



New South Wales

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

Explanatory Note

This Explanatory Note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to amend the *Anti-Discrimination Act 1977* (*the Act*) as follows—

- (a) to establish principles of the Act for the purpose of reconciling conflicting human rights and anti-discrimination provisions, using international conventions and other instruments,
 - (b) to define religious beliefs and activities in a comprehensive and contemporary way, making religious freedoms and the fair treatment of believers and non-believers possible,
 - (c) to prohibit discrimination on the ground of a person's religious beliefs or religious activities in work and other areas, so that religion has protections equal to other forms of discrimination in NSW,
 - (d) to prohibit discrimination against people who do not have any religious conviction, belief, opinion or affiliation,
 - (e) to provide that a religious ethos organisation is taken not to discriminate on the ground of religious beliefs or religious activities by engaging in certain conduct because of the doctrines, tenets, beliefs or teachings of the religion of the organisation, so as to recognise that religion is integral to the existence and purpose of these organisations; and that religious and associational freedoms are fundamental to a free and democratic society.
 - (f) to make it unlawful for an employer, qualifying body or educational authority to restrict, limit, prohibit or otherwise prevent people from engaging in a protected activity, or to punish or sanction them for doing so, or for their associates doing so,
 - (g) to ensure the provisions of the Bill extend to discrimination concerning applicants and employees, commission agents, contract workers, partnerships, industrial organisations, qualifying bodies, employment agencies, education, goods and
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- services, accommodation, registered clubs and State laws and programs, and
- (h) to limit exceptions to this part of the Act to those specified, such as for religious ethos organisations and genuine occupational qualifications, rather than encouraging tribunal activism.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.

Schedule 1 Amendment of Anti-Discrimination Act 1977 No 48

Schedule 1[1] establishes the principles of the Act, including that the Minister, Board, President, Tribunal and Courts have fundamental regard to certain international instruments in carrying out functions under the Act and that the provisions of the Act are used in a way that is consistent with the purpose and meaning of those international instruments (the 1966 *International Covenant on Civil and Political Rights*, the 1981 *UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, and the 1985 *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*). That is, any limitation imposed on a religious believer's or non-believer's manifestation of their belief or non-belief under the Act (including through the 'reasonableness test' for indirect discrimination in Part 2B) must not encroach on the protections afforded to that person in international law. These include that only 'necessary' limitations may be imposed pursuant to certain limited grounds, that any such limitations must 'pursue a legitimate aim and be proportionate to that aim' and be applied using 'no more restrictive means than are required for the achievement of the purpose of the limitation'.

Schedule 1[2] inserts proposed Part 2B (proposed sections 22K–22Z) into the Act which makes it unlawful to discriminate against a person on the ground of the person's religious beliefs or religious activities, or against a person of no religious conviction, belief, opinion or affiliation, in the circumstances described in the Part.

Division 1 of the proposed Part (proposed sections 22K–22L) contains specific provisions relevant to the definitional understanding and interpretation of the proposed Part.

Proposed sections 22K and 22KA define the terms *religious activities* (including an activity motivated by a religious belief, but not an activity that would constitute an offence punishable by imprisonment), *religious beliefs* (having or not having a religious conviction, belief, opinion or affiliation) and *religious ethos organisation* (private educational authorities, registered charities and other bodies conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion) for the purposes of the proposed Part and specifies what a person's beliefs include and when a person is taken to hold a religious belief and to genuinely believe a belief. The 'sincerity test' (genuinely believes) gives effect to the approach consistently adopted by the highest courts in Australia (specifically in *Church of the New Faith v Commissioner for Payroll Tax (Vic)*), the United Kingdom, United States and Canada as a means to avoid courts determining matters of religious doctrine or disputation. This test does not interfere with the ability to impose legitimate limitations on religious activities, as allowed elsewhere in the Act and the proposed Part.

Proposed Section 22KB provides for a religious belief or activity to include past, future and presumed religious belief or activity.

Proposed section 22L sets out what constitutes discrimination on the ground of religious beliefs or religious activities, defining discrimination in a manner consistent with other parts of the Act. As with the remainder of the Act, it extends the grounds on which discrimination is unlawful under Part 2B to discrimination on the basis of characteristics that appertain generally to persons with particular religious beliefs or activities or characteristics which are

generally imputed to persons of that religious belief or activity. This clarifies that the acts flowing from a person's religious beliefs are not a component of

the circumstances of the complaint; they are instead characteristics that attach to persons of religious belief. Thus it assists in avoiding the unintended conclusion that if an employer asserts it would discipline both a religious and non-religious employee for doing and/or saying the same thing, there must have been no discrimination against the person of religious belief.

