



New South Wales
Council for Civil Liberties

NSW Council for Civil Liberties
Submission regarding the
Religious Discrimination Bill
Exposure Draft

2 October 2019

About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts; attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

NSWCCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

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1 Introduction

The NSW Council for Civil Liberties [NSWCCL] welcomes the opportunity to make a submission on the Drafts of the Religious Discrimination Bill 2019 [the Bill], the Human Rights Legislation Amendment (Freedom of Religion) Bill 2019 and the Religious Discrimination (Consequential Amendments) Bill 2019. We particularly welcome the Bills being released as exposure drafts to allow community consideration and input before they are finalised.

We note these submissions will be considered by the Attorney General's Department and the final Bills then presented to Parliament. Given the significance of the Bills – and particularly the main Religious Discrimination Bill – we will, at that stage, be advocating their referral to a relevant Parliamentary Committee for a more independent review process.

This submission focuses on the draft Religious Discrimination Bill 2019.

2 Objects of the Religious Discrimination Bill

The NSWCCL supports the objects of the Bill as specified in sub-clause 3(1):

- (a) to eliminate, so far as is possible, discrimination against persons on the ground of religious belief or activity in a range of areas of public life; and*
- (b) to ensure, as far as practicable, that everyone has the same rights to equality before the law, regardless of religious belief or activity; and*
- (c) to ensure that people can, consistently with Australia's obligations with respect to freedom of religion and freedom of expression, and subject to specified limits, make statements of belief.*

However, the Explanatory Notes state that while these objects broadly reflect the objects in existing federal anti-discrimination laws, that:

“In addition, paragraph 3(1)(c) reflects the principles underpinning Part 4, which protects the expression of statements of belief in good faith from the operation of certain provisions of Commonwealth, state and territory anti-discrimination law.¹

As will be noted later in the submission, this addition in conjunction with the principles in part 4 do open the door for some disturbing implications, including the undermining of existing protections under anti-discrimination laws and the appropriate balance of competing rights and protections in existing legislation.

3 Indivisibility of Human Rights

In this context, sub-clause 3(2) is significant:

In giving effect to the objects of this Act, regard is to be had to:
(a) the indivisibility and universality of human rights; and

¹Explanatory Notes Exposure Draft of The Religious Discrimination Bill 2019 [EN RDB 2019] p8

(b) the principle that every person is free and equal in dignity and rights.

The “indivisibility and universality of human rights” is a central concept in the approach to human rights frameworks and legislation including discrimination legislation. In so far as this reference suggests the Government agrees with this, we hope that this might open the way for a more cohesive approach to human rights legislation in Australia.

It is clearly important for Australia’s discrimination laws to work cohesively together and for no one right to be automatically privileged over another/others. The protection and balancing of human rights would be greatly assisted by the adoption of an Australian Charter of Human Rights and by a review of Australia’s state and federal human rights laws to ensure the appropriate coherence and consistency. The current Review by the ALRC into The Framework of Religious Exemptions in Anti-Discrimination Legislation will contribute to this from the perspective of religious rights- but the broader exercise is necessary.

As it stands, the NSWCCCL has concerns that this Bill does open the way for the ‘over-privileging’ of religious rights in some contexts and will also have the effect of undermining existing rights and discrimination laws.

Recommendation 1

The Australian Government should move quickly to the development of an Australian Charter of Human Rights to provide a strong and effective framework for the protection of the rights of Australians.

Recommendation 2

In the context of this and the related reviews on the right to freedom of religion and the current ALRC Review of Framework of Religious Exemptions in Anti-Discrimination Legislation, the Australian Government should initiate a review of existing federal human rights and discrimination laws to ensure comprehensiveness and appropriate consistency - including with the international human rights framework.

4 Inclusion of non-believers and believers

Religious belief or activity is defined in 5(1) as:

- (a) holding a religious belief; or*
- (b) engaging in lawful religious activity; or*
- (c) not holding a religious belief; or*
- (d) not engaging in, or refusing to engage in, lawful religious activity.*

The NSWCCCL has always argued for the fundamental right to freedom of ‘thought, conscience and religion’ for all persons- including for atheists and agnostics as well as religious believers. We are therefore fully supportive of the inclusion of both religious belief and activity, and the absence of same, as protected attributes in this Bill

This is the correct approach on principle, is consistent with our international human rights obligations and is clearly very appropriate given the substantial proportion of Australian who do not adhere to any religion or religious belief.

There is clearly a substantial need in Australia for the protection against discrimination of religious minorities in Australia – noting the long history of discrimination against those of Jewish faith and the more recent growth of discrimination against Muslims in Australia.

