



29 September 2023

NSW Law Reform Commission  
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**Preliminary Submission**  
**NSW Law Reform Commission Review of Anti-Discrimination Act 1977 (NSW)**

Dear Commissioner,

Thank you for the invitation to offer a preliminary submission for the Commission's review of the Anti-Discrimination Act.

The Falun Dafa Association of Australia<sup>1</sup> is pleased to provide this response which identifies issues that should be addressed in the review for religion to become a specific ground for discrimination in the Act.

We understand the *Anti-Discrimination Amendment (Religious Vilification) Act 2023* will commence on 12 November 2023, which is a welcome amendment. However, we believe further amendment is required for effective protection from religious vilification in NSW.

## 1.0 Overview

Falun Dafa,<sup>2</sup> also called Falun Gong, is a traditional spiritual practice of cultivation in the Buddhist tradition. Over the past 24 years of the persecution of Falun Dafa in China we have highlighted the importance of the fundamental human right of freedom of religion.

While there is an obvious gap in New South Wales discrimination law, there is also widespread public support for extending protection for religious followers and organisations.

NSW and South Australia are currently the only jurisdictions that do not include religion as a ground for protection under discrimination laws.

The current *Anti-Discrimination Act 1977 (NSW)* includes many Grounds for discrimination, such as, Racial, Sexual Harassment, Sex Discrimination, Transgender, Marital or Domestic Status, Disability, Responsibility as a Carer, Homosexuality, Compulsory Retirement, Age, and HIV.

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<sup>1</sup> The Association is a charitable organisation which facilitates free classes to teach Falun Dafa meditation and exercises, organises public events, conferences, and advocacy work to governments, NGO's and media.

<sup>2</sup> Falun Dafa was introduced to the public in China in 1992 by Mr Li Hongzhi. Falun Dafa considers the principles of truthfulness, compassion, forbearance (Zhen 真, Shan 善, Ren 忍), are the essential law and characteristic of the universe, and the underlying principles of orthodox religions.

But not Religion.

The above Grounds are all important. They relate to the physical manifestation of being human, which of course has an associated mental aspect. Human beings also have a spiritual or “inner” dimension which is an important aspect of health and moral guidance at the individual and societal levels.

While laws can also be seen as a reflection of a society, religious belief should not be marginalised or excluded from protection under discrimination and vilification laws, just because secular society has had a change of focus and priorities over the past 40 or 50 years.

## **2.0 Importance of Freedom of Religion**

The relationship between earthly expression and the Creator, or anti-discrimination laws and respect for religious freedom, was addressed by Tim Wilson, Australian Human Rights Commissioner from 2014 to 2016. He noted in his speech, *The Forgotten Freedoms – Freedom of Religion*, at the Australian Catholic University in May 2014:

Religion is about everyone’s relationship to their creator. It is more than just earthly expression. It has the potential to be the expression of an individual’s purpose based on the relationship to their creator, their capacity to fulfil that purpose and the judgement that they may receive as a consequence of their actions, in a future life.

Anti-discrimination laws are regularly contentious when respecting religious freedom. Discrimination by government is a violation of equality before the law. Discrimination by other citizens can often be about exercising human rights.

Mr Wilson also explained the following four key points regarding human rights and discrimination.

Human rights are not the same as civil rights. Human rights are universal and exist from birth; civil rights are the gift of citizenship.

Human rights are not the same as social justice. Human rights are about uncompromisingly protecting the autonomy of the individual; social justice is broadly about advancing equity.

Human rights are not the same as anti-discrimination. Apart from equality before the law, human rights can actually be about exercising discrimination, such as free association; whereas anti-discrimination is about removing unjust prejudice.

Human rights are not about protecting groups of people. Universal human rights can only exist for individuals, by comparison group rights cannot be extended to everyone.

## **3.0 Terms of Reference**

We address the following review terms of reference (No. 5, 7, 8, 11, 12) as they relate to religion becoming a specific ground for discrimination in the Act.

