

Submission to the Religious Freedom Review

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RELIGIOUS FREEDOM REVIEW

The Expert Panel on Religious Freedom
religiousfreedom@pmc.gov.au

Contact: **David Turner**
President, NSW Young Lawyers

Maria Nawaz
Chair, NSW Young Lawyers Human Rights Committee

Contributors: Angus Abadee, Simon Bruck and Maria Nawaz

The NSW Young Lawyers' Human Rights and Public Law and Government Committees welcome the opportunity to make an initial submission to the Religious Freedom Review.

NSW Young Lawyers

NSW Young Lawyers is a division of The Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 15 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

The Committees

The Human Rights Committee (HRC) is comprised of a group of over 1,200 members interested in human rights law, drawn from lawyers working in academia, for government, private and the NGO sectors and other areas of practice that intersect with human rights law, as well as barristers and law students. The objectives of the HRC are to raise awareness about human rights issues and provide education to the legal profession and wider community about human rights and its application under both domestic and international law. Members of the HRC share a commitment to effectively promoting and protecting human rights and to examining legal avenues for doing so. The HRC takes a keen interest in providing comment and feedback on legal and policy issues that relate to human rights law and the development and support of it.

The Public Law and Government Committee (PLGC) is comprised of over 1,000 members who include a range of practicing lawyers from the public and private sectors, barristers and law students. The PLGC aims to educate members of the legal profession, and the wider community, about developments in public law and provide a social environment for young lawyers to develop their skills. The PLGC's areas of interest include, but are not limited to, administrative and constitutional law and the work of government lawyers.

Summary of Recommendations

In summary, the Committees make the following recommendations:

1. The Commonwealth Government:
 - a. create an effective remedy under civil law for both discrimination and vilification, in public places, on the basis of religion; and
 - b. empower the Australian Human Rights Commission to investigate complaints of religious discrimination and religious vilification, and to conduct conciliation of those complaints.
2. The Commonwealth Government remove religious exemptions that permit discrimination by religious organisations, with the exception of religious exemptions in sections 37(1)(a)-(c) of the *Sex Discrimination Act 1984* (Cth).

Freedom of religion and freedom from religious hatred and discrimination are core human rights under international law

Article 18 of the International Convention on Civil and Political Rights (ICCPR) provides that everyone shall have the right to freedom of thought, conscience and religion.¹ This right includes freedom to have or adopt a religion or belief, as well as the freedom to manifest one's religion or belief in worship, observance, practice and teaching. While freedom of religion or belief is a non-derogable right, the freedom to manifest one's religion may be subject to limits, where such limitations are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

The right to freedom of religion or belief is also protected in Article 18 of the Universal Declaration of Human Rights and Article 14 of the Convention of the Rights of the Child.

Article 20 of the ICCPR requires state parties to prohibit by law any advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence. Australia currently has a reservation to Article 20, reserving the right not to introduce further legislative provisions on these matters.

Protections under the *Commonwealth Constitution* recognise the fundamental need to provide safeguards against religious discrimination

Section 116 of the *Commonwealth of Australia Constitution Act* provides:

'The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for an office or public trust under the Commonwealth.'

Section 116 'is an overriding provision'² that limits the Commonwealth Parliament's legislative power.³ It prohibits the Commonwealth from enacting laws that:

- (a) establish a religion 'as an officially recognised State religion',⁴ in the way that the Church of England is an established religion;
- (b) impose any form of religious observance;
- (c) prohibit the free exercise of religion; or

¹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18.

² *Adelaide Company of Jehovah's Witnesses Incorporated v The Commonwealth* (1943) 67 CLR 116, 123 (Latham CJ).

³ *Kruger v The Commonwealth* (1997) 190 CLR 1 ('*Kruger*'), 124 (Gaudron J).

⁴ *Attorney-General (Vic); Ex rel Black v The Commonwealth* (1981) 146 CLR 559 ('*Ex rel Black*'), 605 (Stephen J).

(d) require a religious test as a qualification for any Commonwealth office.

These protections are intended to preserve religious equality.⁵ They are not intended to guarantee individual rights.⁶ This follows from the framers' view that individual rights, such as freedom of religion, would be adequately protected by the common law and the legislative process.⁷ Consistently, any affirmative legal protection of religious freedom is to be sourced in Commonwealth (or state) law.

