



THE LAW SOCIETY
OF NEW SOUTH WALES

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Mr Jonathan Smithers
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By email: leonie.campbell@lawcouncil.asn.au

Dear Mr Smithers,

Religious freedom reforms

Thank you for the opportunity to provide input for a Law Council submission to the Attorney-General's Department regarding the Religious Discrimination Bill 2019 (Cth), the Religious Discrimination (Consequential Amendments) Bill 2019 (Cth), and the Human Rights Legislation Amendment (Freedom of Religion) Bill 2019 (Cth) ("religious freedom reforms").

The Law Society's input on this issue has been informed by our Human Rights and Employment Law Committees. In this submission, we outline the Law Society's views about the objectives and likely impact of the religious freedom reforms, along with comments and suggestions regarding specific provisions of the reforms.

1. General comments about the religious freedom reforms

1.1. The objectives of the religious freedom reforms

The core objective of the religious freedom reforms is to implement the following recommendations contained in the final report the Religious Freedom Review prepared by the Expert Panel and released in December 2018 ("Religious Freedom Review").¹

3. Commonwealth, State and Territory governments should consider the use of objects, purposes or other interpretive clauses in anti-discrimination legislation to reflect the equal status in international law of all human rights, including freedom of religion.

4. The Commonwealth should amend section 11 of the Charities Act 2013 to clarify that advocacy of a 'traditional' view of marriage would not, of itself, amount to a 'disqualifying purpose'.

12. The Commonwealth should progress legislative amendments to make it clear that religious schools are not required to make available their facilities, or to provide goods or services, for any marriage, provided that the refusal:

(a) conforms to the doctrines, tenets or beliefs of the religion of the body, or

¹ Australian Government Attorney-General's Department, 'Religious freedom reforms' (August 2019), 1

(b) is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

15. The Commonwealth should amend the *Racial Discrimination Act 1975*, or enact a Religious Discrimination Act, to render it unlawful to discriminate on the basis of a person's 'religious belief or activity', including on the basis that a person does not hold any religious belief. In doing so, consideration should be given to providing for appropriate exceptions and exemptions, including for religious bodies, religious schools and charities.

19. The Australian Human Rights Commission should take a leading role in the protection of freedom of religion, including through enhancing engagement, understanding and dialogue. This should occur within the existing commissioner model and not necessarily through the creation of a new position.

In framing its recommendations, the Religious Freedom Review stated that "by and large, Australians enjoy a high degree of religious freedom, and that basic protections are in place in Australian law."² The Expert Panel also stated that in conducting the review it "received limited information to suggest that the right to freedom of religion is currently being infringed [in Australia]". With regard to violence or the threat of violence, the Expert Panel cited reports from the Executive Council of Australian Jewry and the Islamophobia Register, which recorded 230 anti-Semitic incidents and 243 Islamophobic incidents during separate 12-month periods between 2014 and 2017.

The religious freedom reforms will also give effect to rights contained in the *International Covenant on Civil and Political Rights* ("ICCPR"), which Australia has ratified, including the right to be free from discrimination on the basis of religion, and the right to freedom of religion.

Article 26 of the ICCPR states that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

In General Comment 18 of 1989 the UN Human Rights Committee ("UN HR Committee") stated that Article 26 provides an "autonomous right" and "prohibits discrimination in law or in fact in any field regulated and protected by public authorities".³

Article 18 of the ICCPR states that the right to adopt a religion or belief is absolute, but the right to manifest those beliefs may be limited in order to protect "public safety, order, health, or morals or the fundamental rights and freedoms of others". The UN Human Rights Committee in its General Comment 22 of 1993 provided guidance as to the interpretation of Article 18:

In interpreting the scope of permissible limitation clauses [to Article 18], States parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination.⁴

² *Religious Freedom Review: Report of the Expert Panel* (2018), 104.

³ UN Human Rights Committee, *CCPR General Comment No. 18: Article 26 (Non-discrimination)*, UN Doc HRI/GEN/1/Rev.9, 37th sess, (10 November 1989), 12.

⁴ UN Human Rights Committee, *CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, UN Doc CCPR/C/21/Rev.1/, 48th sess, (30 July 1993), 3.

