



Anti-Discrimination
New South Wales

3 March 2023

Hon Justice Mark Moshinsky
Acting President
Australian Law Reform Commission

By email: antidiscriminationlaw@alrc.gov.au

Dear Justice Moshinsky,

Anti-Discrimination NSW submission to the Australia Law Reform Commission's Inquiry into Religious Educational Institutions and Anti-Discrimination Laws

1. Introduction

Anti-Discrimination NSW (**ADNSW**) thanks the Australian Law Reform Commission (**ALRC**) for the opportunity to respond to its Consultation Paper for the Inquiry into Religious Educational Institutions and Anti-Discrimination Laws (**Consultation Paper**).

ADNSW administers the *Anti-Discrimination Act 1977* (**ADA**) which makes it unlawful to discriminate in specified areas of public life against a person on grounds which include their sex, race, age, disability, homosexuality, marital or domestic status, transgender status, and carer's responsibilities.

Vilification on the grounds of race, homosexuality, transgender status, or HIV/AIDS status is also unlawful.

Religion is not, of itself, a protected ground under the ADA, however the definition of race includes descent and ethnic, ethno-religious or national origin.

2. The proposed changes to anti-discrimination laws

ADNSW supports the proposals in the Consultation Paper to remove and narrow the exceptions for religious educational institutions in anti-discrimination law by amending the *Sex Discrimination Act 1984* (Cth) (**SDA**) and *Fair Work Act 2009* (Cth) (**FWA**).

ADNSW considers that the changes are reasonable and proportionate and consistent with existing laws (or proposed law reform) in most Australian states and territories, except for NSW. However,

ADNSW has noted below some consequences that may arise on the operation of the ADA, if the proposed changes are enacted.

3. Existing laws in the ADA

Unlike the SDA, the ADA covers homosexuality and transgender status and not gender identity and sexual orientation. The ADA does not provide separate protection for religion, however, the definition of race in [section 4](#) includes descent and ethnic, ethno-religious or national origin.

Some religious groups have been held to be ethno-religious groups, such as Jews and Sikhs, meaning these groups currently have protection under the ADA.

Cases on whether Muslims are an ethno-religious group under the ADA have come before the NSW Administrative Decisions Tribunal (**ADT**) and NSW Civil and Administrative Tribunal (**NCAT**). The ADT Appeal Panel has generally ruled that Muslims are covered by ADA as an ethno-religious group; however single member decisions have not been so consistent.¹

3.1 Exceptions for religious bodies

The ADA contains provisions that are similar to those currently in the SDA.

The ADA does not define 'religious bodies', however, [section 56](#) of the ADA contains broad exceptions for religious bodies. Section 56(d) provides that:

Nothing in this Act affects any other act or practice of a body established to propagate religion that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.

The ADA provides exceptions from the ADA for private education authorities (including religious schools) to discriminate against students, teachers and staff on the grounds of:

Sex	sections 25(3)(c) and 31A(3)(a)
Transgender status	sections 38C(3)(c) and 38K(3)
Marital or domestic status	sections 40(3)(c) and 46A(3)
Disability	sections 49D(3)(c) and 49K(3)(a)
Homosexuality	sections 49ZH(3)(c) and 49ZO(3)

4. Consequences on the ADA from the proposed amendments

The proposed amendments could unintentionally make it harder for some people to access complaints mechanisms. ADNSW is aware that the AHRC must terminate complaints if they have

¹ *Ekerawali v Nine Network Australia Pty Ltd* [2019] NSWCATAD 29

previously been made to another body.² Individuals who are unfamiliar with the jurisdictions may risk losing their rights by bringing a complaint to ADNSW that would be better dealt with by the AHRC because of the removal of exceptions proposed in the ALRC's reforms.

Further, the inconsistency between the ADA and federal laws could create confusion among school communities about complying with discrimination and employment law. Consultation Proposal 13 (that the Australian Human Rights Commission (**AHRC**) develop detailed guidance to assist educational institution administrators to understand and comply with the SDA and FWA) could be amended to include guidance on the interaction between state and federal laws, and which law applies.

Finally, if the proposed amendments are made (and other state-based reform proposals are enacted), the ADA will be the only jurisdiction in Australia still containing broad exceptions from anti-discrimination law for religious educational institutions. ADNSW is concerned that the ADA will be out-of-step with anti-discrimination reforms around Australia and would support a consultative review of the current exceptions for religious institutions in the ADA.

5. Law reform in NSW

In 2020 the NSW Parliament considered amendments to the ADA to prohibit discrimination on the ground of religious belief or activity. The Joint Select Committee into the *Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020* (the Bill) recommended that the NSW Government introduce a Government Bill inserting discrimination on the grounds of religious belief or activity, where that activity is lawful, as a protected attribute in the ADA.

In September 2021, the NSW Government provided a response to the Committee's report, indicating that it would wait until the *Religious Discrimination Bill 2019* (Cth) passed before reforming the ADA to include protections based on religious grounds. This process did not involve a review of the current exceptions in the ADA for religious educational institutions.

Please do not hesitate to contact Jackie Lyne, Manager of Governance and Advice, on [REDACTED] or [REDACTED] if you have any questions about this submission.

Yours sincerely,

[REDACTED]

Helen McKenzie
President
Anti-Discrimination NSW

² *Australian Human Rights Commission Act 1986*, [section 46PH](#).