Submission to the Australian Government via the Attorney-General’s Department

Inquiry into the Religious Freedom Bills

Religious Discrimination Bill 2019

2 October 2019

Prepared by the Muslim Legal Network (NSW) Inc

Contact: Sarah Khan, President, Muslim Legal Network (NSW) Inc
# Table of Contents

- Introduction .................................................. 2
- Employer conduct rules and statements of belief .......... 3
- Clause 10 ......................................................... 4
- Jurisdictional Inconsistency ................................ 5
  
  - Lack of adequate frameworks to address vilification .. 6
    
    - The prevalence of Islamophobia ....................... 6
    - Lack of legal protection ................................ 7
  
- Charter of Human Rights .................................... 9
- Conclusion .................................................... 10
Introduction

1. The Muslim Legal Network (NSW) Inc (MLNNSW) welcomes the opportunity to provide submissions on legislation recently released by the Australian Government collectively referred to as the “Religious Freedom Bills” which encompass three distinct pieces of proposed legislation.

2. The MLNNSW welcomes legislative regimes which seek to protect minorities and vulnerable communities from discrimination and vilification in the way that current protections exist in law against discrimination on other grounds such as race, sex, disability and age.

3. The proposed legislation seeks to provide protections by prohibiting discrimination on the basis of religious belief or activity in certain areas of public life including work, education and the provision of goods, services and facilities amongst other things.

4. This submission by MLNNSW focuses on discrete aspects of the exposure draft of the Religious Discrimination Bill 2019 released on 29 August 2019 (the Bill). It should be noted that to provide a comprehensive review of the Bill would require a cross examination against the suite of anti-discrimination legislation which already exists on a State and Commonwealth level, and as such the matters raised within the body of this submission should be read in conjunction with view of other organisations who have provided additional technical legal examination of the Bill.

5. The MLNNSW also notes that the timeframe for the release of the Bill and the time for submissions provides an inadequate opportunity for relevant civil society actors to provide meaningful alternative drafting for the Bill and related instruments.
Employer conduct rules and statements of belief

6. The MLNNSW notes that clauses 8(1) – (2) relate to indirect discrimination and believe these should be retained in the legislation, however, provides the following with respect to clause 8(3) of the Bill.

7. This clause applies to employers who have had at least $50 million in revenue for the current or previous financial year. The ‘conduct rule’ relates to conditions that a relevant employer seeks to impose in order to regulate or restrict employees from making statements of belief outside of work.

8. The Bill states that any such conduct rule is not reasonable ‘unless compliance with the rule by employees is necessary to avoid unjustifiable financial hardship to the employer’.

9. With respect to ‘unjustifiable financial hardship’, the Australian Human Rights Commission (AHRC) submits at paragraph 105 of their submission on the Bill that it found no other jurisdiction similar to Australia where the law on religious discrimination applies a phrase such as this (i.e. financial hardship). The AHRC also noted that financial hardship does not have any foundation in international law dealing with religious discrimination citing Article 18(3) of the International Covenant on Civil and Political Rights which provides that the 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.

10. There is no definition of ‘financial hardship’ contained in the Bill and the burden of proof falls on employers to argue this point (see clause 8(7) of the Bill). This clause has the potential for employers to directly discriminate on the basis of religion if they unintentionally begin factoring in ‘hypotheticals’ of employee candidates as a ‘liability’ due to any perceived risk to the business caused by future financial hardship.

11. This is problematic in and of itself as it identifies that an employer will only seek to have employees engage in non-discriminatory behaviour due to financial reasons and fails to
acknowledge efforts by many employers to implement diversity regimes and encourage safe work practices.

12. The clause does not seem to have a coherent structure, fails to identify why the arbitrary amount of $50 million is provided, and seems only to exist to address the issues arising from the contractual dispute as between Rugby Australia and Israel Folau following Mr Folau's commentary relating to persons of particular attributes.

13. Similarly, clause 8(4) of the Bill offers little in terms of function save from limited protections for large employers.

Clause 10

14. We raise the following concerns and suggestions in respect of clause 10 of the Bill.

15. We welcome the right for religious bodies to engage in conduct that accords with their religion. Determining whether conduct “may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of a religion” gives rise to the following threshold question: what are the doctrines, tenets, beliefs or teachings of a religion? The second consideration is whether the conduct under examination is reasonably regarded as being in accordance with those doctrines, tenets, beliefs or teachings.

16. These questions can only be objectively answered by reference to expert practitioners of the particular religion. Applying a layman’s interpretation of religious beliefs or teachings can lead to unfair outcomes that do not correctly reflect the true position of a religion and inhibit the authentic practice of a faith or can also apply an unnecessarily narrow interpretation of the faith.