Enhancing legislative protections from religious discrimination and vilification under Commonwealth anti-discrimination law is critical

Current Commonwealth anti-discrimination laws do not protect against discrimination on the ground of religion, with the exception of (a) the *Fair Work Act 2009* (Cth)⁸ which prohibits adverse action on the basis of religion in employment, only where a state or territory law that prohibits such discrimination is in force, and (b) limited protections under the *Australian Human Rights Commission Act 1986* (Cth).

This means that in most cases, persons subject to discrimination on the ground of religion do not have access to an effective remedy at the Commonwealth level. Since religious and racial discrimination can operate in a similar fashion, and can often have a similar impact on the individual and community, protection from discrimination on the ground of religion should be similar to the protection provided in Part II of the *Racial Discrimination Act 1975* (Cth) for discrimination on the ground of race, colour, descent or national or ethnic origin.

There are no standalone protections against religious vilification at the Commonwealth level. Currently complainants from a recognised ethno-religious group can bring a vilification complaint under the racial vilification provision at section 18C of the *Racial Discrimination Act 1975* (Cth). Section 18C protects against vilification done because of race, colour, or national or ethnic origin, but does not protect against vilification on the basis of religion. This means that persons from recognised ethno-religious groups, such as from the Jewish or Sikh faith who have experienced religious vilification could bring a complaint of vilification under section 18C, while members of the Christian or Muslim faith which are not recognised as ethno-religious groups are unable to access this protection. This means that currently, some religious groups do not have equal protection under the law and access to effective remedies if they experience religious vilification. This should be addressed through a standalone religious vilification protection at the Commonwealth level, to

⁵ *Ex rel Black*, 613 (Mason J).

⁶ *Ex rel Black*, 605 (Stephen J) quoted in *Kruger* (1997) 190 CLR 1, 24-5 (Gaudron J).

⁷ Helen Irving, *To Constitute a Nation: A Cultural History of Australia's Constitution* (Cambridge University Press, 1999), 162; quoted in Luke Beck, *The Foundations of Section 116 of the Australian Constitution: An Historical and Conceptual Analysis* (PhD Thesis, University of Sydney, 2016), 9.

⁸ *Fair Work Act 2009* (Cth), s 351.

provide protection against religious vilification to all religious groups, in line with Articles 2, 20 and 26 of the ICCPR. Narrow and defined exceptions to the religious vilification provisions, similar to those contained in section 18D of the RDA should also be introduced to balance the rights of freedom of religion and freedom of speech. Such exemptions would ensure that conduct that is offensive, insulting, humiliating or intimidating on the basis of religion will not be unlawful if it is done reasonably and in good faith in an artistic work or in the course of any statement, publication or discussion made or held for any genuine academic, artistic, scientific or public interest purpose.

Religion should be a protected attribute under Commonwealth anti-discrimination law. The definition of religion as a protected attribute should include having a religion or belief, and not having a religion or belief, in line with international human rights law.⁹ The Committees recommend that the following legal test for a 'belief' to be recognised should be used. The belief should:

- a) Be genuinely held;
- b) Be a belief and not an opinion or viewpoint based on the present state of information available;
- c) Be a belief as to a weighty and substantial aspect of human life and behaviour;
- d) Attain a certain level of cogency, seriousness, cohesion and importance; and
- e) Be worthy of respect in a democratic society, not incompatible with human dignity and not conflict with fundamental rights of others¹⁰.

The prohibition on discrimination on the basis of religion should apply in areas of public life including employment, education, goods and services and clubs.

To enforce these outcomes, the Committees support:

- the creation of an effective civil law remedy for both discrimination on the ground of religion, and for religious vilification;
- the authorisation of the Australian Human Rights Commission to investigate complaints of religious discrimination and religious vilification and conduct conciliation of those complaints; and
- the creation of protections from acts that are not in private, which are reasonably likely to cause religious vilification should be introduced with appropriate safeguards similar to section 18D of the *Racial Discrimination Act 1975* (Cth).

⁹ Human Rights Committee, *General Comment No. 22: Freedom of Thought, Conscience or Religion: Article 18*, 48th sess, UN Doc CCPR/C/GC/22 (30 July 1993).

¹⁰ *R v AM* [2010] 5 ACTLR 170.

Introducing narrow and defined exemptions to religious vilification laws will ensure that protections strike the fine balance between fair and accurate reporting or fair comment expressing a genuine belief, with the need to protect individuals and communities from vilification on the basis of their religion.

