



New South Wales

Anti-Discrimination Amendment (Religious Freedom and Equality) Bill 2020

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New South Wales

Anti-Discrimination Amendment (Religious Freedom and Equality) Bill 2020

No. _____, 2020

A Bill for

An Act to amend the *Anti-Discrimination Act 1977* to make discrimination on the ground of a person's religious beliefs or activities unlawful; and for related purposes.

The Legislature of New South Wales enacts—

1 Name of Act

This Act is the *Anti-Discrimination Amendment (Religious Freedoms and Equality) Act 2020*.

2 Commencement

This Act commences on the date of assent to this Act.

Schedule 1 **Amendment of Anti-Discrimination Act 1977 No 48**

[1] **Section 3**

Insert after Section 2—

3 Principles of Act

- (1) In carrying out functions and making determinations under this Act, the Minister, Board, President, Tribunal and Courts shall have fundamental regard to the following—
 - (a) the *International Covenant on Civil and Political Rights*,
 - (b) the *UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, proclaimed by the UN General Assembly on 25 November 1981; and
 - (c) the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*.
- (2) In particular, in interpreting the requirement of the *International Covenant on Civil and Political Rights*, Article 18(3), that limitations upon a person's right to manifest their religion or belief must only be made where such are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others, the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* provide that limitations must, amongst other matters—
 - (a) be prescribed by law,
 - (b) respond to a pressing public or social need,
 - (c) pursue a legitimate aim and be proportionate to that aim, and
 - (d) be applied using no more restrictive means than are required for the achievement of the purpose of the limitation.
- (3) So far as it is possible to do so consistently with their purpose, all provisions of this Act must be interpreted in a way that is compatible with the international instruments referred to in subsection (1).

[2] **Part 2B**

Insert after Part 2A—

Part 2B Discrimination on the ground of religious beliefs or religious activities

Division 1 General

22K Definitions

- (1) In this Part—

religious activities includes engaging in religious activity, including an activity motivated by a religious belief, but does not include any activity that would constitute an offence punishable by imprisonment under the law of New South Wales or the Commonwealth.

religious beliefs includes the following—

 - (a) having a religious conviction, belief, opinion or affiliation,

- (b) not having any religious conviction, belief, opinion or affiliation.
- genuinely believes*** in relation to a person means the person's holding of the religious belief is sincere and is not fictitious, capricious or an artifice.
- religious ethos organisation*** means—
- (a) a private educational authority that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion, or
 - (b) a charity registered with the Australian Charities and Not-for-profits Commission under the *Australian Charities and Not-for-profits Commission Act 2012* of the Commonwealth that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion, or
 - (c) any other body that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion.

22KA Determining when a belief is held

For the purposes of this Act, a person holds a religious belief (inclusive of the person's beliefs as to the actions, refusals, omissions or expressions that are motivated or required by, conflict with, accord or are consistent with, that belief) if the person genuinely believes the belief.

22KB Religious belief or activity includes past, future and presumed religious belief or activity

- (1) A reference in this part to a person's religious belief is a reference to a religious belief:
 - (a) that a person holds, or
 - (b) that a person is thought to hold (whether or not the person in fact holds the religious belief), or
 - (c) that a person held in the past, or is thought to have held in the past (whether or not the person in fact held the religious belief) or
 - (d) that a person will hold in the future or that it is thought a person will hold in the future (whether or not the person in fact will hold the religious belief).
- (2) A reference in this Part to a person's religious activity is a reference to a religious activity:
 - (a) that a person engages in, does not engage in or refuses to engage in, or
 - (b) that a person is thought to engage in, thought not to engage in, or refuses to engage in (whether or not the person in fact engages in the religious activity), or
 - (c) that a person engaged in in the past, or is thought to have engaged in in the past or did not engage in or refused to engage in in the past, or it is thought to have not engaged in or to have refused to engage in in the past (whether or not the person in fact engaged in the religious activity), or
 - (d) that a person will engage in in the future, or that it is thought a person will engage in in the future, or will not engage in or refuse to engage in in the future, or it is thought a person will not engage in or refuse to engage in in the future (whether or not the person in fact will engage in the religious activity).

