

Legislative Reforms on Religious Freedoms

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

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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.

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 Attorney-General's Department. Should you require any further information, please contact

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Introduction

Legal Aid NSW welcomes the opportunity to provide a submission to the Attorney-General's Department on the package of legislative reforms on religious freedoms. Our comments are focused on the Exposure Draft Religious Discrimination Bill 2019 (**Bill**).

Legal Aid NSW supports in principle legal protection from religious discrimination. Clients seek advice from Legal Aid NSW regarding religious discrimination, primarily in employment.¹ However, currently in NSW and federally, protection from religious discrimination is inadequate.²

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

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. Security guards told our client that he was not permitted to pray in this area. The TAFE permitted students of other religions to pray in the public area. Our client made a complaint to TAFE and as a result, his permission to attend TAFE was revoked.

If passed, the Bill will fill this legislative gap. However, we are concerned that as currently drafted, the Bill will add further complexity to the already complex landscape of discrimination law. It also risks reducing existing legislative protection from discrimination under other Acts, more than is necessary to protect freedom to make religious statements.

Complexity

We commend the generally clear drafting used in the Bill. However, we are concerned that the Bill will add to the complexity of discrimination law as it refers to concepts used in other federal discrimination laws, which are worded in slightly different ways. Except for the definition of employment as discussed below, it is not clear if the effect will be to broaden or limit these concepts. For example:

- Legal Aid NSW supports the inclusion of 'unpaid work' in the definition of 'employment' in cl 4 of the Bill. However, we note that this definition of employment is different to, and broader than, the definition used in the *Age Discrimination Act*

¹ In the 2017/18 to 2018/19 financial years Legal Aid NSW provided 24 advice and minor assistance services regarding discrimination on the ground of religion. 17 of these services were regarding religious discrimination in employment.

² The *Anti-Discrimination Act 1977* (NSW) does not include a prohibition on discrimination on the ground of religious belief. It does provide some limited protection through the prohibition on racial discrimination, which is defined to include ethno-religious origin. The *Australian Human Rights Commission Act 1986* (Cth) provides limited protection from religious discrimination in employment and occupation, and not in other areas of public life. Complaints of religious discrimination that are not successfully conciliated cannot be dealt with by a court.

2004 (Cth) (**ADA**), *Disability Discrimination Act 1992* (Cth) (**DDA**), *Racial Discrimination Act 1975* (Cth) (**RDA**) and *Sex Discrimination Act 1984* (Cth) (**SDA**).

- The victimisation provision in cl 43 of the Bill uses slightly different wording compared to the victimisation provision in section 51 of the ADA (which also uses different wording compared to the other federal discrimination Acts).
- The temporary exemption provisions in clauses 36 to 40 of the Bill use different wording compared to the temporary exemption provisions in other federal discrimination Acts.
- The ancillary liability provision in cl 62 of the Bill uses different wording compared to the other federal discrimination Acts.
- The employer conduct rule provisions in cl 8 of the Bill will add complexity to the already complicated concept of indirect discrimination.

Complexity in discrimination law makes it difficult for people to know and understand their rights and comply with the law, undermining its effectiveness. In our experience, this is particularly problematic for clients seeking advice on discrimination issues, including applicants and respondents, on one or more ground, or where there is a choice of forum. Clients are often confused and overwhelmed by the broadly similar but not identical concepts and definitions. Complexity also adds to the cost, duration and uncertainty of legal claims.

We also take this opportunity to reiterate our support for a consolidated federal discrimination Act and harmonised federal and state discrimination laws to the fullest extent possible, to address some of these issues. Where definitions differ between Acts, the legislation should be amended to reflect the greatest level of protection.

Lessening existing protections

Clause 41 of the Bill provides that statements of religious belief will not contravene federal, state or territory discrimination laws. We are concerned that cl 41 potentially abrogates existing protections in discrimination laws, and the extent to which this may occur.

We note that the protection in cl 41(1) is limited by the definition of 'statement of religious belief' in cl 4, which requires the statement to have been made in good faith, and meet the conditions in cl 41(2). Clause 41(2) provides that the protection does not apply to a statement that is malicious, or would or is likely to harass, vilify or incite hatred or violence against another person or group, or to expressions of religious belief that counsel, promote, encourage or urge conduct that would be a serious criminal offence (covered by cl 27(1)(b)).

It is not clear how courts would interpret the exception in cl 41(2) of the Bill, and in particular, cl 41(2)(b). In our view, the exception in cl 41(2)(b) may create too high a threshold, particularly if the terms 'harass' and 'vilify' are given their dictionary definitions.

Meaning of harass

The term 'harass' is not defined in the Bill and we are aware of few cases that have considered its meaning. Some authorities have considered the meaning of 'harass' in the context of the DDA, and have found that it requires repeated conduct.³ For example, in *McCormack v Commonwealth*,⁴ Mowbray FM adopted the following definition from the Macquarie Dictionary:⁵

Harass 1. to trouble by repeated attacks, incursions, etc., as in war or hostilities; harry; raid. 2. to disturb persistently; torment, as with troubles, cares, etc.

