SUBMISSION:

NSW Law Reform Commission review of the *Anti-Discrimination Act 1977* (NSW)

AUSTRALIAN CHRISTIAN LOBBY

About Australian Christian Lobby

Australian Christian Lobby's vision is to see Christian principles and ethics influencing the way we are governed, do business, and relate to each other as a community. ACL seeks to see a compassionate, just and moral society through having the public contributions of the Christian faith reflected in the political life of the nation.

With around 250,000 supporters, ACL facilitates professional engagement and dialogue between the Christian constituency and government, allowing the voice of Christians to be heard in the public square. ACL is neither party-partisan nor denominationally aligned. ACL representatives bring a Christian perspective to policy makers in Federal, State and Territory Parliaments.

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20 September 2023

Dear Sir/Madam,

On behalf of the Australian Christian Lobby (**ACL**), I welcome the opportunity to make a submission to the NSW Law Reform Commission (**Commission**) regarding its review of the *Anti-Discrimination Act 1977* (NSW) (**Act/NSW Act**).

The ACL would be very willing to meet with the Commission to discuss these submissions.

Yours sincerely,

Christopher Brohier
Director, Policy & Research

Joshua Rowe
State Director | NSW

EXECUTIVE SUMMARY

ACL's submission discusses the following in response to the Terms of Reference (**TOR**), and recommends that:

- **TOR 1 (re modernisation of the Act), TOR 2 (re protected attributes) and TOR 11 (re the provisions in other jurisdictions):** The Act should be modernised to better promote the equal enjoyment of rights and reflect contemporary community standards by prohibiting discrimination on the basis of religious attributes – i.e. religious belief/affiliation/conviction and religious activity/conduct. This would bring the NSW Act into line with the approach in almost every other Australian jurisdiction, accord with international law (particularly the *International Covenant on Civil and Political Rights* (**ICCPR**)), and address a deficiency identified in other previous reviews.

- **TOR 3 (re reform to the areas of public life in which discrimination is unlawful):**
  a) The Commission should strongly resist any move to reform the Act to make private educational authorities an area of public life in which discrimination is unlawful.
  b) The Commission should also resist any move to reform the Act to insert new definitions regarding 'gender identity' or 'sexual orientation' or to reform the existing provisions in any other way to prohibit a wider scope of discrimination than the currently included transgender and homosexuality grounds. If the Commission does determine that there is a need to do so, we urge it to only consider wording which is reflective of practical realities in the discrimination context and limited in scope as far as possible to discernible matters regarding a person's sex.

- **TOR 4 (re discrimination tests):** Existing discrimination tests are too wide and should be narrower.

- **TOR 5 (re vilification protections):** The existing protections against vilification in NSW are more than adequate. There should be a high bar for vilification claims, and no amendments should be made to lower the relevant tests and thresholds. Anti-vilification provisions have concerning effects and implications, and it is important that any provisions which do exist are not too wide-reaching and do not set too low of a bar. There is also no need to introduce any other new anti-vilification provisions.

- **TOR 6 (re sexual harassment):** The existing protections against sexual harassment are adequate.

- **TOR 7 (re positive obligations):** The Act should not include positive obligations to prevent harassment, discrimination and vilification, or to make reasonable adjustments to promote full and equal participation in public life. This would place an unreasonable burden on religious and not-for-profit organisations in particular, whose very purposes would be frustrated by such obligations.

- **TOR 8 (re exceptions and exemptions):** The NSW Act currently seeks to balance non-discrimination with other rights, including freedom of religion, through the inclusion of general exceptions. However, this does not appropriately reflect the equal status in international law of freedom of religion to non-discrimination. The Commission should consider the insertion of an express clause in the NSW Act (such as an objects, purposes or interpretive clause) which reflects the equal status in international law of freedom of religion.

- **TOR 9 (re the adequacy and accessibility of complaints procedures and remedies) and TOR 10 (re systemic discrimination):** The existing complaints procedures under the Act clearly require reform, including regarding the powers and functions of the Anti-Discrimination Board (**ADB**) and its President. The current system is essentially too accessible to complainants with activist or political agendas. Several changes are needed to prescribe a more robust complaint handling procedure, improve checks and balances and better prevent the bringing of complaints which are frivolous,

vexatious, misconceived or lacking in substance. While there is evidently a need to improve the existing complaints handling procedures in this way, we do not consider that there is any need for new mechanisms to address systemic discrimination.

- **TOR 12 (re the interaction between the NSW Act and Commonwealth anti-discrimination laws):** Commonwealth anti-discrimination laws should allow for as much flexibility for State and Territory laws to operate as possible.

Our submissions are discussed in more detail below. All **bold** emphasis in quoted extracts is ours.

SUBMISSIONS

1. TOR 1: Whether the Act could be modernised and simplified to better promote the equal enjoyment of rights and reflect contemporary community standards

***ACL submission*: The Act should be modernised to better promote the equal enjoyment of rights and reflect contemporary community standards by prohibiting discrimination on the basis of religious attributes – i.e. religious belief/affiliation/conviction and religious activity/conduct. This would bring the NSW Act into line with the approach in almost every other Australian jurisdiction, accord with international law (particularly the ICCPR), and address a deficiency identified in other previous reviews.**

The NSW Act protects against discrimination in respect of a range of attributes, including on the grounds of race,[1] sex,[2] transgender grounds,[3] marital or domestic status,[4] disability,[5] a person's responsibilities as a carer,[6] homosexuality[7] and age.[8]

However, it contains *no* protections in relation to discrimination on the basis of religious attributes.

This starkly differs from the approach taken in almost every other Australian jurisdiction. In particular:

- Queensland (**QLD**): The *Anti-Discrimination Act 1991* (Qld) (**Qld Act**) sets out a range of attributes on the basis of which discrimination is prohibited.[9] Notably, it expressly protects against discrimination on the basis of the attribute of "religious belief or religious activity".[10]

- Western Australia (**WA**): The *Equal Opportunity Act 1984* (WA) (**WA Act**) also protects against discrimination on a range of grounds.[11] This includes discrimination on the ground of "religious or political conviction".[12]

- Victoria: The *Equal Opportunity Act 2010* (Vic) (**Vic Act**) also sets out a range of attributes on the basis of which discrimination is prohibited.[13] Notably, it includes the attribute "religious belief or activity".[14]

[1] See Part 2 of the Act.
[2] See Part 3 of the Act.
[3] See Part 3A of the Act.
[4] See Part 4 of the Act.
[5] See Part 4A of the Act.
[6] See Part 4B of the Act.
[7] See Part 4C of the Act.
[8] See Part 4G of the Act.
[9] See Part 2 of the Qld Act, particularly section 7.
[10] See section 7(i) of the Qld Act.
[11] See Parts II, IIAA, IIA, IIB, III, IV, IVA, IVB and IVC of the WA Act.
[12] See Part IV of the WA Act, particularly section 53.
[13] See Part 2 of the Vic Act, particularly section 6.
[14] See section 6(n) of the Vic Act.

- Tasmania: The *Anti-Discrimination Act 1998* (Tas) (**Tas Act**) also sets out a range of attributes on the grounds of which discrimination is prohibited.[15] Those grounds include both "religious belief or affiliation"[16] and "religious activity".[17]

- Australian Capital Territory (**ACT**): The *Discrimination Act 1991* (ACT) (**ACT Act**) also sets out a range of protected attributes to which the ACT Act applies.[18] Notably, the list of protected attributes includes "religious conviction".[19]

- Northern Territory (**NT**): The *Anti-Discrimination Act 1992* (NT) (**NT Act**) also lists a range of attributes on the ground of which discrimination is prohibited.[20] Notably, it includes "religious belief or activity".[21]

- South Australia (**SA**): The *Equal Opportunity Act 1984* (SA) (**SA Act**) sets out some criteria for establishing discrimination on other grounds, [22] including "religious appearance or dress".[23] While these are more limited protections than the above, they also reflect an intent to protect religious attributes to some extent.