Proposed section 22M provides that a religious ethos organisation is taken not to discriminate if it engages in conduct that is required because of the religious susceptibilities of the adherents of the religion, or that is consistent with, or furthers or aids the organisation in acting in accordance with, the doctrines, tenets, beliefs or teachings of the religion (for example, giving preference to persons of the same religion as the religion of the organisation). Importantly, this is an exception, not an exemption. The provision says that when a religious institution acts in accordance with its beliefs, this is not discrimination, as technically described at law. This brings NSW into line with international practice. In part, General Comment 18 of the United Nations Human Rights Committee recognises that “not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate” under the International Convention on Civil and Political Rights.

Division 2 of proposed Part 2B (proposed sections 22N–22U) prohibits discrimination on the ground of religious beliefs or religious activities in work.

Proposed section 22N provides that certain conduct, in relation to the religious beliefs or religious activities of an employee, is unlawful. In particular, it will be unlawful for an employer to restrict, limit, prohibit or otherwise prevent an employee from engaging in a protected activity, or punish or sanction them for doing so, or because their associate has done so. It is also unlawful to discriminate against a person by refusing the employee permission to wear a religious symbol or religious clothing during work hours (with exemptions relying on the reasonable circumstances and industry standards of that employment). This provision is modeled on existing protections in Western Australia, the ACT and the Northern Territory.

Proposed sections 22O and 22P provide that certain conduct, in relation to the religious beliefs or religious activities of applicants, commission agents and contract workers, is unlawful.

Proposed sections 22Q–22T provide that certain conduct of partnerships, industrial organisations, qualifying bodies and employment agencies in relation to the religious beliefs or religious activities of a person is unlawful. In section 22S, provision is made for protected activities in relation to qualifying bodies.

Proposed section 22U provides that the proposed Division does not apply to or in respect of any work or employment that involves a genuine occupational qualification as specified in the proposed section, respecting the circumstances of certain religious activities and services that rely on the participation of people of a particular religion.

Division 3 of proposed Part 2B (proposed sections 22V–22Z) sets out additional circumstances in which discrimination on the ground of religious beliefs or religious activities is unlawful.

Proposed section 22V provides that it is unlawful for an educational authority to discriminate against a person on the ground of religious beliefs or religious activities by refusing to accept the person's application for admission as a student or by the terms on which it is prepared to admit the person. Provision is also made for protected activities in relation to educational authorities.

Proposed sections 22W and 22X make provision with respect to discriminatory conduct in connection with the provision of goods and services and the provision of accommodation.

Proposed section 22Y provides that it is unlawful for a registered club to discriminate

against a person on the ground of religious beliefs or religious activities by refusing to accept the person's application for membership or by the terms on which it is prepared to admit the person to membership. However, the section also provides that the registered club does not discriminate on the ground of religious beliefs or religious activities if the objects of the registered club include providing benefits for persons with specified religious beliefs or religious activities.

Proposed section 22Z makes it unlawful for a person to discriminate against another person on the ground of religious beliefs or religious activities in the course of performing any function under a State law or for the purposes of a State program, or in carrying out any other responsibility for the administration of a State law or the conduct of a State program. The proposed section also provides that a person is taken to discriminate against a religious ethos organisation on the ground of religious beliefs or religious activities if the person requires the organisation to engage in conduct, including use the organisation's property, in a manner that is contrary to the doctrines, tenets, beliefs or teachings of the organisation.

Schedule 1[3] ensures that the only exemptions granted under Part 2B are those specified in the Bill.

Examples of Legislative Coverage

This Explanatory Note also gives examples of how the Bill is intended to work in practice:

1. At **Section 22K(1)**, the definition of 'religious activity' is intended to include:
 - (a) engaging in religious activity of worship, observance, practice or teaching; and
 - (b) conduct, refusal (including refraining from participating in activities that are inconsistent with religious beliefs), omission, expression, and association carried out in accordance with, in connection with, based upon, constitutive of, supportive of or a corollary of a religious belief; and
 - (c) teaching, writing, issuing and disseminating relevant publications, to establish and maintain communications with individuals and communities in matters of religion or belief at the national and international levels ; and
 - (d) seeking, receiving and imparting religious beliefs either orally, in writing or in print, in the form of art or through any other media; and
 - (e) any activity or manifestation motivated by a religious belief, whether in public or in private, and whether individually or in community with others.

The examples make clear that the proposed Part does not intend to protect solely 'sacred acts' or acts in the performance of a 'religious ritual'. It is necessary to clarify in anti-discrimination law that, for many religious believers, religious convictions that impact on or motivate behaviour can extend to the whole of their personal values and lived experience.

2. **Sections 22L** applies the standard structure of the Act's prohibitions on discrimination to religious belief and religious activity, respectively. Examples of direct and indirect discrimination are as follows:

Example 1: R refuses to rent a flat to C because C is a member of the Sikh religion and R doesn't like Sikh people.