22L What constitutes discrimination on the ground of religious beliefs or religious activities

- (1) A person (*the perpetrator*) discriminates against another person (*the aggrieved person*) on the ground of religious beliefs if the perpetrator—
- (a) on the ground of the aggrieved person's religious beliefs or the religious beliefs of a relative or associate of the aggrieved person, treats the aggrieved person less favourably than in the same circumstances, or in circumstances that are not materially different, the perpetrator treats or would treat a person—
 - (i) with different religious beliefs, or
 - (ii) who has such a relative or associate with different religious beliefs, or
 - (b) requires the aggrieved person to comply with a requirement or condition with which a substantially higher proportion of persons who—
 - (i) do not have the same religious beliefs, or
 - (ii) have such a relative or associate who does not have the same religious beliefs,comply or are able to comply, being a requirement or condition that is not reasonable having regard to the circumstances of the case and with which the aggrieved person does not or is not able to comply.
- (2) A person (*the perpetrator*) discriminates against another person (*the aggrieved person*) on the ground of religious activities if the perpetrator—
- (a) on the ground of the aggrieved person's religious activities or the religious activities of a relative or associate of the aggrieved person, treats the aggrieved person less favourably than in the same circumstances, or in circumstances that are not materially different, the perpetrator treats or would treat a person who—
 - (i) engages in different religious activities, or
 - (ii) does not engage in, or refuses to engage in, religious activities, or
 - (iii) has such a relative or associate who engages in different religious activities or who does not engage in, or refuses to engage in, religious activities, or
 - (b) requires the aggrieved person to comply with a requirement or condition with which a substantially higher proportion of persons who—
 - (i) do not engage in the same religious activities, or
 - (ii) do not engage in religious activities, or refuse to engage in, religious activities, or
 - (iii) have such a relative or associate who does not engage in, or refuses to engage in, religious activities,comply or are able to comply, being a requirement or condition that is not reasonable having regard to the circumstances of the case and with which the aggrieved person does not or is not able to comply.

- (3) For the purposes of this section, something is done on the ground of a person's religious beliefs or religious activities if it is done on the ground of—
 - (a) the person's religious beliefs or religious activities, or
 - (b) a characteristic that appertains generally to persons with those religious beliefs or who engage in those religious activities, or
 - (c) a characteristic that is generally imputed to persons with those religious beliefs or who engage in those religious activities.

22M Religious ethos organisations taken not to discriminate in certain circumstances

- (1) For the purposes of this Part, a religious ethos organisation is taken not to discriminate against another person on the ground of the person's religious beliefs or religious activities by engaging in conduct if the organisation genuinely believes the conduct—
 - (a) is consistent with the doctrines, tenets, beliefs or teachings of the religion of the organisation, or
 - (b) is required because of the religious susceptibilities of the adherents of the religion of the organisation, or
 - (c) furthers or aids the organisation in acting in accordance with the doctrines, tenets, beliefs or teachings of the religion of the organisation.
- (2) Without limiting subsection (1), conduct referred to in that subsection includes giving preference to persons of the same religion as the religion of the religious ethos organisation.
- (3) Nothing in this section, or any provision of this Act that refers to a religious ethos organisation, affects the operation of section 56 (Religious bodies).

Division 2 Discrimination in work

22N Discrimination against applicants and employees

- (1) It is unlawful for an employer to discriminate against a person on the ground of religious beliefs or religious activities—
 - (a) in the arrangements the employer makes for the purpose of determining who should be offered employment, or
 - (b) in determining who should be offered employment, or
 - (c) in the terms on which the employer offers employment.
- (2) It is unlawful for an employer to discriminate against an employee on the ground of religious beliefs or religious activities—
 - (a) in the terms or conditions of employment which the employer affords the employee, or
 - (b) by denying the employee access, or limiting the employee's access, to opportunities for promotion, transfer or training, or to any other benefits associated with employment, or
 - (c) by dismissing the employee or subjecting the employee to any other detriment.
- (3) Without limiting subsection (1) and (2), it is unlawful for an employer to—
 - (a) restrict, limit, prohibit or otherwise prevent an employee from engaging in a protected activity, or
 - (b) punish or sanction an employee:
 - (i) for engaging in a protected activity, or
 - (ii) because an associate of the employee engaged in a protected

activity.