Overall, NSW is one of only *two* jurisdictions which do not protect religious belief or activity in its relevant anti-discrimination act (the other jurisdiction being SA).

In our view, the NSW Act should clearly be modernised to also prohibit discrimination on the basis of religious attributes – i.e. religious belief/affiliation/conviction and religious activity/conduct. There is an evident need to provide proper protection against discrimination on such grounds in NSW law.

Firstly, this would better promote the equal enjoyment of rights, by ensuring that religious attributes attract similar protections to those which currently exist in relation to other attributes protected by the NSW Act. It would in fact directly achieve that aspect of this TOR. A person's religion is just as much a central tenet of the identity of a person of faith as any other protected attribute in anti-discrimination law.[24] It is therefore deserving of the same protection afforded to other protected attributes.

Modernising the Act to prohibit discrimination on the basis of religious attributes would also better reflect contemporary community standards in this regard. In fact, it would be consistent with the approach in almost every other Australian jurisdiction which protects religious belief/affiliation/conviction and/or religious activity. NSW is clearly the 'outlier' in this context, as most other jurisdictions protect religious attributes to some extent at least. This deficiency in NSW law clearly requires correcting.

The protection of religious belief and activity also accords with international law, including the provisions of the ICCPR (discussed further below). Article 18 of the ICCPR states:

> *"**Article 18***
>
> *1. **Everyone shall have the right to freedom of thought, conscience and religion**. This right shall **include freedom to have or to adopt a religion or belief** of his choice, **and freedom, either***

[15] See Part 4 of the Tas Act, particularly section 16.
[16] See section 16(o) of the Tas Act.
[17] See section 16(p) of the Tas Act.
[18] See Part 2 of the ACT Act, particularly section 7.
[19] See section 7(t) of the ACT Act.
[20] See Part 3 of the NT Act, particularly section 19.
[21] See section 19(1)(m) of the NT Act.
[22] See Part 5B of the SA Act, particularly section 85T.
[23] See section 85T(1)(f) of the SA Act.
[24] *Christian Youth Camps Ltd and Anor v Cobaw Community Health Services Ltd and Anor* [2014] VSCA 75 (***CYC v Cobaw***) at [559]-[563].

> ***individually or in community with others and in public or private, to manifest his religion or belief*** *in worship, observance, practice and teaching.*
>
> *2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.*
>
> *3.* ***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.***
>
> *4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions."*

Clearly, the ability to both hold and express religious beliefs is critical. In fact, freedom of religion may justifiably be said to be the "paradigm freedom of conscience" which is "the essence of a free society".[25]

Previous reviews have also supported that NSW anti-discrimination laws should protect religious attributes. Amending the Act in this regard would therefore also address the deficiency identified by such reviews.

For example, in 2017 the Federal Government appointed an Expert Panel into Religious Freedom chaired by the Hon Philip Ruddock (**Ruddock Review**),[26] to examine whether Australian law adequately protects the human right to freedom of religion.[27] The Panel provided a report in 2018 (**Report**).[28] It was the culmination of a nationwide consultation process, including public submissions and face-to-face meetings in every State and Territory. It reflected comprehensive research, the Panel's expertise and input to the Panel throughout the review.[29] It comprehensively considered discrimination law and intersecting rights.

Notably, the Report of the Expert Panel explicitly recommended this outcome in NSW:[30]

> *"**Recommendation 16***
>
> ***New South Wales*** *and South Australia* ***should amend their anti-discrimination laws 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 the appropriate exceptions and exemptions, including for religious bodies, religious schools and charities."*

The Report also expressly discussed the need for Australian laws to do more to protect the right to non-discrimination on the basis of 'religious belief or activity', and the need for NSW anti-discrimination laws in particular to include religion as a protected attribute:[31]

> *"1.373* ***A broad range of stakeholders expressed concern that not all Australian jurisdictions prohibit discrimination on the basis of a person's religious belief or activity. Stakeholders expressed a broad range of concerns about their ability to manifest their faith publicly without suffering discrimination.*** *This includes, for example, their ability to hold and communicate views based on religious understandings, the ability to wear religious symbols and dress in educational or employment settings, and to access goods and services and generally engage in public life without fear of discrimination because of their religion.*

[25] *Church of the New Faith v Commissioner for Pay-Roll Tax* (1983) (1983) 154 CLR 120 at [130].
[26] Australian Government Attorney-General's Department's website: See this link.
[27] See page iii of the Expert Panel's report: This link.
[28] Australian Government Attorney-General's Department's website: See this link.
[29] See page i of the Expert Panel's report: This link.
[30] See Recommendation 16 on pages 5 and 95-96 of the Ruddock Review report.
[31] See pages 91 to 95 of the Ruddock Review report.

> *…*
> *1.383 **In New South Wales, religious belief and activity are not protected attributes under the Anti-Discrimination Act 1977**, although that Act does protect against discrimination on the ground of race, which is defined to include 'ethno-religious' origin. **This has meant that some people of faith are protected, while others are not.** For example, ethno-religious origin has generally been interpreted to include Jewish people but not Muslim people, and accordingly the New South Wales legislation does not protect Muslim people against religious discrimination.*
> *…*
> *1.385 **In its 1999 Review of the Anti-Discrimination Act 1977, the New South Wales Law Reform Commission also recommended the inclusion of religion as a ground of discrimination**, while recognising the need to delimit carefully the scope of the ground and to apply appropriate exceptions.*
> *…*
> *1.390 The Panel has concluded that **Australian laws should do more to protect the right to non-discrimination on the basis of religious or other beliefs**. **In particular, the Panel considers that 'religious belief or activity' (including not having a religious belief) should be a protected attribute** under federal anti-discrimination law.*
> *…*
> *1.394 The Panel also takes the view that **anti-discrimination laws in** South Australia and **New South Wales should be amended so as to include religion as a protected attribute.** Again, consideration would need to be given to exceptions to new anti-discrimination laws, which may be necessary to safeguard other aspects of the human right to freedom of religion or belief."*

Clearly, the Expert Panel was also of the view that the NSW Act should be modernised to prohibit discrimination on the basis of religious attributes. As the Ruddock Review was an expert, national and wide-ranging review as recent as 2018 which analysed international human rights law in detail, its support for amending NSW anti-discrimination laws in this regard is both compelling and authoritative.

We also note that the protection of religious belief or activity must extend to corporations as: [32]

> *"**Corporations have a long history of association with religious activity**. Blackstone, in his Commentaries on the Law of England, lists 'advancement of religion' first in the list of purposes that corporations might pursue. Religious institutions have long been organised as corporations at common law and under the King's charter. It has been repeatedly held by European courts, applying art 9 of the European Convention on Human Rights, that **entities and associations including corporations, unincorporated associations, institutions and societies are capable of possessing and exercising the right to freedom of religious beliefs and principles** [footnotes omitted]."*

2. TOR 2: Whether the range of attributes protected against discrimination requires reform

***ACL submission**: As discussed above, the range of attributes protected against discrimination should be expanded to include religious attributes.*

As discussed above, the range of attributes protected against discrimination in the NSW Act should be expanded to religious attributes – i.e. religious belief/affiliation/conviction and religious activity/conduct.