This Bill will provide needed protections against such discrimination.

5 Direct and indirect discrimination

NSWCCL supports the inclusion in the Bill of both direct and indirect discrimination as unlawful – again consistent with existing anti-discrimination law and the actual experience of discrimination.

6 Lack of protection against discrimination of LGBTQI+ students

One of the major disappointments with this Bill is the failure to include much needed and explicitly promised protections for LGBTQI+ students in religious and private schools. This Bill has been hastily drawn up in advance of the report from the inquiry into The Framework of Religious Exemptions in Anti-Discrimination Legislation underway by the Australian Law Reform Commission [ALRCC], but one of the most urgent and disturbing manifestations of inappropriate religious exemptions for otherwise unlawful discriminatory acts against children has deliberately not been addressed in the Bill and instead left to the ALRC review. Simultaneously the reporting date for the ALRC review has been pushed back to December 2020².

This decision to avoid this addressing this manifestation of discrimination on religious grounds in the current Bills is a disturbing but not surprising decision. It is a complex and highly controversial issue for some religious groups and educational institutions. But discrimination against LGBTQI+ school students is serious and extremely harmful to these young people and must be addressed in this Bill. The solution must put the interest of the child first.

Both the Government and the Labor party promised to address this issue as a matter of urgency when the lack of protection from discrimination became a public issue last year. The Prime Minister's commitment appeared to be clear³:

"Contrary to what has been reported, the Ruddock Review proposes to strengthen the protections for students from discrimination.

This misreporting has created unnecessary confusion and anxiety for parents and students alike....

To address this issue I will be taking action to ensure amendments are introduced as soon as practicable to make it clear that no student of a non-state school should be expelled on the basis of their sexuality. I believe this view is shared across the Parliament and we should use the next fortnight to ensure this matter is addressed.

Our Government does not support expulsion of students from religious non-state schools on the basis of their sexuality. I also know that this view is widely shared by religious schools and communities across the country.

Amending the legislation will give all students and parents the certainty they require."

² See altered terms of reference to the ALRC issued by the AG on 29th August 2019 following the release of this Bill. <https://www.alrc.gov.au/inquiry/review-into-the-framework-of-religious-exemptions-in-anti-discrimination-legislation/altered-terms-of-reference-29-august-2019/>

³ PM media release 13 Oct 2018 <https://www.pm.gov.au/media/media-statement>

NSWCCL agrees with the PM's stated view that no student should be expelled from a school on the basis of their sexuality. We also consider they should be protected from any discrimination on the basis of their sexuality as students in all schools.

Sadly the Labor party and the Government did not agree on a legislative approach and the promised urgent amendment to prohibit, at least, the expulsion of students on the basis of their sexuality did not eventuate.

Obviously the logical and caring response by the Government should then have been the inclusion of provisions in this Bill to provide that protection to LGBTIQ+ students and provide them and their parents 'with the certainty they require'.

NSWCCL presumes that the Government failed to take this course of action because of concerns about hostile reactions from some religious bodies. This appears to be a clear case of the privileging of religious rights over the rights of students to be protected against discrimination on the basis of their sexuality.

The ability of the ALRC to make appropriate findings and recommendations on this matter— and other issues— appears to be significantly constrained by the altered terms of reference for their review which firmly exclude them making any recommendations to amend any aspect of the current Bills that become law:

The ALRC should confine its inquiry to issues not resolved by that Bill, and should confine any amendment recommendations to legislation other than the Religious Discrimination Bill...

but should confine its recommendations to amendments to laws existing prior to enactment of the Religious Discrimination Bill 2019.⁴

The current Bill contains provisions which, if legislated, would make it difficult, if not impossible, for the ALRC to recommend necessary protections for LGQBTI+ students from 'lawful' discrimination on religious belief grounds and religious schools' exemptions. These prohibitions will likely block the ALRC from properly addressing this issue in its review.

The issue of protections from discrimination of GLBTQI+ students must therefore be addressed in this Bill.

Recommendation 3

The Religious Discrimination Bill 2019 be amended to include provisions which will prohibit the expulsion of, or other forms of discrimination against LGBTI+ students in all Australian schools. These provisions should include the necessary limitation of exemptions on religious or other grounds to ensure this protection of children from discrimination is legally enforceable.

Recommendation 4

The Government give consideration to reviewing its amended terms of reference to the ALRC to ensure they do not constrain it from being able to fully and professionally address all the issues relevant to its core reference.

