



## Submission to the Attorney General on the Religious Discrimination Bill – Exposure Draft

1 October 2019

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### 1. Introduction

- 1.1 Anti-Discrimination NSW (**AD NSW**) makes this submission to the Attorney General's Department on the Exposure Draft of the Religious Discrimination Bill 2019 (**Exposure Draft**).
- 1.2 The Australian Government has invited submissions on a package of legislative reforms on religious freedom. These include the:
  - Religious Discrimination Bill 2019
  - Religious Discrimination (Consequential Amendments) Bill 2019
  - Human Rights Legislation Amendment (Freedom of Religion) Bill 2019

### 2. Current protections in NSW

- 2.1 AD NSW administers the *Anti-Discrimination Act 1977 (NSW)* (ADA) which makes it unlawful to discriminate in specified areas of public life against a person on grounds which include their sex, race, age, disability, homosexuality, marital or domestic status, transgender status and carer's responsibilities. Vilification on the grounds of race, homosexuality, transgender status or HIV/AIDS status is also unlawful.
- 2.2 Religion is not, of itself, a ground of unlawful discrimination under the ADA, however the definition of race includes descent and ethnic, ethno-religious or national origin.

#### **Current NSW exceptions for religious activities and private educational authorities**

- 2.3 Section 56 the ADA contains an exception from the provisions of the ADA for the following religious activities:

- 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 appointment of any other person in any capacity by a body established to propagate religion; or
- any other act or practice of a body established to propagate religion that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.

2.4 This exception enables religious bodies to conduct their religious practices in accordance with their religious doctrines.

2.5 The ADA also includes exceptions for private educational authorities, which include faith-based schools. These exceptions mean that private educational authorities will not breach the ADA if they discriminate against students, potential students, job applicants and existing employees on the grounds of sex, transgender status, marital or domestic status, disability, age (exception only applies to education, not to employment) and homosexuality.<sup>1</sup>

### **Race includes ethno-religion**

2.6 The definition of race under the ADA includes ethno-religion. The ADA was amended in 1994 and the definition of 'race' in section 4 was expanded to include 'colour, nationality, descent and ethnic, ethno-religious or national origin'.

2.7 In his Second Reading Speech, the then Attorney General, the Hon J.P. Hannaford indicated that the amendment was:

To clarify that ethno-religious groups, such as Jews, Muslims and Sikhs have access to the racial vilification and discrimination provisions of the Act...The amendment will make it clear that vilification or discrimination against a person on the basis of ethno-religious origin falls within the protections against racial discrimination and racial vilification currently contained in the Act.<sup>2</sup>

2.8 Since 1994 the NSW Civil and Administrative Tribunal (the Tribunal), including its predecessor the NSW Administrative Decisions Tribunal, and its Appeal Panel have

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<sup>1</sup> *Anti-Discrimination Act 1977* (NSW) ss 25(3)(c), 31A(3)(a), 38C(3)(c), 38K(3), 40(3)(c), 46A(3), 49D(3)(c), 49L(3)(a), 49ZH(3)(c), 49ZO(3), 49ZYL(3)(b)

<sup>2</sup> *Anti-Discrimination (Amendment) Bill 1994 - Second Reading Speech*, The Hon J.P. Hannaford, 4 May 1994

considered the meaning of 'ethno-religious'. However, the extent to which the racial vilification and discrimination provisions of the ADA extend to all groups identified by the Attorney General remains uncertain. It has frequently been accepted that Jews are a group of people with an ethno-religious origin<sup>3</sup> and constitute a race for the purposes of section 4 of the ADA.<sup>4</sup> However, due to the development of NSW case law, despite the stated intention in the Second Reading Speech, the extent to which the ADA covers Muslims remains unclear.<sup>5</sup>

### **3. The Exposure Draft**

- 3.1 AD NSW acknowledges and is in favour of the broad aims of the Exposure Draft to provide statutory protection to the community to prohibit discrimination on the basis of religious belief and activity (including beliefs such as atheism or agnosticism).
- 3.2 However, the human rights of religion and belief are not absolute and may be limited when they impinge upon the fundamental rights of others. Under Article 18.3 of the International Covenant on Civil and Political Rights (ICCPR):

Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.<sup>6</sup>

- 3.3 AD NSW is concerned that the Exposure Draft does not strike the appropriate balance between protecting the human rights of freedom of thought and conscience, religion and belief and the protection of other fundamental human rights and equality before the law.
- 3.4 AD NSW is very concerned about a number of provisions in the Exposure Draft. These provisions are discussed in detail below.