3. TOR 3: Whether the areas of public life in which discrimination is unlawful should be reformed

ACL submission:

a) The Commission should strongly resist any move to reform the Act to make private educational authorities an area of public life in which discrimination is unlawful.

[32] *CYC v Cobaw* at [480].

b) ***The Commission should also resist any move to reform the Act to insert new definitions regarding 'gender identity' or 'sexual orientation' or to reform the existing provisions in any other way to prohibit a wider scope of discrimination than the currently included transgender and homosexuality grounds. If the Commission does determine that there is a need to do so, we urge it to only consider wording which is reflective of practical realities in the discrimination context and limited in scope as far as possible to discernible matters regarding a person's sex.***

The application of the Act to private educational authorities

The Act currently specifies that certain sections contained do not apply to employment by a private educational authority, or otherwise to or in respect of a private educational authority.[33]

However, we are aware that people in some quarters have recently been advocating for private schools to fall within the purview of discrimination prohibited by the Act.

In our view, this is entirely inappropriate. We support the fact that the Act effectively does not apply to certain acts of discrimination by private schools under the existing provisions. Private schools are by their very nature private communities. They are set up for the specific purpose of creating distinct schooling environments which reflect certain attributes among their employed staff and student cohorts. They are not areas of public life in respect of which discrimination on the grounds of employment or other matters such as sex, transgender grounds, marital or domestic status, disability, homosexuality or age should be unlawful. Otherwise, there would be very little distinction between such schools and other educational authorities, undermining the very reason for their existence. There has also been no discernible problem regarding the existence or operation of the existing provisions in this regard since the Act was introduced in NSW in 1977. There is therefore no compelling rationale for amending those provisions.

In our view, the Commission should strongly resist any move to reform the Act to make private educational authorities an area of public life in which discrimination is unlawful.

Provisions in the Act regarding discrimination on transgender grounds and the ground of homosexuality

The Act currently contains clear protections against discrimination on transgender grounds[34] and on the ground of homosexuality.[35]

However, we are aware that people in some quarters have recently been advocating for the Act to be amended to incorporate wider definitions of 'gender identity' and 'sexual orientation' in respect of which discrimination is prohibited.

In our view, the existing provisions are already broad enough in their current form. For example, the prohibition against discrimination on transgender grounds applies whether or not a person is a recognised transgender person, includes reference to a person being thought of a transgender person (whether or not the person is, or was, in fact a transgender person), and applies to something done on the ground of even just a characteristic that appertains generally to or is generally imputed to transgender persons.[36] Similarly, the prohibition against discrimination on the ground of homosexuality also includes a reference to a person's being thought to be a homosexual person, whether he or she is in fact a homosexual person or not, and applies to something done on the ground of even just a characteristic that appertains generally to or is generally imputed to homosexual persons.[37]

[33] For example, sections 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) and 49ZYL(3)(b) of the Act.
[34] See Part 3A of the Act.
[35] See Part 4C of the Act.
[36] See sections 38A and 38B of the Act.
[37] See sections 49ZF and 49ZG of the Act.

The Commission should therefore resist any move to reform the Act to insert new definitions regarding 'gender identity' or 'sexual orientation' or to reform the existing provisions in any other way to prohibit a wider scope of discrimination than the currently included transgender and homosexuality grounds.

If the Commission does determine that there is a need to consider further definitions or amendments, we urge it to only consider wording which is reflective of practical realities in the discrimination context and limited in scope as far as possible to discernible matters regarding a person's sex.

In contrast, a very wide definition of such terms is included in the Vic Act, under which:[38]

> ***Gender identity*** *"means* ***a person's gender-related identity****, which may or may not correspond with their designated sex at birth, and* ***includes the personal sense of the body*** *(whether this involves medical intervention or not)* ***and other expressions of gender****, including dress, speech, mannerisms, names and personal references"*; and
>
> ***Sexual orientation*** *"means a person's emotional, affectional and sexual attraction to, or intimate or sexual relations with, persons of a different gender or the same gender or more than one gender".*

These are reflective of the very broad descriptions contained in the *Yogyakarta Principles* under which:[39]

> ***Gender identity*** *"is understood to refer to* ***each person's deeply felt internal and individual experience of gender,*** *which may or may not correspond with the sex assigned at birth, including the* ***personal sense of the body*** *(which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means)* ***and other expressions of gender****, including dress, speech and mannerisms"; and*
>
> ***Sexual orientation*** *"is understood to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender"*.

The Yogyakarta Principles do not have legal authority. They are merely the outcome of a conference of activist academics.[40]

We urge the Commission to reject any moves to insert similar definitions into the NSW Act.

In our view, these definitions are far too broad for anti-discrimination legislation. For example, it would be virtually impossible for any person to discern in day-to-day activities a person's "personal sense of the body" or "deeply felt internal and individual experience of gender", particularly if not otherwise obvious through medical intervention or a person's dress, names or personal references. Whether a person appears to have characteristics generally imputed to transgender or homosexual persons is far more objectively determinable than how a person feels on a personal or deep level about their body or gender. Allowing discrimination claims to be brought on such bases risks the Act becoming a vehicle for spurious claims.

Such definitions are also based on a gender-fluid philosophy which is contested in many spheres and which is in stark contrast to traditional views about gender and sexuality which have existed for centuries.

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[38] See the definitions on pages 9 and 15 of the Vic Act.

[39] As published in 2006 with descriptions of 'sexual orientation' and 'gender identity' on page 6: This link, and as supplemented in 2017: This link.

[40] The Senate Legal and Constitutional Affairs Legislation Committee in its inquiry into the *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013* appropriately noted the status of the Yogyakarta Principles in its report concerning the 2013 Bill. It rejected calls for the Yogyakarta Principles to be referenced as "relevant international instruments" in the *Sex Discrimination Act 1984*, or in the Explanatory Memorandum to the Bill. The Committee drew attention to the Attorney-General's Department correct observation that "[T]he Yogyakarta Principles have no legal force either internationally or within Australia. They were developed by a group of human rights experts, rather than being an agreement between States." See *Senate Legal and Constitutional Affairs Legislation Committee* report p.26.

Though we do not consider that any further expansion or definition of the terms currently used in the Act is necessary, any new definitions which are inserted should take a much narrower approach which operates far more practically in the discrimination context.

For example, the Qld Act limits the definitions of:[41]

> ***Gender identity*** *to "in relation to a person, means that the person—*
>
> > *(a) identifies, or has identified, as a member of the opposite sex by living or seeking to live as a member of that sex; or*
> >
> > *(b) is of indeterminate sex and seeks to live as a member of a particular sex;";* and
>
> ***Sexuality*** *to "means heterosexuality, homosexuality or bisexuality".*

If the Commission finds it necessary to amend the scope of discrimination prohibited by the Act in relation to such terms, we urge it to consider inserting definitions which are similarly limited in scope.

4. TOR 4: Whether the existing tests for discrimination are clear, inclusive and reflect modern understandings of discrimination

***ACL submission*: The existing discrimination tests are too wide and should be made narrower.**

In our view, the existing tests for discrimination are very wide. Non-discrimination has become a virtually unassailable proposition which has been furthered at the expense of the protection of human rights as a whole (discussed further below). Ultimately, we consider that the existing tests for discrimination should therefore be made narrower. However, we recognise that this is likely not the intention behind this TOR, so have at this stage limited our submissions regarding this TOR to this brief paragraph.