- (4) In subsection (3), *protected activity* means—
- (a) a religious activity performed by the employee that:
 - (i) occurs at a time other than when the employee is performing work and at a place other than the employer's place of work, and
 - (ii) does not include any direct criticism of, or attack on, or does not cause any direct and material financial detriment to, the employer.
 - (b) a religious activity performed by an associate of the employee that does not include any direct criticism of, or attack on, or does not cause any direct and material financial detriment to, the employer.
- (5) For the avoidance of doubt, the following do not constitute direct and material financial detriment to an employer for the purposes of subsection 4(a) and 4(b)—
- (a) any boycott or secondary boycott of the employer by other persons because of the employee's protected activity, or the protected activity of their associate, or
 - (b) the withdrawal of sponsorship or other financial or corporate support for the employer because of the employee's protected activity, or the protected activity of their associate.
- (6) It is unlawful for an employer to discriminate against a person on the ground of religious beliefs or religious activities by refusing the employee permission to wear any religious symbol or any religious clothing during work hours, but only if—
- (a) the symbol or item of clothing is of a kind recognised as necessary or desirable by persons with the same religious beliefs or who engage in the same religious activities as that of the employee, and
 - (b) wearing the symbol or item of clothing during working hours is reasonable having regard to the circumstances of the employment, including—
 - (i) the workplace safety, productivity, communications and customer service requirements of that employment, and
 - (ii) the industry standards of that employment.
- (7) Subsections (1)–(6) do not apply to employment—
- (a) for the purposes of a private household, or
 - (b) where the number of persons employed by the employer, disregarding any persons employed within the employer's private household, does not exceed 5.
- (8) For the purposes of subsection (7)(b), a corporation is to be regarded as the employer of the employees of any other corporation that is a related body corporate of that corporation within the meaning of the *Corporations Act 2001* of the Commonwealth.
- (9) Subsections (4) and (5) do not apply to employment by—
- (a) a religious ethos organisation, or
 - (b) a body established to propagate religion under section 56.

220 Discrimination against commission agents

- (1) It is unlawful for a principal to discriminate against a person on the ground of religious beliefs or religious activities—
- (a) in the arrangements the principal makes for the purpose of determining

- who should be engaged as a commission agent, or
 - (b) in determining who should be engaged as a commission agent, or
 - (c) in the terms on which the principal engages the person as a commission agent.
- (2) It is unlawful for a principal to discriminate against a commission agent on the ground of religious beliefs or religious activities—
- (a) in the terms or conditions that are afforded to the commission agent, or
 - (b) by denying or limiting access to opportunities for promotion, transfer or training, or to any other benefits associated with the position of commission agent, or
 - (c) by terminating the commission agent's engagement or subjecting the commission agent to any other detriment.

22P Discrimination against contract workers

It is unlawful for a principal to discriminate against a contract worker on the ground of religious beliefs or religious activities—

- (a) in the terms on which the principal allows the contract worker to work, or
- (b) by not allowing the contract worker to work or continue to work, or
- (c) by denying or limiting access to any benefit associated with the work performed by the contract worker, or
- (d) by subjecting the contract worker to any other detriment.

22Q Partnerships

- (1) It is unlawful for a firm consisting of 6 or more partners, or for any one or more of 6 or more persons proposing to form themselves into a partnership, to discriminate against a person on the ground of religious beliefs or religious activities—
- (a) in the arrangements made for the purpose of determining who should be offered a position as partner in the firm, or
 - (b) in determining who should be offered a position as partner in the firm, or
 - (c) in the terms on which the person is offered a position as partner in the firm.
- (2) It is unlawful for a firm consisting of 6 or more partners to discriminate against a partner on the ground of religious beliefs or religious activities—
- (a) by denying the partner access, or limiting the partner's access, to any benefit arising from membership of the firm, or
 - (b) by expelling the partner from the firm, or
 - (c) by subjecting the partner to any other detriment.

22R Industrial organisations

- (1) It is unlawful for an industrial organisation to discriminate against a person who is not a member of the industrial organisation on the ground of religious beliefs or religious activities—
- (a) by refusing or failing to accept the person's application for membership, or
 - (b) in the terms on which it is prepared to admit the person to membership.
- (2) It is unlawful for an industrial organisation to discriminate against a person who is a member of the industrial organisation on the ground of religious

beliefs or religious activities—

- (a) by denying the person access, or limiting the person's access, to any benefit provided by the industrial organisation, or
- (b) by depriving the person of membership or varying the terms of the person's membership, or
- (c) by subjecting the person to any other detriment.

