



Hindu Council of Australia

29th September 2023

NSW Law Reform Commission

Selborne Chambers

Level 6, 174 Philip Street

SYDNEY NSW 2000

Email: nsw-lrc@justice.nsw.gov.au

Attn: Kate Eastman AM SC

Chairperson

Dear Ms Eastman

Anti-Discrimination Act Review: Submissions

The Hindu Council of Australia (**HCA**) extends our thanks to the New South Wales Law Reform Commission (**Commission**) for the opportunity to provide preliminary submissions with respect to the overall review of the *Anti-Discrimination Act 1997* (NSW) (**Act**) and the relevant Terms of Reference, dated 29 August 2023.

At the outset, along with the recent amendments to the Act by the *Anti-Discrimination Amendment (Religious Vilification) Bill 2023* (NSW) (**Religious Vilification Bill**), HCA considers it of the utmost importance that robust anti-discrimination and vilification laws are in place to foster a just and cohesive multi-cultural society in New South Wales.

Modernised and simplified Act

1. HCA broadly agrees with the observations made by other jurisdictions and eminent scholars and commentators, including Prof. Simon Rice of the University of Sydney Law School, that the Act has reached a point where it could benefit from modernisation and simplification.¹
2. HCA submits that the modernisation and simplification of the Act would make it more comprehensible to the public, and therefore, allowing greater access for aggrieved persons seeking recourse from discrimination and vilification.
3. A focus on the modernisation and simplification of the Act should be on communicating the use and purpose of the Act to an ordinary reader. The amendments to the Act should be in plain English.

Range of protected attributes

4. HCA notes that as an Australian peak body representing various organisations that represent Hindus living in New South Wales (NSW) and indeed, Australia, HCA has a strong interest in not only protecting people practising Hinduism but others as well from unjust and unlawful discrimination and vilification.
5. In achieving the goal of freely practising their faith in multi-cultural NSW, it is important that all persons, irrelevant of their faith, attribute or characteristic, must feel free to do so. HCA holds the same ambition for any religious or cultural association, sharing a similar goal to HCA – to promote different faiths and cultures within NSW.
6. HCA submits that in achieving this goal, it is important that protected attributes under the Act should be both significantly broad, as to capture relevant attributes, but also precise enough that each attribute is identifiable. In this regard, HCA endorses the following attributes, as recently recommended by the Law Reform Commission of Western Australia, as the relevant attributes to be protected in modern NSW:
 - Accommodation status;
 - Assistance animals;
 - Carer responsibility;

1 Paul Gregoire, “A Sword and Not a Shield”: Professor Simon Rice on Latham’s Religious Freedom Laws’, *Sydney Criminal Lawyers* (Internet Article, 17 April 2021) <<https://www.sydneycriminallawyers.com.au/blog/a-sword-and-not-a-shield-professor-simon-rice-on-lathams-religious-freedom-laws/>>.

- Disability;
- Employment status;
- Family status;
- Gender identity;
- Immigration status;
- Industrial, trade union or employment activity;
- Irrelevant criminal record;
- Irrelevant medical record;
- Lawful sexual activity;
- Physical features;
- Political conviction;
- Pregnancy;
- Race;
- Relative or associate of someone with a protected attribute;
- Religious conviction;
- Sex characteristics;
- Sexual orientation.²

Areas of public life in which discrimination is unlawful

7. HCA recognises the important balance that must be struck in modern NSW between competing goals of personal liberty and freedom of expression, against the desire for equality and freedom from discrimination. In public life, the latter goal must trump the former where the actions and behaviours of persons seek to harm, ridicule, or demean another on the ground of an attribute they cannot control, or an attribute which they lawfully choose to identify or associate with.
8. Currently, the Act covers areas of 'public life' that include work, education, the provision of goods and services, accommodation, and registered clubs. HCA considers that these specific definitions of 'public life' may, therefore, be restricting the protection afforded under the Act.

² The Law Reform Commission of Western Australia, *Review of the Equal Opportunity Act 1984 (WA)* (Project 111 Final Report, May 2022) 64 – 124.