5. TOR 5: The adequacy of protections against vilification, including (but not limited to) whether these protections should be harmonised with the criminal law

***ACL submission*: The existing protections against vilification in NSW are more than adequate. There should be a high bar for vilification claims, and no amendments should be made to lower the relevant tests and thresholds. Anti-vilification provisions have concerning effects and implications, and it is important than any provisions which do exist are not too wide-reaching and do not set too low of a bar. There is also no need to introduce any other new anti-vilification provisions.**

The Act contains provisions regarding racial,[42] transgender,[43] homosexual[44] and HIV/AIDS vilification.[45] Clearly, it already protects against vilification on a range of grounds.

In addition, as the Commission would be aware, the *Anti-Discrimination Amendment (Religious Vilification) Bill 2023* (NSW) (**RV Act**) recently passed NSW Parliament and received assent on 11 August 2023.[46] The RV Act commences 3 months after the date of assent,[47] so the NSW Act currently does not include amendments arising as a result of the RV Act (and will not do so until 12 November 2023).[48] However, when the changes do commence, new religious vilification provisions will also be inserted into the Act. These provisions will further broaden the scope of the NSW Act in terms of the types of vilification it prohibits.

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[41] See the definitions on pages 146 and 151 of the Qld Act.
[42] See Part 2, Division 3A of the Act.
[43] See Part 3A Division 5 of the Act.
[44] See Part 4C Division 4 of the Act.
[45] See Part 4F of the Act.
[46] See https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=18449.
[47] See section 2 of the RV Act.
[48] See page 1 of the Act.

In our view, these existing and anticipated protections against vilification in NSW are more than adequate. There should be a high bar for vilification claims, and no amendments should be made to lower the relevant tests and thresholds as they currently exist in the NSW Act. There is also no need to introduce any other new anti-vilification provisions, given the range of types of vilification already covered by the Act.

In fact, we have made numerous submissions to inquiries previously setting out our concerns about the effects and implications of anti-vilification provisions generally, and explaining why it is important than any vilification provisions which do exist should not be too wide-reaching or set too low of a bar. For example:

- Earlier this year, the ACL made a submission to the NSW Government regarding a confidential consultation about the then proposed religious vilification amendments to the Act. As we explained in that submission, we consider that anti-vilification laws have stifling effects on fundamental Australian freedoms, including freedom of speech and the freedom of thought, conscience and religion. They are harmful for society and the legal system more broadly. We therefore did not support the introduction of any new anti-vilification provisions in NSW, including a prohibition on religious vilification. While the ACL itself has religious aims, even we recognise that people must have the ability to criticise religion. Religion, and the proclamation of it, is a contest about truth. Differing religions proclaim differing ideas. Some are wrong and some are true. Disagreement on fundamental issues such as the deity of Christ are realities in religious discourse. Therefore, anti-vilification laws are inappropriate instruments to attempt to regulate this field of human activity and life. Obviously new religious vilification provisions will in fact be introduced despite our submission, but given that we did not support the introduction of such laws on even a basic level, we also would not support the lowering of the bar set for religious vilification by these new provisions.

- In 2019 the ACL also made this submission to a Victorian Inquiry into Anti-Vilification Protections. While tailored to the terms of the relevant Victorian bill being considered, our submission also discussed some of our general concerns relating to anti-vilification provisions. For example:[49]

    - Freedom of speech and freedom of the press has enjoyed long and special recognition in Australia. These freedoms have often been taken for granted and are woven into the fabric of our common law system. This is because our democracy is built upon the foundations of free and open exchange of ideas in the public square. This exchange serves the important purpose of testing and refining ideas and arguments, so that the best of these and the truth may prevail in developing policy that will benefit all Australians. Anti-vilification laws do not create, nor do they encourage, an environment where speech is met with speech. Rather than engage with a bad or offensive idea and show that it is false, such laws encourage a stifling of debate altogether.

    - As such, anti-vilification laws are a direct threat to freedom of speech and can restrict important freedoms, including people's ability to speak freely and publicly criticise someone's point of view. If people think that their public speech on unpopular issues or views is liable to be prosecuted under anti-vilification legislation, they will most likely 'self-censor'. Rather than benefit society, this can deepen prejudice and ignorance. The potential for 'punishment through process' is enough to make people think twice before speaking their mind honestly. In short, these kinds of laws create a chilling effect on free speech. They do not encourage healthy democratic debate.

    - There is a clear difference between the incitement of hatred towards others, and engaging in conduct that is likely to invite severe ridicule of someone. This is an important distinction if someone is advocating a position or view which in truth may be incorrect or detrimental to

[49] See the submission itself and its footnotes for further details and supporting references.

society and should be able to be openly and publicly debated. When the bar for vilification is set too low, legislative provisions can even incriminate people who unintentionally cause offence to others.

- Vilification provisions leave the interpretation of whether actions meet legislative thresholds to a court. This creates uncertainty for people, never knowing for sure if what they are about to say or do will breach these provisions. When vilification provisions are wide-reaching, they can in fact be impossible to implement without embarking on substantial litigation.

- In 2019 the ACL also made this submission to the Australian Law Reform Commission's 'Freedoms Inquiry'. Among other things, the section regarding anti-vilification laws[50] explained that, in our view:[51]

  - Free and open debate is essential in a democratic society. In a diverse multicultural society, there is going to be disagreement on controversial issues, and people will take offence at the opinions of others. But whether the disagreement is about religion, politics, ethnicity, or anything else, it is essential that the law protects the rights of people to hold their opinions without interference.

  - While vilification legislation is intended to promote tolerance and social cohesion, its effect can be the very opposite. Courts and tribunals may be dragged into great political controversies through such laws.

  - Anti-vilification laws present a significant threat to religious freedom and freedom of thought conscience and expression generally in Australia. Too often there are inadequate protections such as exemptions for religious organisations and individuals. Religious leaders and laity should be free to express their doctrines and their comparative view of other doctrines. We should not resolve differences about religious views in our community with lawsuits. In this way, vilification laws pose a danger to the future of multiculturalism. They cause collateral damage to religious freedom, given their chilling effect on legitimate religious activity even where the outcome of a complaint is to declare the religious expression to have been lawful. The punishment lies not in the penalties but in the necessity to defend against claims of a breach. The prospect of a costly litigation against a claim can have a more crippling effect than the law itself, even when litigation would fail because the act was lawful. Vilification laws threaten free and open debate on religion, and also have the potential to scare people into remaining silent rather than risk a lawsuit. The classic example of this is *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc* [2006] VSCA 284 (14 December 2006). The case was brought by activists, the decision that there was vilification or the like was overturned on appeal, but Catch the Fire Ministries suffered massive inconvenience and incurred significant legal costs.

  - Another source of collateral damage is 'folklaw', what people believe the law to be, even wrongly. Highly publicised cases may distort the law as it is written and interpreted by courts. This is an additional stifling effect on free speech in public discourse and extends the unintended effects of the law even further. A similar effect occurs when organisations employ 'risk-averse management', interpreting narrowly drafted laws much more widely to avoid going anywhere near the boundary. This may constrain speech far beyond the original intention of the law.

  - Article 20 of the ICCPR forbids "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence". Article 19 also establishes a right

[50] See page 17 onwards of the submission.
[51] See the submission itself and its footnotes for further details and supporting references.

to freedom of expression, but this right is not absolute. Section 19(3) clarifies that it carries "special duties and responsibilities", and states that it may be subject to certain restrictions, but only those necessary for respecting the rights and reputations of others or for the protection of national security, public order, or public health or morals. Notably, there is no right not to be offended by others. Unless speech or conduct "constitutes incitement to discrimination, hostility or violence", it does not fall within the scope of Article 20. And unless necessary to curtail speech for the protection of the rights of others or national security, doing so contravenes Article 19 and undermines one of the most basic human freedoms. Anti-vilification law that goes beyond the ICCPR standard of "incitement" is in danger of overreaching its purpose, with perspective lost in the pursuit of ideologically driven goals. Article 20, coming directly after Article 19, must be understood to be a narrow restriction on a fundamental freedom.