⁴ <https://www.alrc.gov.au/inquiry/review-into-the-framework-of-religious-exemptions-in-anti-discrimination-legislation/altered-terms-of-reference-29-august-2019/>

7 Conscientious objection by health providers

The Bill makes provision for conscientious objection of medical practitioners on religious grounds in the context of protection against indirect discrimination. The range of health services encompassed is very wide – and includes Aboriginal and Torres Strait Islander health practice, dental, medical, medical radiation practice, nursing, midwifery, occupational therapy, optometry, pharmacy, physiotherapy, podiatry and psychology. It is not clear what services are likely to be subject to conscientious objections from medical practitioners in some of these services.⁵

NSWCCL has concerns about the provisions in the Bill relating to right of medical practitioners to refuse to provide health services on the basis of conscientious objection. It is vitally important to ensure the legitimate right to conscientious objection is appropriately balanced against the rights of the patients to access the service without discrimination. This is especially so if the service is being sought in regional and remote contexts where alternatives practitioners are often difficult to access.

Where conscientious objection is deemed reasonable and lawful, NSWCCL considers that an obligation to refer patients to a practitioner who does not have a conscientious objection is reasonable and should be legislated. This will assist in ensuring that patients seeking health services are able to access them without discrimination.

NSWCCL agrees with other commentators that Clauses 8(5) and 8(6) raise major concerns in their approach. They set out the “*conditions that are not reasonable relating to conscientious objections by health practitioners*”.

Clause 8(5) provides that if a state or territory law allows conscientious objection a ‘*health practitioner conduct rule that is not consistent with that law is not reasonable* and would therefore constitute unlawful indirect discrimination.

If clause 8(5) does not apply, clause 8(6) specifies that a health practitioner conduct rule is not reasonable unless it is necessary to avoid an unjustifiable adverse impact on:

- (a) *the ability of the person imposing, or proposing to impose, the rule to provide the health service; or*
- (b) *the health of any person who would otherwise be provided with the health service by the health practitioner.*

The critical determinant here is the meaning of ‘unjustifiable adverse impact’ which is not defined or otherwise clarified in the Bill. The Explanatory Notes do offer guidance:

147 For example, if non-compliance with a health practitioner conduct rule could result in the death or serious injury of the person seeking the health service, this would generally amount to an unjustifiable adverse impact.

148 Similarly, non-compliance with a policy that required the sole medical practitioner in a small rural community to prescribe contraception in appropriate cases may amount to an unjustifiable adverse impact on the ability of that practice to provide medical services to that community, and may also have an unjustifiable adverse impact on the health of women seeking contraception (such as women seeking the Pill for non-contraceptive use, such as in order to treat endometriosis or polycystic ovary syndrome),

⁵ The Explanatory Notes indicate that the list is derived from the Therapeutic Goods Act 1989. EN RDB 2019 p18.

as they may be unable to access alternative healthcare promptly without significant travel and cost⁶.

While paragraph 148 provides a reasonable example on unjustifiable impact on a service, paragraph 147 sets an extraordinarily high level of harm – ‘death or serious injury’ of the patient – to ‘generally’ justify an obligation to supply a service or refer. Clearly the latter is unacceptable for calibrating an appropriate balance between the right to conscientious objection and the right of a patient to access a service.

It is difficult to unravel the implications of these two clauses without a detailed analysis of all relevant state and territory provisions. But it would appear that will in some contexts override existing official guidelines and policies and state laws on conscientious objections and protection of patients.

The NSWCCCL agrees with the Australian Human Rights Commission that these clauses should be removed from the Bill.

Recommendation 5

Clauses 8(5) and 8(6) which set out the ‘conditions that are not reasonable relating to conscientious objections by health practitioners’ should be deleted from the Religious Discrimination Bill 2019.

Recommendation 6

The Religious Discrimination Bill 2019 be amended to specify that an obligation to refer a patient to a different practitioner who does not conscientiously object to provide a health service by the medical practitioner who does conscientiously object, is reasonable.

8 Discriminatory statements of belief - exclusions

Clause 41 provides an extraordinary set of exemptions for ‘a statement of belief’ in that it does not:

- constitute discrimination for the purposes of any anti-discrimination law,
- contravene subsection 17(1) of the *Anti-Discrimination Act 1998* of Tasmania – (which prohibits conduct which offends, humiliates, intimidates, insults, or ridicules on a wide range of grounds)
- or a provision of a law prescribed by the regulations for the purposes of this paragraph.

There are some specified exceptions to this:

(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.