9. HCA emphasises, in line with the submissions below that public life, by extension, must include the subtle nuances created by colleagues and employers associating out of work hours, where this may create discrimination through religious coercion.
10. HCA submits that greater protection could be achieved by enhancing certain aspects of public life, through extended definitions. One example could be through enhancing the definition of employment to include the association of employees outside of their regular working hours HCA supports the Commission further examining other possibilities for capturing behaviour or conduct that may fall in this grey area.

Existing tests – clear, inclusive and reflect modern understanding of discrimination

11. HCA submits that the existing tests under the Act are adequate but could be considered more appropriate if there was greater emphasis on the tests being concise and inclusive. In this respect, HCA endorses the use of a test which applies to all protected attributes equally and is easy to understand. HCA supports the Commission examining a possible reconstruction of these tests to better achieve these ends.
12. An area of concern to HCA is the possibility of 'religious coercion', which HCA submits is a situation that adherents of a particular faith may feel direct or indirect pressure to disassociate from that faith, or adopt a competing belief, in order to conform. This pressure may be subtle and may also impact the ability of religious bodies in NSW to promote harmony amongst people of different faith and cultural groups. In line with article 18(2) of the *International Covenant on Civil and Political Rights*³ HCA would endorse a definition of religious coercion here as:

"an exercise of power through use of social pressure, inducement or influence by an individual or a group of persons that impairs a person's freedom to have or adopt a religion or belief of his or her choice."

13. HCA submits that religious coercion is outside of the Act's current ambit of 'public life'.

Protections against vilification

³ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18.

14. HCA notes that NSW was the first Australian State to have a criminal offence specifically proscribed under the *Crimes Act 1900* (NSW) for committing vilification on the grounds of a protected attribute by 'publicly threatening or inciting violence'.
15. However, within the NSW jurisdiction, it does not appear as though any charge has been directly brought against an individual for the contravention of the relevant s 93Z of the *Crimes Act 1900* (NSW). Although in *R v Bayda; R v Namoa (No 8)*,⁴ Fagan J recognised that on the facts of that case, a likely charge brought under s 93Z may have been successful given the circumstances. HCA recognises that criminal sanctions for vilification must seek to prevent the most concerning conduct or behaviour with respect to discrimination and vilification.
16. HCA submits that proscribing vilification that threatens or incites violence through criminal sanction is an important protection provided by the law. Accordingly, HCA submits that both the Act, and any criminal offences contained within in Act or relevant legislation, should be in substantially similar terms. HCA submits that a threshold test should exist for when conduct or behaviour extends beyond the scope of the Act and threatens or incites violence – at which point this conduct or behaviour should be considered a criminal offence.
17. To achieve this, HCA submits that substantially similar drafting of these provisions should be used to achieve consistency and avoid the impression of differential treatment. Further, the protected attributes should be described in the exact same language in the Act and other relevant legislation. If drafted similarly, it should be straightforward to determine whether to bring an action under the Act for a civil remedy or as a criminal sanction, depending on the circumstances of the case. Moreover, enacting provisions in this way should provide a clear understanding to the public that discrimination and vilification are not tolerated and that more severe cases of discrimination and vilification will attract criminal sanctions.

Positive obligations

4 [2019] NSWSC 24.

18. HCA understands that the imposition of positive obligations under the Act may be used as a means of prompting persons to act in a manner which seeks to prevent harassment, discrimination, and vilification. However, HCA also understands that the insertion of positive obligations in the Act may incidentally shift the balance of personal liberty and equality too far, effectively forcing a person to act in a specific way inhibiting their personal liberty in order to comply with the Act.
19. In this respect, HCA can foresee the imposition of positive obligations under the Act as being unduly restrictive. Creating positive obligations under the Act may assume that people are incapable of acting autonomously to avoid discrimination and must conform with specific obligations. HCA considers that this process inhibits free-thinking and incentivises people to comply with specific obligations, simply to avoid undesirable outcomes.
20. In *Sklavos v Australasian College of Dermatologists*,⁵ in considering the positive obligation under s 5(2) of the *Disability Discrimination Act 1992* (Cth) (**DDA**), Bromberg, Griffiths and Bromwich JJ agreed that special consideration must be given to the causation inquiry as to whether the aggrieved person was 'treated less favourable "because of" that person's disability'.⁶ Section 5(2) of the DDA provides that direct discrimination based on disability occurs where 'the discriminator does not make, or proposes not to make, reasonable adjustments for the person' and 'the failure to make the reasonable adjustments has, or would have, the effect that the aggrieved person is, because of the disability, treated less favourably than a person without the disability would be treated in circumstances that are not materially different'. The Full Court of the Australian Federal Court unanimously agreed on a narrow construction of this positive obligation under s 5(2) of the DDA, in that the element of causation is of fundamental importance.
21. HCA submits, the imposition of any positive obligations into the Act should be considered carefully for their ability to achieve the purposes of the Act without unduly affecting the personal liberty of persons. Moreover, if any positive obligations are considered necessary for fulfilling the purpose the Act, in all circumstances these positive obligations should be both reasonable and proportionate for achieving their aims.