While this TOR is not apparently intended to consider the utility of anti-vilification provisions generally, only whether the existing vilification provisions in NSW are adequate, the above points are still relevant in this context. They help to explain why we consider that any vilification provisions which do exist are more than adequate and should set a high bar for successful claims. As we do not support anti-vilification provisions generally, we would not support any amendments to lower the existing tests and thresholds in NSW.

We also note that there is an important tension at play between anti-vilification laws and freedom of political communication. In particular, the High Court has inferred a freedom of political communication from the Constitution.[52] This limits the power of parliaments to impose burdens on freedom of communication on government and political matters.[53] The High Court has recognised that the implied freedom can be limited, or burdened, but only by laws that are reasonably appropriate and adapted to serving a legitimate end in a manner which is compatible with Australia's system of representative and responsible government.[54] Not every object or end pursued by a law will justify burdening the freedom of political communication.[55] Obviously, anti-vilification laws are one type of law that may restrict the implied freedom, and there is a need to ensure that any changes to such laws in NSW do not inappropriately do so. Any changes to NSW anti-vilification laws which lower the bar for vilification claims may risk inappropriate encroachment on the implied freedom of political communication.

As French CJ said in *Monis*, a reasonable person would be aware that political communications in Australia are robust - some are strident, insulting and offensive. Further, "unreasonable, strident, hurtful and highly offensive" communications fall with the range of robust debate. Also communications which are likely or are calculated to incite significant anger, outrage, resentment, hatred or disgust - i.e. Australia's military involvement in military conflict.[56] The current proposals fly in the face of this reasoning.

6. <u>TOR 6: The adequacy of the protections against sexual harassment and whether the Act should cover harassment based on other protected attributes</u>

<u>ACL submission</u>: The existing protections against sexual harassment are adequate.

Part 2A of the Act prohibits sexual harassment. It contains provisions regarding the sexual harassment of employees, commission agents, contract workers, partners, etc. as well as regarding sexual harassment by members of qualifying bodies, in employment agencies, at educational institutions, in the provision of

[52] See public sector guidance sheet by the Attorney-General's Department on the right to freedom of opinion and expression: This link.
[53] See *Monis v The Queen* [2013] HCA 4 (27 February 2013) at [2] per French CJ at this link (***Monis***).
[54] See public sector guidance sheet by the Attorney-General's Department on the Right to freedom of opinion and expression: This link. See also *Monis v The Queen* [2013] HCA 4 (27 February 2013), including at [2] per French CJ at this link.
[55] See *Monis v The Queen* [2013] HCA 4 (27 February 2013) at [126] per Hayne J at this link.
[56] At [66]-[67].

goods and services, in the provision of accommodation, in the course of land dealings, in respect of sporting activities, and in respect of State laws and programs.[57]

In our view, the protections against sexual harassment already clearly cover a very wide range of contexts. We consider that the existing protections against sexual harassment are therefore adequate. There is no evident need for the Act to cover harassment based on other protected attributes.

7. TOR 7: Whether the Act should include positive obligations to prevent harassment, discrimination and vilification, and to make reasonable adjustments to promote full and equal participation in public life

***ACL submission*: The Act should not include positive obligations to prevent harassment, discrimination and vilification, or to make reasonable adjustments to promote full and equal participation in public life. This would place an unreasonable burden on religious and not-for-profit organisations in particular, whose very purposes would be frustrated by such obligations.**

The inclusion of positive obligations in the Act would require organisations to take proactive steps to prevent harassment, discrimination and vilification, and/or to make reasonable adjustments to promote full and equal participation in public life within their organisations.

This TOR does not clarify what specific entities or organisations such obligations would apply to, but seems to leave open the possibility that schools, charities, welfare and other organisations, bodies or associations that operate out of a religious mission or with not-for-profit purposes could be affected.

If a religious school, a religious charity or even a church is required to take positive action to eradicate harassment, discrimination and vilification, or to make the specified adjustments, this could force these religious organisations to compromise on their deeply held religious convictions.

The suggestion of positive obligations also places an unreasonable burden on religious organisations that would stretch their capacity beyond their resources and mission:

- religious charities and welfare organisations have legitimate charitable purposes, such as advancing religion and advancing health and changes to law that will be frustrated by positive obligations to prevent harassment, discrimination and vilification; and
- religious charities are predominantly not-for-profit and do not have the resources to focus on taking extra steps to do so.

For such reasons, the positive obligations suggested by this TOR should not be included in the Act. In our view, it would be both too onerous and improper to do so. It would unfairly prejudice and unreasonably burden religious and not-for-profit organisations, bodies and associations in particular. They would be taken away from their core mission, have their resources unduly stretched and in some cases may be forced to compromise on their deeply-held convictions.

The NSW Act currently sets out some general exceptions, really balancing clauses, to the Act regarding (among others) charities, religious bodies, voluntary bodies and adoption services (including faith-based organisations).[58] As discussed above, there are also some balancing clauses regarding private educational authorities. Any positive obligations which are ultimately included in the Act would have to be accompanied by protections for such entities, including so that religious bodies are not forced to act contrary to their religious convictions and to the destruction of their rights under Article 18 of the ICCPR.

8. TOR 8: Exceptions, special measures and exemption processes

[57] See Part 2A of the Act.
[58] See Part 6 of the Act.

***ACL submission**: The NSW Act currently seeks to balance non-discrimination with other rights, including freedom of religion, through the inclusion of general exceptions. However, this does not appropriately reflect the equal status in international law of freedom of religion to non-discrimination. The Commission should consider the insertion of an express clause in the NSW Act (such as an objects, purposes or interpretive clause) which reflects the equal status in international law of freedom of religion.*

The ICCPR, to which Australia is a party, codifies relevant human rights standards.[59] It aims to ensure the protection of a wide range of civil and political rights. This includes freedom from discrimination (such as under Article 26), but also other rights which potentially exist in tension with it, including the right to freedom of thought, conscience and religion (under Article 18).[60]

Notably, these rights are intended to be indivisible, and one right does not take precedence over another.

The Preamble to the ICCPR itself refers to the equality of the human rights which it recognises:

> *"**Preamble***
>
> *The States Parties to the present Covenant,*
>
> *Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, **recognition of the i**nherent dignity and of the **equal and inalienable rights** of all members of the human family is the foundation of freedom, justice and peace in the world,*
>
> *Recognizing that these rights derive from the inherent dignity of the human person,*
>
> *Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby **everyone may enjoy his civil and political rights**, as well as his economic, social and cultural rights,*
>
> *Considering the obligation of States under the Charter of the United Nations to promote **universal respect for, and observance of, human rights and freedoms**,*
>
> *Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the **promotion and observance of the rights recognized in the present Covenant**,:*
> *…"*

The Ruddock Review report also clearly discussed that there should not be any "hierarchy of rights":[61]

> *"1.36 Secondly, freedom of religion sits alongside and interacts with the broad suite of human rights found in the international instruments to which Australia is committed. These include well known civil and political rights, such as freedom of expression, non-discrimination, freedom of association, and protections against torture and slavery. They also include social and cultural rights, including, for example, the right to found a family and the right of every child to an education.*
>
> *1.37 **Importantly, there is no hierarchy of rights: one right does not take precedence over another. Rights, in this sense, are indivisible.** This understanding was absent from some of the submissions and representations the Panel received. **Australia does not get to choose, for example, between protecting religious freedom and providing for equality before the law. It must do both***

[59] See information published by the Attorney-General's Department: This link.
[60] United Nations Office of the High Commissioner for Human Rights: This link.
[61] https://www.ag.gov.au/sites/default/files/2020-03/religious-freedom-review-expert-panel-report-2018.pdf at pages 13 and 14.