Similarly, in *Penhall-Jones v State of NSW*,⁶ Raphael GM stated:⁷

There is little authority on what constitutes "harassment" where a claim under s 35 of the DDA has been made, or in any of the sorts of claims which could be made under Division 3 of the DDA. But that which there is identifies it as something which is repetitious or occurs on more than one occasion...

Meaning of vilify

'Vilify' is also not defined in the Bill and there are few cases considering its meaning. The two cases we are aware of appear to have adopted different approaches to defining this term.

In *Chief Commissioners of Police v Police Appeals Board & Ors*,⁸ the Victorian Supreme Court drew a distinction between the ordinary meaning of 'vilify' and its meaning within the context of sections 7 and 8 of the *Racial and Religious Tolerance Act 2001* (Vic). These sections are headed 'Racial Vilification Unlawful' and 'Religious Vilification Unlawful' respectively, although neither section itself contains the expression 'vilify' or 'vilification'. Instead, these sections prohibit conduct that "*incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons*". His Honour Kaye J, stated:⁹

In general terms to vilify a person is to lower or lessen that person's worth, or to ridicule that person, or to make the person of little account or esteem. In order that conduct constitute vilification in ordinary English, it need not, necessarily, involve inciting hatred against, serious contempt for, or revulsion or serious ridicule of, another person or class of persons.

³ We note that it is well accepted that a one-off incident can amount to sexual harassment (see for example *Hall v Sheiban* (1989) 20 FCR 217). Sexual harassment is defined in the SDA, and in *Hall v Sheiban* (1989) 20 FCR 217, both Wilcox and French JJ stated that while the dictionary definition of 'harass' implies repetition, the statutory definition of sexual harassment (then section 28(3) of the SDA, now replaced by section 28A) did not require repetition and did not use the word harass to define 'sexual harassment' (at 247, 279).

⁴ [2007] FMCA 1245.

⁵ At [75].

⁶ [2008] FMCA 832.

⁷ At [39].

⁸ [2012] VSC 105.

⁹ At [50].

In *Mundzic v Minister for Immigration and Citizenship*,¹⁰ the Administrative Appeals Tribunal considered the meaning of ‘vilify’ within section 501(6)(d)(iii) of the *Migration Act 1958* (Cth). The Tribunal stated:¹¹

There is no definition of “vilify” in the [Migration] Act, Direction No 41 provides no guidance, and the Minister states that the word has not been the subject of judicial consideration. According to the Macquarie Dictionary, the ordinary meaning of “vilify” is “to speak evil of; defame; traduce”. The Butterworths Concise Australian Legal Dictionary defines “vilification” as “a public act of showing and inciting hatred towards, serious contempt for, or severe ridicule of, a person or group of persons”.

Risk the threshold in cl 41(2) is too high

If the terms ‘harass’ and ‘vilify’ are given their dictionary definitions, it appears that a one-off statement that attacks or torments (which would amount to ‘harass’ if repeated), but that does not meet the threshold of vilifying or inciting hatred, may not meet the threshold of cl 41(2)(b). This would mean that such a statement would be protected from any discrimination claim under cl 41(1). In our view this does not strike an appropriate balance between freedom to make religious statements and freedom from other forms of discrimination that are currently unlawful.

We suggest that cl 41(2) be amended to make clear that one-off statements can be considered to ‘harass, vilify or incite hatred or violence’ under cl 41(2)(b). We also suggest that the exception under cl 41(2) be broadened to include statements that humiliate or intimidate. These terms form the higher threshold aspect of the test of unlawful offensive behaviour because of race, colour or national or ethnic origin under section 18C of the RDA, which also includes the terms offend or insult.

Threshold for general exception too high

Clause 27 of the Bill provides a general exception from complying with proposed Divisions 2 and 3, where a person expresses and holds a religious belief that counsels, promotes, encourages or urges conduct that would constitute a serious criminal offence. ‘Serious criminal offence’ is defined in cl 27(2) as:

...an offence involving harm (within the meaning of the *Criminal Code*), or financial detriment, that is punishable by imprisonment for 2 years or more under a law of the Commonwealth, a State or a Territory.

In our view, the threshold of serious criminal offence is too high. For example, statements of belief that counsel, promote, encourage or urge conduct that would constitute the criminal offence in NSW of interfering with access to a reproductive health clinic, causing actual or potential distress or anxiety to persons within the safe zone of a reproductive

¹⁰ [2010] AATA 399.

¹¹ At [53].

health clinic, or capturing and distributing visual data of persons in the safe zone of a reproductive health clinic,¹² would not be caught by the exemption in cl 27. These offences are punishable by six months imprisonment for a first offence and 12 months imprisonment for second and subsequent offences.

We suggest that the Department consider amending this section so that the exception applies where a person expresses and holds a religious belief that counsels, promotes, encourages or urges conduct that would constitute any criminal offence, or alternatively, a criminal offence punishable with a term of imprisonment.

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. The Australian Human Rights Commission (**AHRC**) is currently holding another consultation on priorities for federal discrimination law reform. We intend to provide comments to the AHRC on broader issues including the complaints-based model, litigation costs, time limits, recording of settlement outcomes and community legal education.

¹² *Public Health Act 2010* (NSW) ss 98C, 98D and 98E.