5 [2017] FCAFC 128.

6 Ibid [53].

Exceptions, special measures and exemption processes

22. HCA submits that the exceptions and special measures currently provided under the Act are adequate and should be replicated in a new version of the Act. HCA notes that these exceptions are necessary in certain circumstances to avoid an overbearing restriction on personal liberty, associations incorporated with interests or goals, religious doctrines or tenets and public safety.
23. HCA submits, these exemptions should be set out together in the Act in a clearer and purposeful manner, as to convey the full ambit of exemptions as they apply to the Act.
24. HCA notes, the current exemption process under the Act is contained in s 126 and the *Anti-Discrimination Regulation 2019* (NSW). HCA considers that this process of applying to the President for the granting of an exemption, along with publishing the exemption in the public gazette as adequate.
25. As it is important to not unduly hinder lawful acts or conduct as provided for by these exemptions under the Act, HCA considers that it may be appropriate to create a safe harbour provision where a person reasonably believes their act or conduct would be granted an exemption despite not having been granted an exemption at that time.
26. HCA acknowledges that such a provision would need to be drafted carefully and as such, may be restricted to certain similar facts or circumstances in which exemptions are regularly granted, such as age and sports-based activities, or accepted religious practices. This safe harbour provision should only act to prevent a finding of discrimination by the President where the person performing the act or behaviour has acted with a reasonable belief on an objective standard.
27. A provision such as this could help streamline the exemption process and allow the public to be engaged with and understand their obligations with respect to anti-discrimination law.

Complaints procedures and remedies

28. Under the current Act, a complaint can be lodged with the President of the NSW Anti-Discrimination Board (**Board**) as constituted by the Act. HCA considers that this body and its constitution are adequate, and largely conform with other Australian and international jurisdictions acting in the same capacity.
29. HCA considers it appropriate that all complaints should be made in writing, however, noting that no form of medium should be prescribed. It is important that the President be enabled to accept complaints made in all forms of written communication, which are reasonable to receive. HCA considers it important that complaints should be accepted by the President even when they are made by third parties to the alleged conduct. HCA commends the current Act for having this process currently available under s 87C. It is submitted that this provision may be too restrictive, and that it may be appropriate to broaden its application by removing the 'sufficient interest' component of s 87C(b).
30. HCA notes that of the 1,644 complaints received between 2021 – 2022, almost 2% of these were declined as they were not made within the 12-month period prior to the alleged conduct.⁷ HCA submits this period should be extended to 24 months to allow time for persons who may delay bringing a complaint because they feel ashamed or embarrassed.
31. Of the 1,644 complaints made between July 2021 – June 2022, 187 (13.4%) of these were settled before, at or after conciliation, and 135 (10.9%) of these were referred to NCAT as they could not be resolved through this process.⁸ HCA submits that the number of complaints referred to NCAT in these circumstances could be greatly reduced if the President and the Board were given a greater range of powers to deploy other Alternative Dispute Resolution (**ADR**) processes. The use of facilitative processes should be promoted, and remedies should be tailored towards promoting cohesion in society through understanding and education, rather than a focus on adversarial outcomes.
32. Where it appears to the President that a complaint can be resolved through an apology, the parties should be incentivised to make and accept the apology, provided they are both satisfied with this outcome.

7 Anti-Discrimination New South Wales, *Anti-Discrimination NSW Annual Report 2021–22* (Annual Report, 7 December 2022) 23.