> ***under its international obligations.*** *Sometimes this will mean one right will 'give way' to another, but this must occur within the framework provided by international law."*

In fact, the Ruddock Review also expressly recommended that anti-discrimination legislation in particular reflect the equal status in international law of all human rights (including freedom of religion):[62]

> *"Recommendation 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****."*

Other commentary also supports that rights to religious freedom should be regarded as just as legitimate as other human rights, and not automatically subordinated to them, in the area of discrimination law:[63]

> *"While the necessary "balancing" of interests may sometimes involve over-ruling desires for action based on religion,* ***it is important to keep in mind that human rights are not generally arranged in a hierarchy****. It is not the case that some rights will always "trump" others, no matter how minor the breach of one and how significant the breach of the other. Or at least, that is the theory. The danger is that, in a "secular" Western society where religion is often perceived as archaic and anachronistic, freedom of religion rights will be restrictively construed, ignored or reduced to a merely formal principle and automatically subordinated to other rights and interests.*
>
> ***This danger is particularly apparent in circumstances where a freedom of religion right*** *is based on a conscientiously held religious belief that* ***runs counter to*** *what is commonly regarded as a "moral norm" in secular society, such as in the area of* ***discrimination law****.* ***In this delicate and often controversial area, it is submitted that rights to religious freedom should be regarded as just as legitimate as other human rights, and that rights to religious freedom should not automatically be subordinated to other rights and interests****…"*

Clearly, the concept of human rights under the ICCPR is intended to be unified, and non-discrimination should not be pre-eminent among human rights.

However, despite this framework, human rights law in Australia has evidently focussed on the right of non-discrimination. Anti-discrimination statutes are ubiquitous in all Australian jurisdictions, including NSW. The ICCPR covenant against non-discrimination is essentially the only part of the ICCPR which has been substantially legislated, contributing to an imbalance in Australian law.

Where several ICCPR rights are at stake, some "balancing process" is required, to attempt to the maximum extent possible to take account of each, and not to ignore one or the other.[64] Currently, anti-discrimination laws in Australia seek to balance non-discrimination with other rights through balancing clauses styled as exemptions or exceptions. This includes the NSW Act, which, for example, provides a range of general exceptions to the Act including regarding religious bodies and some faith-based organisations.[65] The NSW Act clearly seeks to balance non-discrimination with other rights, including freedom of religion, through the inclusion of these exceptions.

While such clauses are currently an important part of the current protection of religious freedom in Australia, Australia should have a more wide-ranging protection of religious freedom. While that can really

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[62] See Recommendation 3 on pages 1 and 47 of the Ruddock Review report.

[63] See 'Freedom of religion and balancing clauses in discrimination law' by Neil Foster in 2015: This link at pages 2 to 4. See also commentary about the paper at this link.

[64] See 'Protecting Religious Freedom in Australia Through Legislative Balancing Clauses' by Neil Foster in 2017: This link at page 3. See also commentary about the paper at this link.

[65] See Part 6 of the Act, particularly sections 56 and 59A.

only be given by Federal legislation based on Article 18 of the ICCPR, it is still important for all legislators to give a high priority to ensuring an appropriate balance of the human rights involved.[66]

As such, the attempt to protect religious freedom through the inclusion of balancing clauses in the form of exceptions and exemptions in anti-discrimination law has attracted much criticism.

Ultimately, as we have said, it is not helpful to speak of religious freedom rights just in terms of 'exemptions' or 'exceptions', as both rights are equal and human rights should be reflected as a whole. Such clauses should be properly considered as 'balancing clauses' which attempt to balance the right of religious belief or activity with the right of non-discrimination. As one commentary explains it:[67]

> *"The nature of any human rights system, then, is that it must allow the appropriate "balancing" of rights which may occasionally come into conflict.* ***But there is under international law no "hierarchy" of the fundamental rights protected in the ICCPR, all are equal, including both the right to free exercise of religion, and the right not to be unlawfully discriminated against. So it is not helpful to speak of provisions designed to balance these rights as "exemptions" or "exceptions"****. As I go on to say in the paper I mentioned above:*
>
>> *Rather than seeing these "defences" as concessions "wrung out" of a reluctant legislature by some powerful lobby group, as they are sometimes painted in the press,* ***it seems to be a better analysis to see the limits drawn around discrimination laws as an integral part of a structure designed to reflect the relevant human rights as a whole****."*

The protection of religious freedoms by way of balancing clause 'exemptions' to discrimination laws is in fact highly unsatisfactory, as it seems to signal that they should be limited and dispensed with as soon as possible.[68] Dealing with this co-equal right by way of an exemption means that it is necessarily subordinated to the right to non-discrimination. Effectively, the current approach of protecting religious freedom through narrow exemptions improperly burdens religious freedom by making it subservient to freedom from discrimination. Creating a priority of rights gives priority to one group of Australians over another. This reflects a hierarchical view of rights in which the right of non-discrimination sits at the top of the pyramid. In practice, this skews human rights law away from the unified concept of human rights in the ICCPR.

This is also an ineffective means of protecting these rights. For example, the Ruddock Review report discussed the limitations of preserving religious freedom through exceptions in anti-discrimination law:[69]

> *"1.109* ***Numerous submissions to the Panel, representing a range of views, argued that the current framework for protecting freedom of religion in Australia is ineffective. These submissions pointed to factors such as:***
>
> - *the absence of a positive right to freedom of religion in Australian law*
> - *the limited scope of constitutional protections*
> - *the framing and limited role of human rights charters in Victoria and the Australian Capital Territory and their absence in other jurisdictions*
> - *the reliance on the absence of contrary laws to protect freedom of religion*
> - *inconsistent approaches across different jurisdictions, and*
> - ***the limitations of preserving religious freedom through exceptions in antidiscrimination law.***

[66] See 'Protecting Religious Freedom in Australia Through Legislative Balancing Clauses' by Neil Foster in 2017: This link at page 3. See also commentary about the paper at this link.
[67] See this publication by Neil Foster in 2016: This link.
[68] See commentary by Neil Foster in 2018 here: This link.
[69] See pages 39 and 40 of the Ruddock Review report.

