the activities of a 'private educational authority'³¹ which would apply to religious schools.

These exemptions for religious bodies and schools are broad and permanent. They are generally confined only by a requirement that the act or practice to which the exemption applies must conform to the doctrines, tenets and beliefs of that religion and be necessary to avoid injury to the religious susceptibilities of adherents of that religion.³²

Many religious bodies now receive Commonwealth funding to provide essential public services in the area of aged care, child welfare, adoption and employment services. In 2013 the SD Act was amended to provide that the exemption for religious bodies does not apply in connection with the provision of Commonwealth funded aged care.³³ However, this carve out from the exemption does not apply to any other public services provided by religious bodies. Legal Aid NSW is concerned about discrimination by religious bodies that are using public funds to provide public services.

Religious bodies and religious schools are also large employers and the majority of individuals who work for them perform roles with no religious content.

Legal Aid NSW is concerned that the breadth of current exemptions means that our clients experience discrimination on the grounds of sex and marital status in their employment by religious organisations. This is demonstrated by the following case study:

Case Study: discrimination in employment by a religious school

Our client was employed at a religious school as an English teacher and had been employed by the school on a series of fixed term 12 month contracts. Our client became pregnant to her de facto partner. Our client told the school that she was pregnant. The school informed our client that her contract would be terminated because she was pregnant and unmarried.

²⁸ *Sex Discrimination Act 1984* (Cth) (**SD Act**) s 37(d); *Age Discrimination Act 2004* (Cth) (**AD Act**) s 35.

²⁹ NSWAD Act s 56(d).

³⁰ SD Act s 38; AHRC Act s 4; FW Act s 351(2).

³¹ NSW AD Act ss 25(3), 31A(3), 38C(3), 38K(3) and 40(3).

³² AHRC Act s 3 (definition of discrimination); SD Act ss 37(1)(d), 38; AD Act 35; FW Act s 351 (2)(c); NSWAD Act s 56(d).

³³ SD Act s 37(2).

The broad scope of the exemptions also undermines Australia's obligations under the *Discrimination (Employment and Occupation) Convention 1958* which provides that workers should not be subject to discrimination. This convention is scheduled to the AHRC Act and various provisions of the FW Act are intended to give effect to it.³⁴

Legal Aid NSW considers that religious bodies and schools should be permitted to discriminate in connection with employment in respect only of those individuals with specific religious roles or functions. However, religious bodies and schools should not be able to discriminate in relation to employment generally. We make the following further recommendations in light of these concerns:

Recommendation 3 – that the exemptions in the SD Act, AD Act and NSW AD Act for religious bodies and schools are amended to provide that the exemptions do not apply in connection with the employment of staff not engaged to perform a religious function.

Recommendation 4 – that the exemptions in the SD Act, AD Act and NSW AD Act for religious bodies and schools are amended to provide that the exemptions do not apply to the provision of Commonwealth funded public services.

³⁴ See for example, FW Act section 771.