Example 2: C's friend, B, is a Sikh and R doesn't like Sikh people, and refusal is made on that basis.

Example 3: R believes that Sikh people are unreliable tenants, so refusal is made.

In each case, R discriminates against C.

3. Examples of conduct protected under **Sections 22L(3)** include the following:

Example 1: If an employer refused to consider an application for employment from

a person who is called Mohammed because it assumed Mohammed was a Muslim, the employer would have discriminated on the basis of an attribute (religious belief) that Mohammed was presumed to have.

Example 2: A refusal to engage in acts that are contrary to religious teaching can be characteristic that appertains generally, or is generally imputed, to persons of a particular religious tradition. The Bill seeks to prohibit discrimination against people on this basis.

Example 3: The making of religious statements on matters of public concern can be a characteristic that appertains generally, or is generally imputed, to persons of a particular religious tradition. The Bill seeks to prohibit discrimination against people on this basis.

4. As for the remaining provisions of the Act, **Section 22L** must be interpreted in accordance with new **Section 3**, Principles of Act. In particular, the Siracusa Principles apply the requirement that limitations on religious manifestation must ‘pursue a legitimate aim and be proportionate to that aim’. The following example assists in clarifying this intended operation.

Example: A Satanist requests that a publisher print materials that promote the teachings of Satanism. A Jewish employee of the publisher requests that she not be required to facilitate the order. Having fundamental regard to the International Covenant on Civil and Political Rights and the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, it would not be necessary or proportionate, for the employer to require her involvement in the order where alternative employees who do not have a genuine religious objection are available to facilitate the order. Similarly, it would not be necessary or proportionate for the employer to require her involvement in the order where alternative publishers are reasonably available to facilitate the order. In both of these cases, for the employer to require her involvement in the order would use ‘more restrictive means than are required’. In addition, to require such conduct would not be compatible with the international instruments stated at section 3.

5. Under **Section 22M**, Religious Ethos Organisations (REO) are taken not to discriminate if they are operating in a manner consistent with the doctrines, tenets, beliefs, teachings or susceptibilities of their religious beliefs, or seeking to further the interests of their organisation in this manner. The onus is on the organisation to prove its REO status. The following example demonstrates how this might be done:

Example: A conference/accommodation centre owned and run by a major church group receives a booking request from an organisation seeking to hold a two-day seminar on pagan religious rituals. The request is refused because the REO considers that to allow this event on

its property would be inconsistent with its beliefs. The seminar organisers lodge a discrimination complaint. The centre seeks to prove its REO status. If it has been operating its commercial conference/accommodation facilities without regard to religious principles (that is, like any other non-religious business), it will fail to provide the necessary proof. It will only succeed if it has been functioning according to clear, consistent religious tenets. That it has done this could be evidenced, for example, through the adoption of practices that are consistent with its beliefs, or a statement of its beliefs prominently displayed on its bookings webpage and in its staff and workplace practices manual.

6. The following examples provide illustrations of the kind of conduct that **Section 22N** is intended to capture:

Example 1: Employer B receives a job application from C who interviews very well and has excellent credentials for the position. B searches for information about C on the Internet and finds out that C is prominent in the local Jewish community. B doesn't like people who get involved in religion, believing it will cause trouble for the business, so B hires someone else. This is discrimination under 22N(1).

Example 2: Employer D is very religious and prefers staff members to also be of deep faith but does not satisfy the requirements for recognition as a religious ethos organisation. D discovers that employee E has recently lapsed and become agnostic. In deciding the staff to attend the next annual training conference for the company, E is omitted. This is conduct covered under 22N(2).

Example 3: An employee is demoted for expressing her religious belief on social media that faith-based aged care providers should not be forced to participate in voluntary euthanasia. The expression of her view does not include any direct criticism of, or attack on, or does not cause any direct and material financial detriment to her employer. The employer has breached Section 22N(3). Section 22N(1) and (2) may also apply.

Example 4: An airline has created a new staff policy celebrating same-sex marriage, requiring its on-flight stewards to wear a commitment ring in support of the policy while also banning Christian crosses in staff jewelry, given the Christian commitment to male-female marriage. The requirement to wear a commitment ring breaches Section 22N(1)(c) and the ban on crosses breaches 22N(6) and possibly 22N(1)(c).

Example 5: A bank employs tellers who wear the Islamic hijab, consistent with its requirement that customers need to be able to see the faces of staff. An Islamic woman who wears a full-face covering applies for a vacant position as a bank teller. The bank interviews her for the position but then rejects her application, due to the customer service and communications problems the full-face covering would cause, including with reference to applicable industry standards and practices. No discrimination occurs, as per the provisions of 22N(6). This is a similar principle to the UK court ruling in *Azmi v Kirklees Metropolitan Borough Council* (2007) ICR 1154, which found that the dismissal of a school's bilingual support worker was justified as the educator's face needed to be visible to pupils.