> *1.110 Many submissions, particularly by those representing a faith perspective, argued that **freedom of religion was a 'poor cousin' to other human rights such as the right to freedom from discrimination**. Elsewhere, freedom of religion has been described as a 'forgotten freedom'.*
>
> *1.111 **The Panel also heard that Australia's 'piecemeal' approach to implementing our human rights obligations generally makes the balancing or reconciling of those rights difficult when 'friction' arises between rights."***

As such, the Expert Panel encouraged all Australian governments to carefully consider the appropriateness of existing exceptions in discrimination laws with respect to religious freedom:[70]

> *"1.154 However, **the Panel encourages all Australian governments to give careful consideration to the appropriateness, and drafting, of existing exceptions in discrimination laws with respect to religious freedom**. The Panel also **notes the importance of ensuring that the right to religious freedom is given appropriate weight in situations where it is in tension with other public policy considerations**, including other human rights."*

Ultimately, it considered that parliaments should consider protecting freedom of religion by the inclusion of express provisions in laws which impact on the right:[71]

> *"1.150 **The Panel is also of the view that, in drafting laws that do have an impact on rights such as freedom of religion, parliaments should consider the inclusion of express provisions that require the interpretation of laws consistently with those rights** so far as it is possible to do so in a way that gives effect to the purpose of the law.*
>
> *1.151 This could be achieved in a variety of ways. One approach is through the use of objects clauses. **Many discrimination laws refer to their purpose or object as being the promotion of the right to equality or equality of opportunity, but make no express reference to other human rights, such as the right to freedom of religion …***
>
> *1.152 **Alternatively, or in addition, appropriate interpretation clauses could be inserted** in the relevant legislation or in legislation of general application **to ensure that such laws are interpreted in a manner consistent with the equal status of all human rights**."*

In fact, Recommendation 3 was expressly tailored to this outcome in anti-discrimination legislation:[72]

> *"Recommendation 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**."*

In our view, such views are well warranted. The use of balancing clauses by way of exemptions and exceptions in anti-discrimination law does not appropriately reflect the equal status in international law of freedom of religion. It does not positively recognise this fundamental human right, nor reflect the framework in the ICCPR which places religious freedoms on the same level as other human rights rather than treating it as an exemption to other human rights. Ultimately, the use of mere exceptions to seek to balance this right against non-discrimination is a problematic mechanism, as the two rights should exist on equal footing.

[70] See page 46 of the Ruddock Review report.
[71] See pages 45 and 46 of the Ruddock Review report.
[72] See Recommendation 3 on pages 1 and 47 of the Ruddock Review report.

While there is an obvious tension between these rights which necessitates a 'balancing process' of some kind, anti-discrimination laws should contain clauses which reflect a more proper balancing of these rights, and reflect that human rights are a whole rather than elevating non-discrimination over other rights.

In line with the recommendations of the Ruddock Review, the Commission should consider the insertion of an express clause in the NSW Act (such as an objects, purposes or interpretive clause) which reflects the equal status in international law of freedom of religion to non-discrimination. For example, there could be an overriding clause that the Act is to be interpreted consistently with the rights to freedom of thought, conscience and religion which are guaranteed by Article 18 of the ICCPR. Essentially, a way forward is for the Act to be amended to make it clear that both rights are treated equally. While NSW legislators cannot resolve the need to better protect religious freedoms at a Federal level, it is able to consider amendments to NSW anti-discrimination laws which reflects a better balancing of the relevant human rights at stake.

9. TOR 9: The adequacy and accessibility of complaints procedures and remedies

***ACL submission*: The existing complaints procedures under the Act clearly require reform, including regarding the powers and functions of the ADB and its President. The current system is essentially too accessible to complainants with activist or political agendas. Several changes are needed to prescribe a more robust complaint handling procedure, improve checks and balances and better prevent the bringing of complaints which are frivolous, vexatious, misconceived or lacking in substance.**

As the Commission may be aware, in 2020 a NSW Legislative Council committee conducted an Inquiry into an *Anti-Discrimination Amendment (Complaint Handling) Bill 2020* (NSW) (**Bill**) which then proposed to amend the complaints handling provisions of the Act.

The ACL made this submission to the Inquiry generally agreeing with the intended purpose of the Bill, i.e. to provide better regulation of the Anti-Discrimination system in NSW and to put a stop to the proliferation of worthless claims that clog up the capacity of the ADB and NSW Civil and Administrative Tribunal (**NCAT**).

In our view, the issues which we discussed in that submission are still relevant today. As our submission explained, reform of the ADB complaint handling process is long overdue. A whole discrimination industry has arisen which clogs up the NSW legal system and utilises the ADB for the purpose of suppressing freedom of speech and to promote activist causes and political campaigns. For far too long, vexatious claims have been allowed to be brought before the ADB which cause undue costs, stress, and loss to undeserving everyday Australians. There is also a genuinely held concern by many of ACL's supporters that it is getting harder to publicly express one's faith. Until NSW anti-discrimination law is amended to 'shut the gate' on vexatious complaints, innocent Australians will be pursued by activists with a political agenda. Because lodging a formal complaint and undertaking a conciliation conference at the ADB is free[73] and a subsequent referral to the NCAT is also free,[74] the potential for abuse of the process is real. There are many examples of respondents who have unjustly incurred significant costs defending themselves against vexatious complaints. Activists can use the process to persecute or punish people simply for having different religious or political convictions. Not only that, but the ADB is able to provide assistance to claimants (but not to respondents) to prosecute their claims including financial and legal advice[75] on their claims. It is obvious to any keen observer that there needs appropriate checks and balances to prevent the acceptance of complaints that are frivolous, vexatious, misconceived or lacking in substance. The financial costs of this vexatious litigation enabled by the current arrangements are not only borne by the respondents but also by the taxpayer who must foot the bill for the draining of important legal resources.

[73] See this link and https://antidiscrimination.nsw.gov.au/anti-discrimination-nsw/need-help/frequently-asked-questions.html.
[74] See https://ncat.nsw.gov.au/forms-and-fees/fees-at-ncat.html.
[75] https://antidiscrimination.nsw.gov.au/anti-discrimination-nsw/need-help/are-you-seeking-legal-advice.html.

The changes to the Act which we advocated for in that submission are also still warranted. In particular, the ACL supported some key proposed changes of the Bill which are still relevant today, including:

- **Claims against non-residents:** The prohibition of claims against non-residents of NSW. As our submission discussed, the Act has clearly been used to pursue residents out of State. Not only is this unjust, but the ensuing explosion of case law around those claims has cost the NSW taxpayer enormous sums of dollars for absolutely no benefit to the State.

- **Cognitive impairment:** The requirement for the President to decline a complaint where the respondent has a cognitive impairment and it is reasonably expected that the cognitive impairment was a significant contributing factor to the conduct that is the subject of the complaint. As our submission discussed, this may prevent the targeting of complaints against those with mental impairment, something which has occurred in the past.

- **Hopeless claims:** The requirement for the ADB to decline hopeless claims. As our submission discussed, the ADB has been an ineffective gatekeeper of claims and has allowed many claims that are clearly worthless. The Bill effectively required the ADB to decline claims that clearly had no merit, and which were being pursued for purposes other than protection of legitimate interests.

- **Reform regarding section 93A:** Notably, we did *not* support the Bill's proposed removal of section 93A of the Act allowing complainants to require the ADB President to refer a matter that has been declined to the NCAT, as there needs to be a balance between the desire to prevent abuse of the claim system and the rights of access to justice and to review of an administrator's decisions by the Courts. However, we expressed concern about how this mechanism can be weaponised. As such, we did agree that section 93A of the Act needs change to disincentivise worthless claims being referred to NCAT by complainants. As such, we suggested that s93A be retained but:
  - To allow a respondent to recover legal costs (on an indemnity basis) if the NCAT confirms a decision of the President under sections 87B(4) or 92 of the Act that a claim is frivolous, vexatious, misconceived or lacking in substance.
  - Provision should also be made to require a complainant to provide security for costs to the NCAT where requiring referral of a claim to NCAT where the ADB has determined that it is frivolous, vexatious, misconceived or lacking in substance.

  In our view, with a requirement to provide security and the threat of becoming liable for indemnity costs, vexatious claimants would be cautious about referring claims that have no substance, and claimants who consider they have legitimate claims that have merit can require those matters to be heard by NCAT. Such a provision would effectively stop worthless claims being advanced.

Our submission also explained that other changes were also needed to prescribe a more robust complaint handling procedure for the ADB. In particular, we suggested:

- **'Public Act' definition:** Amending the definition of 'public act' in respect of any vilification under the Act to clarify that such acts must originate in NSW or be carried out in NSW to be public acts that can be the subject of a vilification complaint. This would put a stop to activists scouring remote corners of the internet to find offensive comments from people in distant corners of Australia to take action on.