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

The Act should be harmonised with the criminal law to include provisions to criminalise serious acts of vilification (on all grounds including on the grounds of religion), similar to s 25 of the *Racial and Religious Tolerance Act 2001* (RARTA).<sup>3</sup>

## **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**

Yes, it is recommended for the Act to impose positive obligations upon government, statutory bodies and corporations to implement policies to prevent harassment, discrimination and vilification. Where employees of such bodies and organisations engage in public conduct that may have a potential to breach laws against harassment, discrimination and vilification, there should be set guidelines or procedures to set out the steps to be undertaken to ensure that the public conduct shall not be in breach before it is permitted to be carried out.

## **8. exceptions, special measures and exemption processes**

The exceptions proposed in s 49ZE(2) of *Anti-Discrimination Amendment (Religious Vilification) Act 2023* are welcome to provide a balance between ensuring freedom of speech whilst protecting against vilifying conduct. However, we consider that to enhance the effectiveness of protecting persons against vilifying conduct, or religious discrimination, we believe the following provision from Part 2 of the *Racial and Religious Tolerance Act 2001*<sup>4</sup> (RARTA) Victoria, should be included in the current Act.

### **11 Exceptions—public conduct**

- (1) A person does not contravene section 7 or 8 if the person establishes that the person's conduct was engaged in reasonably and in good faith—
- (a) in the performance, exhibition or distribution of an artistic work; or
  - (b) in the course of any statement, publication, discussion or debate made or held, or any other conduct engaged in, for—
    - (i) any genuine academic, artistic, religious or scientific purpose; or
    - (ii) any purpose that is in the public interest; or
    - (c) in making or publishing a fair and accurate report of any event or matter of public Interest.

At (i) above the word “genuine”, and at (c) above the words “fair and accurate” should be inserted in the NSW Act to improve the clarity and intent of the listed exceptions.

## **11. the protections, processes and enforcement mechanisms that exist in other Australian and international anti-discrimination and human rights laws, and other NSW laws**

At present, there is no legislation at the federal level to prevent discriminatory or vilifying conduct on the grounds of religion.

As noted at Term of Reference No. 8 above, and as set out in the following section **4.0** Review of Anti-Discrimination Amendment (Religious Vilification) Act 2023, we consider that the review of the NSW Anti-Discrimination Act should incorporate the provisions of PART 2—Unlawful Conduct in the Victorian RARTA.

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<sup>3</sup> [https://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/vic/consol\\_act/rarta2001265/s25.html](https://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/vic/consol_act/rarta2001265/s25.html)

<sup>4</sup> <https://www.legislation.vic.gov.au/in-force/acts/racial-and-religious-tolerance-act-2001/011>

## 12. the interaction between the Act and Commonwealth anti-discrimination laws

We note that federal laws do not prohibit discrimination or vilification on the grounds of religion, except for a limited category of 'ethnic origin'.

While it would be helpful for Australians to have a more harmonised set of anti-discrimination laws, amendment of the current *Anti-Discrimination Act 1977 (NSW)* to include the ground of religion should proceed now for the benefit of NSW residents, rather than waiting for possible changes to federal anti-discrimination laws.

### 4.0 Review of Anti-Discrimination Amendment (Religious Vilification) Act 2023

The *Anti-Discrimination Amendment (Religious Vilification) Act 2023* is not as comprehensive as the related Victorian legislation i.e., sections under Part 2 of the Racial and Religious Tolerance Act 2001 (RARTA) Victoria.<sup>5</sup> We provide the following observations and comments related to the above Amendment, which were also submitted as feedback to the NSW Government Department of Communities and Justice in May 2023.

#### Part 4BA Religious vilification

##### 49ZD Definitions

We note that - **public act** includes - specific definitions at (a), (b), (c) that are connected by the word "and", which could indicate that a *public act* must satisfy all three criteria. If the word "or" replaced the word "and" it may indicate more clearly that any ONE of the public acts as separately described in (a), (b) or (c) would satisfy the definition of a *public act*, if indeed that is the intention?