1.2. Complexity of Australia's anti-discrimination framework

Australia has a complex system of anti-discrimination protections at the state, territory and federal level. As a solution to this complexity, the Law Society has previously advocated for consolidation of the existing Commonwealth discrimination laws into a single Act, as proposed by the Law Council's 2011 policy statement on the federal anti-discrimination regime.⁵

The Law Society is concerned that the proposed religious freedom reforms may increase the complexity of Australia's anti-discrimination framework, rather than alleviate it. We note in particular that the proposed Racial Discrimination Bill 2019 ("RDB") will operate differently from existing federal anti-discrimination laws, for example:

- The definition of "employment" in the RDB includes unpaid work, while the definition under other anti-discrimination laws does not capture volunteers.
- The temporary exemptions regime under the RDB diverges from the practice under other anti-discrimination laws.
- Section 8(4) of the RDB provides that a statement of belief is not protected under certain provisions if it is "likely to, harass, vilify or incite hatred or violence against another person or group of persons" (see 2.1 below for further detail). This differs from the standard contained in the *Racial Discrimination Act 1975* (Cth), which provides that an action on the basis of a person's race, colour or national or ethnic origin is unlawful if it is "reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people".
- The term "religious belief or activity" is defined under the RDB, while "religion" is not presently defined under the *Fair Work Act 2009* (Cth). This creates the potential for a lack of harmonisation across jurisdictions and 'forum-shopping' by litigants who allege they have suffered religious discrimination at work.
- Under s 5(1) of the RDB the term person is defined to include "a body corporate, which may include a religious body or other religious institution". This diverges from other federal anti-discrimination laws, which only apply to natural persons.

1.3. Interaction with existing federal, state and territory anti-discrimination legislation

The Law Society is of the view that reforms to Australia's anti-discrimination framework should preserve or enhance – rather than weaken – existing protections against discrimination, and promote substantive equality. We note in this regard that 23% of submissions to the Religious Freedom Review were of the view that "protections [for religious freedom] should not override anti-discrimination laws".⁶

1.4. Balancing the right to freedom of religion with protections for other rights.

The Religious Freedom Review invoked various authorities, including the UN Human Rights Committee, Special Rapporteurs, and human rights scholar Manfred Nowak to emphasise the importance of balancing the right to freedom of religion with other rights, stating that:

the relationship between the right to freedom of religion or belief and the rights to equality and non-discrimination requires careful consideration in light of the particular laws and facts concerned.⁷

⁵ Law Council of Australia, *Policy Statement: Consolidation of Commonwealth Anti-Discrimination Laws* (March 2011).

⁶ *Religious Freedom Review: Report of the Expert Panel* (2018), 118.

⁷ *Religious Freedom Review: Report of the Expert Panel* (2018), 30.

Several international jurisdictions with statutory protections for freedom of religion have developed a 'proportionality' approach to balancing the right to manifest religion with other rights. The European Court of Human Rights ("ECtHR") has through cases including *Wasmuth v Germany*⁸ developed a two-part test to determine whether an interference with an individual's right to freedom of thought, conscience and religion, protected under Article 9(1) of the European Convention on Human Rights ("ECHR") is "necessary... for the protection of the rights and freedoms of others" per Article 9(2) of the ECHR. Firstly, the interference must serve a legitimate aim, and secondly it must be proportionate to that aim.

This test, or a close variation on it, has been applied by the African Commission on Human and Peoples' Rights,⁹ and national courts in South Africa,¹⁰ the UK,¹¹ and Canada.¹² In the 2013 case of *Eweida and others v the United Kingdom*, the ECtHR held that the national courts had struck the right balance between "the employer's right to secure the rights of others and the applicants' right to manifest their religion" in finding that an employee's refusal to carry out certain duties which they believed would condone homosexuality was appropriate grounds for dismissal.¹³ To take one example from the national level, in the case of *Bull & Bull v. Hall & Preddy*, decided by the UK Court of Appeal in 2012, the Court held that laws prohibiting discrimination on grounds of sexual orientation were a "necessary and proportionate intervention", to protect the rights of others. In reaching this decision, the Court affirmed at paragraph 65 that:

No individual is entitled to manifest his religious belief when and where he chooses so as to obtain exemption in all circumstances from some legislative provisions of general application.¹⁴

The Law Society is concerned that certain provisions of the religious freedom reforms do not strike an appropriate balance between the right to freedom of religion and the rights to equality and non-discrimination. Further detail on these concerns is outlined at 2.2. and 2.4 below.

2. Comments regarding specific provisions of the religious freedom reforms

2.1. Sections 8(3) and 8(4) of the RDB: Conditions that are not reasonable relating to statements of belief

The RDB provides at ss 8(3) and 8(4) that certain employer conduct rules imposed by businesses with annual revenue of \$50 million or more are prima facie unreasonable, and constitute indirect discrimination. Subclause 8(3) provides that an employer conduct rule imposed, or proposed to be imposed, by a relevant employer which would have the effect of restricting or preventing an employee from making a statement of belief outside of work hours is not reasonable unless compliance with the rule is necessary to avoid unjustifiable financial hardship to the employer. Subclause 8(4) clarifies that clause 8(3) does not apply to statements which are malicious, would harass, vilify, or incite hatred or violence against a person or group, or which advocate for the commission of a serious criminal offence.