- **Higher threshold for standing:** Requiring a higher threshold of standing for applicants to make claims – they must be directly affected by alleged conduct. The Act should require a higher threshold of standing for complainants. Currently, virtually anyone can make a complaint under the Act no matter how remote they are from the respondent or how distant they are from actual threat or harm by the conduct of the complainant. Especially for vilification actions, complainants should be required to

include in their complaint evidence that the conduct of the respondent has a direct effect on them individually or as a member of a defined group (not merely as persons who merely have a particular attribute such as homosexuality, transgenderism or AIDS/HIV status). Many other parties have been seeking a raising of the threshold for claimants to be able to take claims for many years.

- **Lodgement fee:** Requiring a complaint lodgement fee to be paid by complainants which they lose if the complaint is decided not to have substance. Complainants should be required to pay a refundable lodgement fee for complaints, with suitable provisions for waiver that mirror those used in other Courts for lodgement fees. This will stop multiple complaints, encourage complainants to bundle their own complaints and allow the ADB to recoup the administrative costs of processing worthless claims.

- **Higher standard for complaints:** Requiring complaints to contain sufficient information about the conduct, alleged breach and damage suffered by the complainant otherwise they are not accepted. Currently, complainants to the ADB can lodge complaints that are ambiguous, poorly constructed, vague and unclear and containing little detail of who is being complained about, the details of the alleged conduct and reasons why that conduct breaches the Act. The ADB should be given the power to require complainants to lodge complaints to demonstrate conduct that, if true, could constitute a breach of the Act with sufficient details of the allegations including how the complainant is directly affected. Any complaints which do not meet that threshold should not be accepted or processed.

- **Notice to respondents:** Requiring the ADB to provide timely notice to respondents of complaints received. The Act should require the ADB to provide timely notice to respondents of complaints received and should give respondents the right to provide the ADB with their views about why the complaint should be declined under section 89B of the Act. This will give the ADB the ability to have at hand the best information on which to make its initial assessment of the complaint and maximise its ability to identify legitimate claims at an early stage and to weed out worthless and vexatious claims.

- **Respondent rights:** Providing a process for respondents to make early application to the ADB for a complaint to be declined for lacking substance or for being vexatious or malicious. Not only should respondents receive notice of complaints but the Act should also provide a process for respondents to apply for the complaint to be terminated for lacking substance and to provide relevant information to the ADB at first instance.

- **Mandatory bundling of actions:** Requiring the ADB to bundle complaints into one proceeding where the complainant lodges multiple complaints against a single respondent, and to decline claims which are substantive duplications of earlier claims. The ADB should be required to rationalise complaints where there are multiple identical complaints. The ADB should be required to bundle complaints into one proceeding where the complainant lodges multiple complaints against a single respondent and the ADB should also be given the power to dismiss complaints where multiple subsequent complaints are lodged that are so similar in allegations to an earlier complaint that another complaint will add no value. This will stop unnecessary reproduction and the current practice of undue pressure being placed on respondents by ambushing them with a huge volume of similar complaints, each of which are duly processed and sent out by the ADB without rationalisation. This needs to stop.

- **Limitation of assistance:** Limiting the assistance that the ADB can give to a complainant so that prolific complainants are not able to receive assistance. The Act gives the ADB broad powers to assist complainants. ACL sees some value in providing this assistance to complainants with single complaints about substantive wrongs and where the complainant has limited assistance and limited financial capacity. However, the Act should limit assistance so that it cannot be given to a serial complainant.

There should be sensible limitations on the provision of assistance to prevent the practice of the ADB subsidising and equipping activist campaigns with taxpayer funds.

- **Equal assistance:** Enabling the ADB to provide equal assistance to respondents as to complainants where circumstances allow. Currently, the ADB does not have the power to assist respondents. In many discrimination cases, this may be appropriate. However, ACL is aware of activist complainants using complaints as a way to target vulnerable Australians and to attempt to extort settlements of vexatious claims. ACL is aware of many Australians who have felt intimidated and coerced towards settlements when faced with potential claims under the Act. The Act should be amended to allow the ADB to provide assistance to both respondents and complainants. It should require the ADB to provide equal assistance to both parties, rather than the current system, which is very one sided.

- **Additional grounds for termination:** Requiring the ADB to terminate a complaint where a claim otherwise has no reasonable prospect of success or if it is satisfied that further inquiry into the matter is not warranted having regard to all of the circumstances of the case. Sections 89B(2) and 92(1) of the Act should contain additional amendments requiring the ADB to terminate a complaint where:
  - the ADB considers that the claim has no reasonable prospect of success; or
  - where the ADB is satisfied that further inquiry into the matter is not warranted having regard to all of the circumstances of the case.

  The addition of these powers to dismiss complaints would allow the President of the ADB to decline a complaint where it doesn't fit into one of the narrow categories already in these sections but where there are good reasons for the complaint not to be progressed.

While this is a long list of suggested changes, each of them is modest in nature and merely intended to prescribe a more robust complaint-handling procedure under the Act. They are not designed to prevent the bringing of legitimate complaints under the Act. They are simply targeted at improving checks and balances, better preventing the bringing of complaints that the Act was never intended to facilitate, such as those which are frivolous, vexatious, misconceived or lacking in substance, and preventing the system being too accessible to complainants with activist or political agendas. Essentially, they are intended to make the ADB a more effective gatekeeper of potential claims and better balance the need to prevent abuse of the claim system with the rights of access to justice. We commend their consideration to the Commission.

10. TOR 10: The powers and functions of the Anti-Discrimination Board of NSW and its President, including potential mechanisms to address systemic discrimination

***ACL submission**: As discussed above, we recommend reform regarding the powers and functions of the ADB and its President. While we do not consider that there is any need for new mechanisms to address systemic discrimination, there is evidently a need to improve the existing complaint handling procedures.*

As discussed above, we recommend a range of reform regarding the existing complaints procedures under the Act, including regarding the powers and functions of the ADB and its President.

While we do not consider that there is any need for new mechanisms to address systemic discrimination, there is evidently a need to improve the robustness of the existing complaint handling procedures.

11. TOR 11: The protections, processes and enforcement mechanisms that exist in other Australian and international anti-discrimination and human rights laws, and other NSW laws

***ACL submission**: As discussed above, the Act should prohibit discrimination on the basis of religious attributes, consistent with the approach in almost every other Australian jurisdiction.*

As discussed above, the Act should be amended to prohibit discrimination on the basis of religious attributes – i.e. religious belief/affiliation/conviction and religious activity/conduct. This would be consistent with the approach in almost every other Australian jurisdiction.

12. TOR 12: The interaction between the Act and Commonwealth anti-discrimination laws

***ACL submission*: Commonwealth anti-discrimination laws should allow for as much flexibility for State and Territory laws to operate as possible.**

Some Commonwealth anti-discrimination laws expressly contain provisions which relate to the interaction between the NSW Act and those federal laws.

For example, the federal *Sex Discrimination Act 1984* (Cth) (**SDA**) expressly states that it is "not intended to exclude or limit the operation of a law of a State or Territory that is capable of operating concurrently with this Act", referring to a law of a State or Territory that deals with discrimination on the ground of sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding, family responsibilities, etc.[76]

In our view, Commonwealth anti-discrimination laws should allow for as much flexibility for State and Territory laws to operate as possible, including the NSW Act.

[76] See section 10 of the SDA, particularly subsections 2 and 3.