Recommendation 1

The Commonwealth Government should:

- (a) create an effective civil law remedy for both discrimination and vilification, in public places, on the basis of the religion of an individual or community, and**
- (b) empower the Australian Human Rights Commission to investigate complaints of religious discrimination and religious vilification, and to conduct conciliation of those complaints.**

Religious exemptions in education and employment

International human rights law recognises that human rights are indivisible, and that in some circumstances, the rights of one group may need to be finely balanced against the rights of another group. While freedom of religion is absolute, the freedom to express one's religion may be limited in order to protect the fundamental rights or freedoms of others. NSW Young Lawyers considers that the freedom to manifest one's religion needs to be carefully balanced against other fundamental rights and freedoms, including the right to equality and non-discrimination under Articles 2 and 26 of the ICCPR. The Committees submit that some religious exemptions under Commonwealth anti-discrimination law that permit religious organisations to discriminate do not strike the correct balance between the freedom to manifest one's religion and the right to equality and non-discrimination, and severely limit the effectiveness of protections against discrimination.

In particular, religious exemptions in the *Sex Discrimination Act 1984* (Cth) (**SDA**) permit religious bodies to discriminate in:

- the ordination or appointment of priests, ministers of religion or members of any religious order;
- the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order;
- the selection or appointment of persons to perform duties or functions for the purposes of or in connection with, or otherwise to participate in, any religious observance or practice; or
- any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.¹¹

¹¹ *Sex Discrimination Act 1984* (Cth), s 37.

The SDA also exempts educational institutions established for religious purposes that are conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, from the requirement to not discriminate against a person on the basis of their sex, sexual orientation, gender identity, marital or relationship status or pregnancy, if this is done in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.¹² Similarly, the *Age Discrimination Act 2004* (Cth) permits religious organisations to discriminate against individuals on the basis of their age.¹³

Many faith-based organisations receive Commonwealth funding for performing essential services in areas including education, aged care, employment and adoption. While the law prohibits religious organisations in receipt of Commonwealth funding in aged care from discriminating against others, religious organisations providing the other services listed above are free to discriminate against current and prospective employees and individuals accessing or attempting to access these services. These religious exemptions are absolute, and thus require no analysis of the reasonableness or proportionality of the exemption. leading to a situation where the freedom to manifest one's religion is automatically privileged above other's fundamental rights to equality and freedom from discrimination.

The Committees recognise the need for religious exemptions in the areas of employment or education for religious bodies and for educational institutions established for religious purposes, such as where the inherent requirements of a position require adherence to the tenets of the religion. The existing exemptions under s 37(1)(a)-(c) of the SDA for religious training, the appointment or ordination of ministers of religion and the selection or appointment of persons to perform duties or functions for the purposes of or participation in any religious observance or practice should be maintained. However, removing other religious exemptions, such as in the provision of goods and services, employment and education would ensure that freedom to manifest one's religion remains adequately protected, while not privileging it over other fundamental rights.

Recommendation 2

The Commonwealth Government remove religious exemptions that permit discrimination by religious organisations, with the exception of religious exemptions in sections 37(1)(a)-(c) of the *Sex Discrimination Act 1984* (Cth).

¹² *Sex Discrimination Act 1984* (Cth), s 38.

¹³ *Age Discrimination Act 2004* (Cth), s 35.

Any changes to religious freedoms following marriage equality should be tightly controlled to only what is necessary

The Committees note that during the 2017 same-sex marriage postal survey, there was some debate over whether business owners should be permitted to refuse service to same-sex couples due to their religious beliefs, for example, a baker refusing to sell a wedding cake. The Committees recommend that Commonwealth law continue to prohibit such discrimination in line with section 22 of the SDA.

Concluding Comments

NSW Young Lawyers and the Committees thank you for the opportunity to make this submission. If you have any queries or require further submissions please contact the undersigned at your convenience.

Contact:



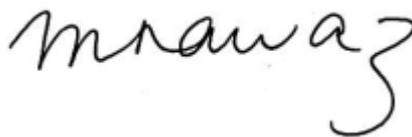
David Turner

President

NSW Young Lawyers

Email: president@younglawyers.com.au

Alternate Contact:



Maria Nawaz

Chair

NSW Young Lawyers Human Rights Committee

Email: hrc.chair@younglawyers.com.au