### **4. Overriding State and Territory laws - section 41**

- 4.1 AD NSW is concerned about the effect of section 41 which would override the operation of state and territory discrimination law. This provision is inconsistent with the four other federal discrimination acts which contain specific provisions that they

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<sup>3</sup> *Ekeremawi v Nine Network Australia Pty Ltd* [2019] NSWCATAD 29 at [51]

<sup>4</sup> *Droga v Birch* [2017] NSWADTAP 22 at [35]; *Azriel v NSW Land and Housing Corporation* [2006] NSWCA 372 at [47]

<sup>5</sup> *Ekeremawi v Nine Network Australia Pty Ltd* [2019] NSWCATAD 29 at [54] to [61]

<sup>6</sup> International Covenant on Civil and Political Rights (ICCPR), Article 18.3, 16 December 1966

do not intend to exclude or limit the operation of state laws that can operate concurrently.<sup>7</sup>

4.2 Section 41 (1) (a) of the Exposure Draft provides that a 'statement of belief' does not constitute discrimination for the purpose of any anti-discrimination law. This means a person would have no redress for any form of discrimination resulting from another person's statement of belief.

4.3 Section 5 defines a 'statement of belief' in two ways. For a religious person a statement of belief must be:

- of a religious belief held by the person;
- made in good faith; and
- that may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion.

4.4 For a non-religious person, section 5 states that the statement must be:

- a statement about religion;
- a statement of belief held by the person that arises directly from the fact that the person does not hold a religious belief; and
- made in good faith.

4.5 There are limits to the kinds of 'statements of belief' that are provided with protection under section 41. Section 41 (2) provides that protection is not given to a statement of belief that:

- is malicious; or
- would, or is likely to, harass, vilify or incite hatred or violence against another person or group of persons; or
- a reasonable person would conclude amounts to counselling, promoting, encouraging or urging conduct that would constitute an offence punishable by imprisonment for two years or more.

4.6 In practice it is already very hard to establish vilification under the ADA. A person must demonstrate that there has been a public act that incites hatred towards, serious contempt for or severe ridicule of, a person or group of persons on the ground of their

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<sup>7</sup> *Race Discrimination Act 1975* (Cth) at s. 6A; *Sex Discrimination Act 1984* (Cth) at s. 10; *Disability Discrimination Act 1994* (Cth) at s. 13; *Age Discrimination Act 2004* at s. 12.

race (section 20D), transgender status (section 38T), homosexuality (section 49ZTA), or HIV/AIDS status (section 49ZXC). Establishing that this was likely as required by the proposed section 41 (2) would create a high evidentiary barrier. The practical effect of section 41 (2) would therefore be severely reduced.

4.7 In 2018 the serious vilification provisions were removed from the ADA and a new offence of publicly threatening or inciting violence on the grounds of race, religion, sexual orientation, gender identity or intersex or HIV/AIDS status was inserted into the *Crimes Act 1900*. In the over 20 years that the provisions were in the ADA there were no prosecutions or convictions. AD NSW does not have access to data detailing the number of convictions under the new offence, however, it is unlikely that section 41 (2) would provide much support to individuals or groups experiencing vilification.

4.8 AD NSW is concerned that unintended consequences may arise from the overriding effect of section 41 on state and territory laws. An example of a situation that may be protected by section 41 arose in the case of *Bevege v Hizb ut-Tahrir Australia*<sup>8</sup>. In this case the Tribunal made a finding of unlawful sex discrimination in the terms of the provision of a service within the meaning of section 33 (1) (b) of the ADA. The Complainant alleged that at a lecture staged by a Muslim organisation she was directed by the Respondent to sit in an area designated for women and children, which was behind an area set aside for male audience members. The Tribunal found that the seating in the men's section offered better seating than the seats in the women's section and therefore, the direction constituted less favourable treatment within section 33 (1) (b) of the ADA.<sup>9</sup>

4.9 In making its finding, the Tribunal considered whether the Respondent's conduct came within the exception for religious bodies in section 56 (d) of the ADA which states:

Nothing in this Act affects...