We also note that the proposed wording of s 49ZD mirrors the wording of definition of a *public act* in s 20B of the NSW Anti-Discrimination Act 1977, which also uses the word "and" to connect subsections (a), (b), (c). If the intent of the wording of the draft amendments to the Bill could be clarified, we suggest it is useful to do so.

##### 49ZE Religious vilification unlawful

Section 49ZE effectively mirrors the wording of **Racial vilification unlawful** in s 20C of the NSW Anti-Discrimination Act 1977. While this may appear to be a straightforward harmonisation of legislative wording, or even a form of non-discriminatory phrasing, it may also overlook important issues relevant to successful protection from religious and/or racial vilification.

For example, the proposed section 49ZE does not contain the following provisions contained in Part 2 of the Racial and Religious Tolerance Act 2001 ("RARTA") Victoria.<sup>6</sup>

#### **RARTA Section 8 Religious vilification unlawful**

- (1) Note "Engage in conduct" includes use of the internet or e-mail to publish or transmit statements or other material.
- (2) For the purposes of subsection (1), conduct -

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<sup>5</sup> <https://www.legislation.vic.gov.au/in-force/acts/racial-and-religious-tolerance-act-2001/011>

<sup>6</sup> Ibid

- (a) may be constituted by a single occasion or by a number of occasions over a period of time; and
- (b) may occur in or outside Victoria.

We find 2(b) above is important in this current age of the internet, where broadcasts and publications may originate from anywhere in the world but still have the capacity to vilify the people of the NSW State that the legislation seeks to protect.

### **RARTA Section 9 Motive and dominant ground irrelevant**

- (1) In determining whether a person has contravened section 7 or 8, the person's motive in engaging in any conduct is irrelevant.
- (2) In determining whether a person has contravened section 7 or 8, it is irrelevant whether or not the race or religious belief or activity of another person or class of persons is the only or dominant ground for the conduct, so long as it is a substantial ground.

### **RARTA Section 10 Incorrect assumption as to race or religious belief or activity**

In determining whether a person has contravened section 7 or 8, it is irrelevant whether or not the person made an assumption about the race or religious belief or activity of another person or class of persons that was incorrect at the time that the contravention is alleged to have taken place.

We find it is very important to include sections like s 9 and s 10 above because religions/religious beliefs are often complex and diverse and some lesser-known religions such as Falun Dafa may be misunderstood, or be victims of campaigns of intentional misinformation.

If a person holds an incorrect assumption about a religious belief or activity and on that basis incites hatred or other intense negative emotional response against a person or group of persons, it should not be a lawful excuse.

Further, a provision similar to s 9 RARTA is important to make it clear that it is not necessary for victims of religious (or racial) vilification to show that the perpetrator had a motive for so acting, as religious and racial vilification should not be tolerated and should be condemned outright, irrespective of the perpetrator's "motive" or "justification" for so acting.

## **5.0 Concluding Remarks**

The *Anti-Discrimination Amendment (Religious Vilification) Act 2023* is a step in the right direction, however more measures are required e.g., positive obligations to provide more protection against discriminatory or vilifying conduct.

The cases which have been brought under current State and Territory laws including the RARTA, and the *Racial Discrimination Act 1975* (at the Commonwealth level) have shown that it is very difficult for complainants to succeed in such applications due to complexities of the legislation, difficulties with interpretation, and due to the many hoops/ hurdles that the complainant or Applicant must surpass to succeed. First, they must prove all the elements of the sections: "public act"; "incitement"; "hatred or other relevant emotion"; "on the grounds of"; "religion" etc. Even if they can successfully prove all these criteria, the Respondent may still be eligible to claim an exception or exemption and the complainant or Applicant must then negate or disprove the Respondent's exception or exemption before they can ultimately succeed.

In essence, the review of the NSW Anti-Discrimination Act should incorporate amendments that affirm freedom of religion as a protected human right. Protection of religious followers and organisations from discrimination and vilification does not have to mean unjust prejudice towards those who oppose religious belief or religious teachings.

We trust this preliminary submission will be of assistance. Please let us know if you need further information. Thank you for your consideration.

Yours sincerely

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