7. The following examples illustrate the operation of **Section 22S**.

Example 1: A private sector body exercising professional or trade accreditation functions on behalf of government or under statutory authority discriminates against a person by refusing accreditation or by imposing disadvantageous conditions on an accreditation of the person

(including an entity) because the person holds or expresses a religious belief or is associated with a person which does so.

Example 2: A body accrediting private schools on behalf of government or under statutory authority discriminates against a tertiary education provider by refusing to accredit or by imposing disadvantageous conditions on the accreditation of the provider because the provider holds or expresses a religious belief or is associated with a person (including an entity) which does so.

Example 3: On his Facebook page, a university social work student declares his support for traditional Christian views of marriage, between a man and a woman. This causes a controversy on campus but initially, university management stays out of it. The student declares publicly that while he is a committed Christian, as a future social worker he will readily look after people of all religions, sexuality and married type. But this is not good enough for the national social worker accreditation body, which says the student will not be admitted to the profession when he graduates. The university buckles under this edict and suspends the student from his course. The accreditation body has breached Section 22S, while the university has breached both sections 22S and 22V.

8. In the interests of providing clarity as to what comprises a ‘genuine occupational qualification’ at **Section 22U**, the following examples are provided:

Example 1: A public hospital advertises for a Muslim chaplain and requires that the chaplain be a person who both holds and acts in conformity with the Islamic faith. The hospital has applied a genuine occupational requirement for the purposes of section 22U(a). This example clarifies that section 22U would apply to chaplains in religious hospitals or public schools. This clarifies that the exception at section 22U(a) applies to chaplaincy roles that are employed by non-religious employers (such as in hospitals, prisons or schools) or where being a religious adherent is an actual requirement of the role. Section 22U(d) may also apply.

Example 2: A sporting association requires that its employees refrain from making statements or acting in a way that it considers is inconsistent with its secular ethos. Applying this policy, the association suspends a competitor on the ground of the religious activity of the competitor. The sporting association has not imposed a genuine occupational qualification under Section 22U. There is nothing particular about the playing of this sport that requires religious or non-religious customs, rituals, artistic performances, cultural practices or welfare. Therefore the competitor has grounds for reinstatement to the sporting association.

9. The following provides several examples of goods or services that would be captured by **Section 22W**. These are provided to clarify the intended scope of the provision.

Example 1: An unincorporated association of Hindus is refused to hire a public school hall or private meeting room because of the religious beliefs and activities of its members. The school has discriminated on the basis of the religious beliefs and activities of the association’s members.

Example 2: The hire of a public school hall or private meeting room is made to an incorporated association of Jews on the condition that the body does not teach its religious beliefs concerning marriage. The school has discriminated against the association on the basis of the religious beliefs and activities of the association’s members.

Example 3: A take-away food business is denied access to facilities on a university campus and is denied separate accreditation to provide food because of its requirement that shareholders and directors ascribe to a religious creed. The university is providing a service for the purposes of section 22W. The university has discriminated against the business on the basis of the religious belief and activities of associates of the business.

Example 4: An aged care facility is denied accreditation within an industry scheme because of its policy of preferring members of its affiliated religious order. The accrediting body is providing a service for the purposes of section 22W. The accrediting body has discriminated against the facility on the basis of the religious belief and activities of associates of the business. (In addition, the aged care facility may also be protected under section 22S.)

10. The following examples illustrate the intended scope of protections against discrimination under **Section 22Z**:

Example 1: A government agency refuses to appoint or hire or promote or dismisses a person, employee or contractor because that person holds or expresses a religious belief or is associated with a person who does so.

Example 2: A government agency or private sector body exercising professional or trade accreditation functions on behalf of government or under statutory authority refuses to accredit or imposes disadvantageous conditions on an accreditation of a person because the person holds or expresses a religious belief or is associated with a person who does so.

Example 3: A local government or State Government agency refuses to provide a grant or funding or other economic benefit or provides it on disadvantageous conditions because the applicant holds or expresses a religious belief or is associated with a person who does so.

Example 4: A government education authority, including a government school, or a private school when acting on the instruction of or in accordance with its funding contract with a government authority, suspends or expels a student or bans or refuses access to facilities or funding to a student club because the student or the student club holds or expresses a religious belief or is associated with a person who does so.

Example 5: A government agency refuses to supply to, or acquire from, a person goods or services or facilities or discriminates against the person in a tender process because the person holds or expresses a religious belief or is associated with a person who does so.

Example 6: A government school implements rules that no sacred religious texts or quotes from such texts were to be brought by students into the school or given by one student to another on the premise such is necessary to provide a “safe environment” for all students.