8 Ibid 23.

Power and functions of the Anti-Discrimination Board of NSW and its President

33. HCA supports the Commission in examining the Power and functions of the Anti-Discrimination Board of NSW and its President, including with respect to potential mechanism to address systemic discrimination, as this is an important area for consideration.
34. HCA notes that at this current time, the President and the Board do not have any specific power under the Act to join multiple similar complaints involving the same alleged defendant against multiple complainants. Allowing the president join similar complaints in this matter may help to address repeat offending and systemic discrimination by holding the same defendant accountable for similarly alleged discrimination. Moreover, where a defendant is found to have engaged in similar and substantive discrimination, the President and Board may be empowered to impose greater or compounding sanctions against that defendant.

Interjurisdictional and international anti-discrimination and human rights laws, and other NSW laws

35. HCA commends the NSW parliament for its recent introduction of the *Religious Vilification Bill* and considers that protection against religious discrimination is an important protection enshrined by international human rights.
36. HCA submits that international human rights law stresses the importance of the indivisibility of human rights, placing great emphasis on not cherry-picking certain rights in favour of others. To bring NSW into alignment with both interjurisdictional and international anti-discrimination and human rights law it is important these protections, processes, and enforcement under the Act consistent and suitable.
37. HCA also recognises that at this current stage, only the ACT and Victoria have enacted legislation that reflects international human rights on a national level.⁹ While anti-discrimination and human rights law can operate independently, it is true that on an international level they are interrelated.

⁹ *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic).

38. HCA submits that it would be consistent with the ACT and Victoria, along with other international jurisdictions, to set out that the objects of the new Act are to give effect to international human rights law and to the treaties the Commonwealth government of Australia is a party to. In turn, HCA submits consideration of both other Australian states and international countries with similar legislation should be evaluated to create consistent protections, processes, and enforcement mechanisms.

Interaction between the Act and Commonwealth anti-discrimination laws

39. As an organisation, HCA operates in multiple Australian states and has an interest in ensuring adherents, members and associates are provided similar protection against discrimination throughout Australia.

40. HCA recognises that Commonwealth anti-discrimination Acts are largely enacted through the external affairs head of power under s 51(xxix) of the *Australian Constitution*, to satisfy Australia's treaty obligations. It is accordingly anticipated that the Commonwealth Acts must comply with the treaties, whereas the State legislation may be legislated more broadly where they are enacted under the respective residual power of State parliaments.

41. Where State legislation differs from Commonwealth legislation, HCA submits that aggrieved parties should be allowed to bring the same complaint to the appropriate State or Commonwealth receiving body non-exclusively.

Other relevant matters

42. As discussed above, HCA wishes to submit its concerns relating to the intersection between 'religious coercion' and discrimination. HCA submits that the concerns of religious coercion expressed in these submissions may be adequately addressed with the possibility of introducing a new, simplified, and comprehensive Anti-Discrimination Act.

43. Religious coercion is a concern where adherents of a particular religious belief or conviction feel compelled to no longer associate with their religious beliefs to conform with the accepted 'norms' of a particular workplace, group, club, or association. In this respect, the discrimination may not be directed towards a person per se but may occur because of a perceived pressure. In either circumstance, HCA submits that

where this religious coercion occurs to the detriment of the person aggrieved, namely through social isolation, there should be a form of recourse available to remedy this. HCA submits that such a complaint could either be made by the person aggrieved, or an associated body to the person aggrieved.

44. An example of religious coercion may occur where a person of a particular religious belief feels pressured, either directly or indirectly, to attend the religious practices of another religion, as their workplace has a majority of individuals from the latter religion working there. Alternatively, that person of a particular religion may feel as though they should not partake in a typical religious practice or ceremony that they normally would in order to conform with the practices of that latter religious majority in the workplace.
45. Religious coercion on this level that has no available recourse may undermine one of the purposes of anti-discrimination legislation, namely, to promote equality and prohibit differential treatment in public life based on individual characteristics.

HCA thanks the NSW Law Reform Commission for the opportunity to provide preliminary submissions to this review.

Sincerely,

Surinder Jain, National Vice President

Ash Agarwal, National Legal Counsel