...

(d) any other act or practice of a body established to propagate religion that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.<sup>10</sup>

4.10 In considering the exception in section 56 (d) the Tribunal noted that:

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<sup>8</sup> *Bevege v Hizb ut-Tahrir Australia* [2016] NSWCATAD 44

<sup>9</sup> *Bevege v Hizb ut-Tahrir Australia*, *ibid*, at [71] to [83]

<sup>10</sup> *Bevege v Hizb ut-Tahrir Australia*, *ibid*, at [90]

The responses from R1 [Respondent 1] to the ADB make it clear that the lecture was organized in the context of religious or cultural beliefs founded in Islam...R1 says that gender separation in Islamic gatherings is not limited to Muslim groups or mosques "but part of Islam and Muslims globally are adhering to this practice through choice and as part of their belief and culture".<sup>11</sup>

4.11 Ultimately, the Tribunal found that the separation of seating for men and women was not necessary in order to avoid injury to the religious susceptibilities of adherents to the Islamic faith attending the lecture.<sup>12</sup> Therefore, it was not satisfied that section 56 (d) or any other exception provided under the ADA applied.<sup>13</sup>

4.12 AD NSW is concerned that proposed section 41 would protect a direction given to a woman such as that in *Bevege* as a 'statement of belief' and therefore that segregation by sex could become more common. AD NSW is concerned that by limiting the operation of state law, conduct that has previously been found or could be found to constitute discrimination under the ADA, such as discrimination on the basis of sex (as in the case of *Bevege*) would be protected under federal law, with no remedy available to those discriminated against.

#### **Access to justice issues with section 41**

4.13 Section 41 would also create significant procedural and access to justice issues. If a claim of unlawful discrimination is brought in proceedings in a state tribunal and section 41 is raised as a defence, the tribunal may not have jurisdiction to consider the defence. The defence would pose a question of federal law and therefore, the proceedings would need to be transferred to a court. This would result in additional procedural and financial burdens on complainants and create a barrier to access to justice.

4.14 Further, if a claim of unlawful discrimination is made in a state jurisdiction, provisions in the federal discrimination acts prevent a person from raising the same claim in the federal jurisdiction. If a respondent raises section 41 as a defence during proceedings underway in a state jurisdiction, a complainant has lost the ability to make a complaint in the federal jurisdiction and therefore, would be left without a remedy.

4.15 In addition, in proceedings brought under the ADA, a respondent may raise the defence in section 41 at any time. Given that the defence is external to the ADA, this

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<sup>11</sup> *Bevege v Hizb ut-Tahrir Australia*, *ibid*, at [98]

<sup>12</sup> *Bevege v Hizb ut-Tahrir Australia*, *ibid*, at [98]

<sup>13</sup> *Bevege v Hizb ut-Tahrir Australia*, *ibid*, at [99]

undermines the ability of complainants to obtain reliable legal advice at the outset of their claim and for AD NSW to effectively conciliate matters.

## **5. Conduct of religious bodies**

5.1 A further concern is the broad scope of section 10 of the Exposure Draft. Section 10 provides that the conduct of a 'religious body' carried out in good faith that reasonably accords with its doctrines, tenets, beliefs or teachings cannot be considered to be discrimination.

5.2 In particular, AD NSW is concerned about the wide definition of 'religious bodies' which extends to include religious schools, religious charities and other religious bodies (other than a body that engages solely or primarily in commercial activities) and the broad exemptions afforded to these bodies under the proposed law.