22S Qualifying bodies

- (1) It is unlawful for an authority or a body which is empowered to confer, renew or extend an authorisation or a qualification that is needed for or facilitates the practice of a profession, the carrying on of a trade or the engaging in of an occupation (qualifying body) to discriminate against a person on the ground of religious beliefs or religious activities—
 - (a) by refusing or failing to confer, renew or extend the authorisation or qualification, or
 - (b) in the terms on which it is prepared to confer the authorisation or qualification or to renew or extend the authorisation or qualification, or
 - (c) by withdrawing the authorisation or qualification or varying the terms or conditions upon which it is held.
- (2) Without limiting subsection (1), it is unlawful for a qualifying body to –
 - (a) restrict, limit, prohibit or otherwise prevent a person from engaging in a protected activity, or
 - (b) punish or sanction a person:
 - (i) for engaging in a protected activity, or
 - (ii) because an associate of the person engaged in a protected activity.
- (3) In subsection (2), *protected activity* means:
 - (a) a religious activity performed by the person that:
 - (i) occurs at a time other than when the person is performing work and at a place other than the person's place of work, and
 - (ii) does not include any direct criticism of, or attack on, or does not cause any direct and material financial detriment to, the qualifying body or the person's employer.
 - (b) a religious activity performed by an associate of the person that does not include any direct criticism of, or attack on, or does not cause any direct and material financial detriment to, the qualifying body or the person's employer.
- (4) For the avoidance of doubt, the following do not constitute direct and material financial detriment to a qualifying body or the person's employer for the purposes of subsections 3(a) and 3(b)—
 - (a) any boycott or secondary boycott of the qualifying body or the person's employer by other persons because of the person's activity, or the activity of their associate, or
 - (b) the withdrawal of sponsorship or other financial or corporate support for the qualifying body or the person's employer because of the person's activity, or the activity of their associate.
- (5) Subsections (2)-(4) do not apply to –
 - (a) a religious ethos organisation, or
 - (b) a body established to propagate religion under section 56.

22T Employment agencies

It is unlawful for an employment agency to discriminate against a person on the ground of religious beliefs or religious activities—

- (a) by refusing to provide the person with any of its services, or
- (b) in the terms on which it offers to provide the person with any of its services, or
- (c) in the manner in which it provides the person with any of its services.

22U Exception—genuine occupational qualification

Nothing in this Division applies to or in respect of any work or employment where that work or employment involves any one or more of the following—

- (a) participation in any way in any ritual or custom in a capacity for which the services of a person of a particular religious association, affiliation or belief are required for reasons of authenticity, cultural sensitivity or other religious, ethical or moral requirements or for adherence to any principle of religious injunction,
- (b) participation in any way in any artistic performance in a capacity for which the services of a person of a particular religious association, affiliation or belief are required for reasons of authenticity, cultural sensitivity or other religious, ethical or moral requirements or for adherence to any principle of religious injunction,
- (c) working in a place in which food or drink is, whether or not for payment, provided to and consumed in circumstances in which the services of a person of a particular religious association, affiliation or belief are required for reasons of authenticity, cultural sensitivity or other religious, ethical or moral requirements or for adherence to any principle of religious injunction,
- (d) providing persons of a particular religious association, affiliation or belief with services for the purpose of promoting their welfare in circumstances where those services can be most effectively, efficiently or appropriately provided by a person with the same religious association, affiliation or belief as the intended recipient of that welfare.

Division 3 Discrimination in other areas

22V Education

- (1) It is unlawful for an educational authority to discriminate against a person on the ground of religious beliefs or religious activities —
 - (a) by refusing or failing to accept the person’s application for admission as a student, or
 - (b) in the terms on which it is prepared to admit the person as a student.
- (2) It is unlawful for an educational authority to discriminate against a student on the ground of religious beliefs or religious activities—
 - (a) by denying the student access, or limiting the student’s access, to any benefit provided by the educational authority, or
 - (b) by expelling the student or subjecting the student to any other detriment.
- (3) Without limiting subsections (1) and (2), it is unlawful for an educational authority to —
 - (a) restrict, limit, prohibit or otherwise prevent a student from engaging in a protected activity, or
 - (b) punish or sanction a student:

- (i) for engaging in a protected activity, or
 - (ii) because an associate of the student engaged in a protected activity.
- (4) In subsection (3), **protected activity** means:
 - (a) a religious activity performed by a student or their associate that:
 - (i) occurs at a time other than when the person is receiving education and at a place other than the person's place of education, and
 - (ii) does not include any direct criticism of, or attack on, or does not cause any direct and material financial detriment to, the educational authority.
- (5) For the avoidance of doubt, the following do not constitute direct and material financial detriment to an educational authority for the purposes of subsections 4(a) and 4(b)—
 - (a) any boycott or secondary boycott of the educational authority by other persons because of the student's activity, or the activity of their associate, or
 - (b) the withdrawal of sponsorship or other financial or corporate support for the educational authority because of the student's activity, or the activity of their associate.
- (6) Subsections (3)-(5) do not apply to —
 - (a) a religious ethos organisation, or
 - (b) a body established to propagate religion under section 56.

22W Provision of goods and services

It is unlawful for a person who provides goods or services, whether or not for payment, to discriminate against another person on the ground of religious beliefs or religious activities—

- (a) by refusing to provide the other person with those goods or services, or
- (b) in the terms on which the other person is provided with those goods or services.

22X Accommodation

- (1) It is unlawful for a person, whether as principal or agent, to discriminate against another person on the ground of religious beliefs or religious activities—
 - (a) by refusing the other person's application for accommodation, or
 - (b) in the terms on which the principal or agent offers the other person accommodation, or
 - (c) by deferring the other person's application for accommodation or according the other person a lower order of precedence in any list of applicants for that accommodation.
- (2) It is unlawful for a person, whether as principal or agent, to discriminate against another person on the ground of religious beliefs or religious activities—
 - (a) by denying or limiting access to any benefit associated with accommodation, or
 - (b) by evicting the other person or subjecting the other person to any other detriment.
- (3) Nothing in this section applies to or in respect of the provision of

accommodation in premises if the person who provides or proposes to provide the accommodation or a near relative of that person resides, and intends to continue to reside, on those premises.

22Y Registered clubs

- (1) It is unlawful for a registered club to discriminate against a person who is not a member of the registered club on the ground of religious beliefs or religious activities—
 - (a) by refusing or failing to accept the person's application for membership, or
 - (b) in the terms on which it is prepared to admit the person to membership.
- (2) It is unlawful for a registered club to discriminate against a person who is a member of the registered club on the ground of religious beliefs or religious activities—
 - (a) by denying the person access, or limiting the person's access, to any benefit provided by the registered club, or
 - (b) by depriving the person of membership or varying the terms of the person's membership, or
 - (c) by subjecting the person to any other detriment.
- (3) Nothing in subsection (1) or (2) applies to or in respect of a registered club if the objects of the registered club include providing benefits for persons with specified religious beliefs or religious activities.
- (4) In determining whether the objects of a registered club are as referred to in subsection (3), regard must be had to—
 - (a) the essential character of the registered club, and
 - (b) the extent to which the affairs of the registered club are so conducted that the persons primarily enjoying the benefits of membership are of the religious beliefs, or engage in the religious activities, specified in the objects, and
 - (c) any other relevant circumstance.

22Z State laws and programs

- (1) It is unlawful for a person to discriminate against another person on the ground of religious beliefs or religious activities—
 - (a) in the course of performing any function under a State law or for the purposes of a State program, or
 - (b) in the course of carrying out any other responsibility for the administration of a State law or the conduct of a State program.
- (2) Without limiting subsection (1), a person is taken to discriminate against a religious ethos organisation on the ground of religious beliefs or religious activities if the person requires a religious ethos organisation to engage in conduct, including use of its property, in a manner which is contrary to the doctrines, tenets, beliefs or teachings of that organisation—
 - (a) in the course of performing any function under a State law or for the purposes of a State program, or
 - (b) in the course of carrying out any other responsibility for the administration of a State law or the conduct of a State program.
- (3) In this section—

State law means—

 - (a) an Act, a statutory rule, or a determination made under or pursuant to an Act, or

(b) an order or award made under or pursuant to such a law.

State program means a program conducted by or on behalf of the State Government.

[3] Section 126 Granting of exemptions by President

Omit “The President” from section 126(1). Insert “Other than for Part 2B, the President”.