17. Deferring to experts also becomes crucial in the setting of textual interpretation. In the same way that a complex body of common law can only be reliably interpreted by a legal expert, religious doctrines and tenets can only be expounded on by specialists in the religion.
18. The community looks to judicial bodies to administer justice in a fair and impartial manner. Accordingly, these lines of enquiry cannot be used as an opportunity by decision makers to pass judgement on a faith or to interpret its teachings. Doing so would fall outside the scope and expertise of the judiciary and tribunal members. An additional risk remains that even where atheological arbiter or expert is produced, it is not in the public interest to have the doctrines, tenets, beliefs or teachings of any religion being scrutinised and determined in a common law jurisdiction.\(^1\)

19. The reference “reasonably regarded” is also broad and unprecedented in the field of anti-discrimination legislation. Many regimes require a direct connection with the religious acts and beliefs. At the Commonwealth level, the Sex Discrimination Act 1984 (Cth) defines acts or practices of religious bodies as those “that conform to the doctrines, tenets or beliefs” of the religion.\(^2\)

20. The MLNNSW has historically held concerns that the lack of clarity surrounding existing religious exemptions has led to broad brush discrimination of Muslim children seeking private schooling and in particular, visibly Muslim women seeking employment.

21. The “reasonably regarded” wording should be reconsidered given the inherent difficulties in the interpretation of religious tenets and the potential for overreach by religious organisations perhaps in the absence of good faith, who seek cover under this exemption.

22. We note that existing regimes at the State level allow for positive discrimination as a legitimate and necessary circumstance without requiring the enactment of the Bill.

**Jurisdictional Inconsistency**

23. MLNNSW is concerned that the Bill also encroaches on potential protections already in place in certain State jurisdictions.

---

\(^1\) Despite Courts making commentary on what constitutes a “religion” in many cases including *Adelaide Company of Jehovah’s Witnesses Inc v Commonwealth* (1943) 67 CLR, 123, particularly where Latham CJ stated “it would be difficult, if not impossible, to devise a definition of religion which would satisfy the adherents of all the many and various religions which exist, or have existed, in the world", attempts to determine what is reasonable in the minutiae of a religion is fraught with danger.

\(^2\) *Sex Discrimination Act 1984 (Cth)* s 37.
24. Despite the Attorney General stating otherwise³, clause 41 of the Bill expressly overrides protections provided in Tasmania under section 17(1) of the Anti-Discrimination Act 1998 (Tas) which prohibits people from offending, humiliating, intimidating, insulting or ridiculing others on the basis of attributes such as disability, sex, sexual orientation and gender identity.

25. Such a clause which operates to override all other Australian discrimination laws is not warranted and sets a concerning precedent.

26. This is also inconsistent with the stated objectives of the Bill which seek to recognise the universality of human rights.

Lack of adequate frameworks to address vilification

27. While the Bill provides important protections to members of religious communities against discrimination, it falls short of addressing the increasing vilification against the followers of minority religions in Australia. This deficiency is serious because, currently, neither Federal nor State level legal frameworks provide adequate protections against hate speech and vilification of vulnerable religious groups like Muslims.

The prevalence of Islamophobia

28. Across Australia, Muslims are increasingly becoming the targets of hate crimes and vilification. A recent study of 243 verified cases collected over a period of 14 months in 2014-2015 found that Islamophobic incidents occurred both in a real-life scenario as well as in the online space.

29. About 54.5% of the offline incidents were of a physical nature (including physical assault, damage, offensive graffiti and non-verbal harassment), while only 15.1% constituted social discrimination (i.e. being excluded from work, school and/or social events).⁴ The same study revealed some further alarming statistics as follows:

· The incidents involved physical attacks, verbal abuse/threats, non-verbal threats, written abuse, damage/graffiti, offensive media content and hate mail.
· After verbal threats and assaults, physical harassment constituted the second largest category of incidents.
· Death threats constituted the severest number of verbal harassments (44% of the verbal insults).
· Overall, women were more likely to be victims while men were largely perpetrators. Females were victims in 67.7% of cases. Unaccompanied women were three times more likely to be a victim. 79.6% of the female victims were wearing headscarves at the time of the reported incidents. In 56.6% of the cases, religious clothing was specifically mentioned by the perpetrator.
· About 45.7% incidents happened online. Of all the offline cases, 48% of the attacks occurred in public spaces like shopping centres, train stations and mosque surroundings.

Lack of legal protection

30. The above statistics show the heightened threat of harm faced by Muslims on a daily basis. Yet, the Commonwealth and State criminal and civil laws do not specifically address this threat.

31. The Criminal Code 1995 (Cth) criminalises urging violence against groups or their members, distinguished by religion.\(^5\) However, it sets a high bar of prosecution on grounds which require threats to ‘peace, order and good governance of Commonwealth’ or an intention that ‘force or violence will occur’. In doing so, it fails to address common and recurring incidents of Islamophobia which, at times, include harassment or vilification without involving force or violence despite the threat of both being present.