5.3 AD NSW is concerned that this provision will create unintended consequences by permitting discrimination on other protected grounds. Under the new law a religious body may legitimately discriminate against people on the basis of their sexual orientation, gender identity, marital status, race, age and disability provided that this accords with the body's religious belief. Further, there is no requirement that the beliefs accord with the current or mainstream beliefs of the religion. Therefore, archaic and out-dated interpretations of religious texts could be used to justify conduct that is currently unlawful. For example, under this provision a registered religious charity may decide to refuse to provide social welfare services to a single unwed woman with children.

5.4 The wide scope of the definition also means that protection will extend to any 'religious body' regardless of whether that body is part of an official or recognised religious denomination.

## **6. Indirect discrimination**

6.1 AD NSW is also concerned about the effect of section 8 of the Exposure Draft which narrows the 'reasonableness' test when assessing indirect discrimination. Section 8 identifies two types of conduct which it deems to be unreasonable other than in limited circumstances:

- an employee conduct rule by a large employer (>\$50 turnover) that restricts or prevents an employee from making a 'statement of belief' outside of work that the employer considers objectionable; and

- restrictions placed on health practitioners which limit their ability to conscientiously object to providing a particular health service.
- 6.2 This represents a significant departure from the established principles of determining ‘reasonableness’ in anti-discrimination law. Unlike all other federal, state and territory discrimination law, specific kinds of conduct are deemed unreasonable without considering other relevant circumstances.
- 6.3 In relation to employee conduct rules, the only consideration that can be taken into account is whether compliance is necessary to avoid unjustifiable financial hardship. This means that no other relevant factors, such as reputational damage or the (non-religious) beliefs of the organisation can be considered.
- 6.4 Sections 8 (5) and (6) relate to ‘conscientious objections’ raised by health practitioners. There are two parts to the provision relating to health practitioners depending on whether state and territory law allows health practitioners to conscientiously object to providing particular health services because of their religious belief.
- 6.4.1 Section 8 (5) provides that where a state or territory law allows a health practitioner to make a conscientious objection, a rule that prevents a health practitioner from conscientiously objecting is not reasonable and would amount to indirect religious discrimination. No other factors can be considered.
- 6.4.2 Secondly, section 8 (6) provides that where a state or territory law does not make a provision for conscientious objection, a health practitioner conduct rule that restricts conscientious objection will be deemed unreasonable unless it is necessary to avoid an ‘unjustifiable adverse impact’ on:
- the provision of the health service; or
  - the health of a person accessing that health service.
- 6.5 Section 8(6) provides that unless an unjustifiable adverse impact can be established, no other circumstances can be taken into account when determining whether a health practitioner rule is reasonable.
- 6.6 AD NSW is very concerned about the potentially limited scope of what may constitute an ‘unjustifiable adverse impact’ under section 8 (6) and a health practitioner’s discretion to make this judgement in emergency situations, such in the case of an emergency abortion, when judicial oversight is not readily available.

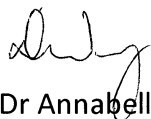


- 6.7 AD NSW believes that these laws will make it much harder for a wide range of patients, including LGBTIQ+ people, women and people with a disability, to access healthcare services which could include hormone therapies, sterilisation, abortion or contraception, resulting in adverse health outcomes for these patients.
- 6.8 AD NSW is also concerned that the conscientious objection rule for health practitioners in sections 8 (5) and (6) gives a broad scope to practitioners to claim that conduct rules amount to indirect discrimination.
- 6.9 The conscientious objection rule complicates and undermines existing state policies and regulatory regimes which already seek to balance conscientious objection with public health and safety concerns.

## **7. Scope of definition of ‘person’**

- 7.1 Finally, AD NSW is concerned that the definition of ‘person’ contained in section 5 of the Exposure Draft includes bodies corporate, meaning that a religious body, a religious institution or religious business could make a claim of unlawful discrimination. This is a significant departure from all other federal, state and territory discrimination law where protection against unlawful discrimination is limited to people. The proposed law could result in corporations taking action against individuals, something that does not occur in relation to other grounds of discrimination, as companies generally do not possess other protected characteristics.

AD NSW thanks the Attorney General’s Department for inviting submissions on the package of legislative reforms on religious freedom.



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