⁸ *Wasmuth v Germany* [2011] ECtHR No. 12884/03.

⁹ *Garreth Anver Prince v South Africa* [2004] AHRLR 105 (ACHPR 2004).

¹⁰ *Christian Education South Africa v Minister of Education* [2000] CCT4/00 (Constitutional Court).

¹¹ *Bull & Bull v Hall & Preddy* [2012] EWCA Civ 83.

¹² *Chamberlain v Surrey School District No. 36*, [2002] 4 S.C.R. 710, 2002 SCC 86.

¹³ *Case of Eweida and Others v. the United Kingdom* [2013] ECtHR Nos. 48420/10, 59842/10, 51671/10 and 36516/10.

¹⁴ *Bull & Bull v. Hall & Preddy* [2012] EWCA Civ 83, 65.

The Law Society is concerned at the ambiguity of the term “unjustifiable financial hardship” included in this provision, and the practical difficulties in establishing this threshold, particularly given that “unjustifiable financial hardship” will be assessed against the capacity of a business with revenue of at least \$50 million. The provision also fails to take into account the fact that an employer may wish to restrict an employee from making statements of religious belief out of work for reasons other than avoiding financial hardship, for instance to avoid workplace conflict and ensure employees of any or no religion can work harmoniously together.

We also note the apparent arbitrariness of the \$50 million cut-off in the provision, and the fact that there is no equivalent provision in any other piece of federal anti-discrimination legislation.

For these reasons, the Law Society recommends that proposed subclauses 8(3) and 8(4) be deleted. The proposed provisions relating to indirect discrimination at ss 8(1) and 8(2) of the RDB provide sufficient protection against indirect discrimination on the basis of religion.

2.2. Section 10: Religious bodies may act in accordance with their faith

Section 10 of the RDB provides that:

- (1) A religious body does not discriminate against a person under this Act by engaging, in good faith, in conduct that may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion in relation to which the religious body is conducted.
- (2) Religious body means:
 - (a) an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion; or
 - (b) a registered charity that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion (other than a registered charity that engages solely or primarily in commercial activities); or
 - (c) any other body that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion (other than a body that engages solely or primarily in commercial activities).
- (3) This section applies despite anything else in this Act.

The Law Society is concerned at the scope of this exclusion, and the lack of clarity, particularly given that “religion” is not defined under the RDB. In addition, this provision is broader than similar exclusions in existing federal discrimination laws. The Law Society is of the view that this provision should either be omitted or modified to narrow the scope of its application and/or introduce a proportionality test in relation to the conduct permitted by the exclusion.

2.3. Part 3 of the RDB: Unlawful discrimination

The Law Society supports the provisions at Part 3 of the RDB (ss 12-26) prohibiting discrimination on the basis of religion in work and other areas of public life. These provisions give effect to Australia’s obligation under the ICCPR to prohibit discrimination on the basis of religion. We note that this portion of the RDB provides protections against discrimination in areas of public life in equivalent terms to other federal anti-discrimination law including the *Age Discrimination Act 2004* (Cth) and *Racial Discrimination Act 1975* (Cth).

2.4. Section 41: Statements of belief do not constitute discrimination

Section 41 of the RDB provides that:

41 Statements of belief do not constitute discrimination etc.

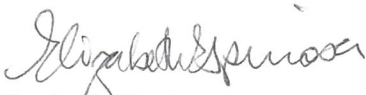
- (1) A statement of belief does not:
 - (a) constitute discrimination for the purposes of any anti discrimination law (within the meaning of the Fair Work Act 2009); or
 - (b) contravene subsection 17(1) of the Anti Discrimination Act 1998 of Tasmania; or
 - (c) contravene a provision of a law prescribed by the regulations for the purposes of this paragraph.
- (2) Subsection (1) does not apply to a statement:
 - (a) that is malicious; or
 - (b) that would, or is likely to, harass, vilify or incite hatred or violence against another person or group of persons; or
 - (c) that is covered by paragraph 27(1)(b).

Note: Paragraph 27(1)(b) covers expressions of religious belief that a reasonable person, having regard to all the circumstances, would conclude counsel, promote, encourage or urge conduct that would constitute a serious offence.

The Law Society is of the view that this provision should be omitted. We believe reforms to Australia's anti-discrimination framework should preserve or enhance – rather than weaken – existing protections against discrimination, and promote substantive equality. By expressly overriding state and territory legislation, there is a risk that the proposed s 41 of the RDB will prioritise freedom of religion at the expense of existing anti-discrimination protections.

Thank you for the opportunity to provide input on this issue. Questions may be directed at first instance to Andrew Small, Principal Policy Lawyer, at (02) 9926 0252 or andrew.small@lawsociety.com.au.

Yours sincerely,



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President