32. In Commonwealth civil laws, the Racial Discrimination Act 1975 (Cth) provides protection against hate speech and other offensive behaviour but does not extend to the protection of religion.\(^6\)

---

\(^5\) Criminal Code Act 1995 (Cth) ss 80.2A and 80.2B.
\(^6\) Racial Discrimination Act 1975 (Cth) s 18C.
33. At the State level, in New South Wales, Western Australia and South Australia, no legal instrument specifically addresses the contemporary experiences of religious vilification. Although the recent addition of section 93Z to the Crimes Act 1900 (NSW) is a welcome step in this regard, it only addresses the more serious forms of vilification i.e. public threat or incitement of violence and hence fails to capture individual instances, such as death threats sent to individuals through mail.

34. In New South Wales, protection against public vilification is also afforded under the Anti-Discrimination Act 1977 (NSW) to ethno-religious groups such as Jews and Sikhs, however, Muslims, many of whom are readily identifiable due to their clothing (e.g. hijab) or daily practices such as praying, remain without protection.

35. In the recent case of Ekermawi v Nine Network Australia Pty Limited involving a renowned TV presenter, who had called for a stop on Muslim migration to Australia, the shortcomings of the NSW regime became abundantly clear. Despite the Tribunal’s finding that the respondents’ comments amounted to vilification, no appropriate remedy could be awarded due to Muslims not having the recognition of an ethno-religious group for the purposes of NSW legislation.

36. Further, although other States and Territories have some form of legal protection against religious vilification, their relevant legal instruments differ in their scope and consequences.

37. While the MLNNSW applauds the attempts to provide protections against religious discrimination, we reiterate the real need to address hate crimes which have recently manifested themselves in significant forms of violence and harassment which have collectively been referred to by many experts and organisations as a rising Islamophobia.

38. Given the recent horrific event in Christchurch where over 50 Muslim men, women and children were murdered whilst congregating for prayer by an Australian espousing hate,

---

7 Ekermawi v Nine Network Australia Pty Limited [2019] NSWCA 2019
8 Anti-Discrimination Act 1991 (Qld); Anti-Discrimination Act 1998 (Tas); Racial and Religious Tolerance Act 2001 (Vic).
9 https://www.globalresearch.ca/the-rise-of-islamophobia-in-white-australia/1485
it is imperative that any attempts to protect religious minorities include specific legislative protections addressing religious hate speech as well as religiously motivated violence as a minimum.

Charter of Human Rights

39. Australian Courts have stated that religious belief is a “fundamental right because our society tolerates pluralism and diversity and because of the value of religion to a person whose faith is a central tenet of their identity”;\(^\text{10}\) and that freedom of religion is the “paradigm freedom of conscience” and “the essence of a free society”\(^\text{11}\) In Evans v New South Wales\(^\text{12}\) religious belief and expression was described as an “important freedom generally accepted in society”.

40. The common law may provide indirect protection to the limited extent that it protects against encroachments on other freedoms, without which freedom of religion is not possible. In Australia, protections in the form of freedom of religion are often limited or combined to situations where the expression of religious freedoms are attached to an exercise of freedom of speech or perhaps association.

41. It is perhaps in this incomplete frame and with regard to the number of issues raised with the Bill that the timing is quite apt for a call for a Federal charter of rights, particularly in circumstances where Australia has in various jurisdictions, a suite of anti-discrimination regimes which could be easily adopted to form such a charter of rights.

42. Over the past decade there have been a number of calls at both a State and Federal level for the introduction of further strengthening of anti-discrimination legislation to include protections from discrimination for those who are a part of a religious group.

43. Anti-discrimination legislation is designed with the intent of protecting the vulnerable, often minority communities. Existing protections have been moderately sufficient at

---

\(^{10}\) Christian Youth Camps Limited v Cobaw Community Health Services Limited (2014) 308 ALR 615, [560] (Redlich JA).

\(^{11}\) Church of the New Faith v Commissioner for Pay-roll Tax (Vic) (1983) 154 CLR 120, 130 (Mason CJ, Brennan J).

various levels, however, have failed to grapple with the many issues including the various ways in which ethnicities intersect with religious identity and other forms of subtle or targeted discrimination. The manner in which the Bill seeks to override existing regimes designed to protect certain groups of persons is an example where unintended consequences are realised in the complexity of the existing multi-jurisdictional regimes currently in place.13

44. The MLNNSW is of the view that one of the most fulsome ways of providing sufficient protections for religious or other minorities is by way of implementation of a Federal human rights charter.

45. The implementation of a human rights charter has been called upon for many years as a means of ensuring protections of various freedoms without impeding protections of marginalised groups.

46. Australia is the only liberal democracy without a national human rights charter, constitutionally enshrined or otherwise. The MLNNSW supports the call for a national human rights charter that seeks to provide protections for all.

Conclusion

47. The MLNNSW invites the government to consider the significant technical issues raised in this submission as well as the policy related matters concerning the inadequacy of legislation addressing hate speech and how that might interact with the implied freedom of speech as well as the not insignificant factor of Australia being the only liberal democracy without a Commonwealth charter of human rights.

48. Thank you for the opportunity to provide this submission.

13 See clause 41 of the Bill which overrides existing state based legislation.