This sets up a major divergence from existing discrimination laws and sets a much higher threshold for unlawful discrimination when the discriminatory statements are religious beliefs. It overrides other existing anti-discrimination laws. Sub-clause 41(1)(c) opens the way for further laws to be overridden by this clause by regulation. .

⁶ Ibid p19

Clause 41 clearly privileges religious rights of speech over other rights and protections against discriminations.

It should be repealed and existing anti-discrimination laws should be the basis on which it is determined if any statement of religious belief constitutes unlawful discrimination.

Recommendation 7

Clause 41 - which specifies that statements of belief do not constitute discrimination for the purposes of existing anti-discrimination laws, or contravene subsection 17(1) of the Anti-Discrimination Act 1998 of Tasmania or a future provision prescribed by regulation - should be deleted from the Religious Discrimination Bill 2019.

9 Religious bodies may act in accordance with their faith

The NSWCCCL has always opposed the broad exemption of religious bodies – and especially religious schools – from discrimination laws. This concern is exacerbated when it extends to charities and other bodies which provide public services which are often funded wholly or significantly by government.

This Bill will broaden the scope of religious bodies which will be entirely exempt from the unlawful religious discrimination – as long as their conduct (discriminatory or otherwise) is in good faith and may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion”. See clause 10(1):

*(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.*

The “may reasonably be regarded’ threshold is looser than similar thresholds in current anti-discrimination legislation. The threshold could be tightened by the removal of ‘may reasonably be regarded’. However, the NSW CCL agrees with the position of the HRLC that the existing religious exemptions should be replaced with specific context, exemptions which are based a genuine need for the discriminatory conduct -in line with international law principles.

Recommendation 8

- i. Clause 10 should be deleted and replaced with specific context exemptions based on a genuine need for the discriminatory conduct - in line with relevant international law principles.**
- ii. Failing that – clause 10(1) should be amended by the deletion of the words ‘*may reasonably be regarded*’**

A larger concern is the range of bodies as set out in 10.2:

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).

NSWCCL considers Clause 10(2) should be amended so that religious body is defined to include only bodies established for religious purposes.

Recommendation 9

The definition of 'religious body at 10(2) be amended to include only bodies established for religious purposes

10 Appointment of a Freedom of religion Commissioner

The NSWCCL is not convinced that there is need for a specific Freedom of Religion Commissioner. We note that the Ruddick Report did not recommend such a position. Rather it recommended that the Commissions should take a leading role in the protection of freedom of religion but not necessarily through the creation of a new position. There has been no substantive public justification by the Government for the creation of this position.

We note the AHRC comments in its submission of the budgetary implications of such an appointment and we support their reasonable argument for an appropriate increase in budget to cover the Commissioner position and support staff.

Recommendation 10

If a new Freedom of Religion Commissioner is appointed to the AHRC, it should have its budget increased appropriately to cover the costs associated with that position and support staff.

11 Other Matters

There are several other matters we wished to comment on but time constraints mean that we will be only able to record our broad recommendations. We are aware that these matters will be comprehensively addressed by other human rights and civil society groups in terms we would agree with.

12 Restriction of scope of protection against discrimination to natural persons

Recommendation 11

NSWCCL strongly supports the AHRC recommendation that the definition of 'person' be removed from the Bill and the Explanatory Notes be amended to make clear that a complaint of discrimination on the ground of religious belief or activity can only be made on behalf of a natural person.

13 Employer conduct rules and statements of belief

The Bill also tackles the topical issue of the extent to which employers can restrict what employees and contractors can state publically outside of work. Israel Folau for one might be interested. The approach taken in the Bill on this issue is to allow employers to place restrictions on freedom of speech only where it is necessary to avoid unjustifiable financial hardship to the employer, but not where it would be malicious, or likely to harass, vilify or incite hatred or violence against another person or group.

Recommendation 12

NSWCCL strongly supports the AHRC recommendation for the deletion of clauses 8(3) and 8(4) which deal with separate treatment of employer conduct rules by private sector businesses with annual revenue of \$50 million or more.

14 Summary

NSWCCL cannot support the Religious Discrimination Bill as currently drafted. It has too many negative aspects which will undermine current anti-discrimination protections and fails to address pressing issues.

It does however have numbers of positive aspects and could, by accepting recommended deletions and some other amendments to improve provisions, be supportable.

NSWCCL hopes this submission is of assistance to the Attorney-Generals Department in assessing the package of Religious Freedoms Bills - and particularly the Religious Discrimination Bill 2019.

This submission was written by Dr Lesley Lynch (Vice President) and builds on prior work and submissions by Dr Martin Bibby (Committee member).



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