



20 November 2020

The Hon. Gabrielle Upton, MP
C/o Ms Elaine Schofield
Director Committees
Parliament of New South Wales

By email: religiousfreedombill@parliament.nsw.gov.au

Dear Ms Upton,

Inquiry into the *Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020* – Questions on Notice

We refer to the hearing for the inquiry into the *Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 (the Bill)* on 6 November 2020.

Question on Notice 1: Religious symbols or religious clothing

We took a question on notice from Mr Gurmesh Singh, MP as to how section 22N(6) of the Bill might take away someone's right to wear religious symbols or clothes in the workplace.

Answer to Question on Notice 1

Kingsford Legal Centre recognises that the right to freedom of religion includes the right to manifest a religion by wearing religious symbols or clothes. We support protection against discrimination on the basis of wearing religious symbols or clothes in all areas of life protected under the *Anti-Discrimination Act 1977 (the Act)*, including work. Our objection is not to the right to wear religious symbols or clothes in the workplace, but to the way this is addressed in the Bill.

Section 22N(6) does not provide a straightforward protection for the wearing of religious symbols or clothes. In order to avail themselves of the protection, people who wear religious symbols or clothes will have to satisfy a complex, multi-factor legal test. The most problematic part of the test is the requirement in section 22N(6)(b) to have regard to at least 5 different, yet overlapping, circumstances of employment – namely, the workplace safety, productivity, communications, customer service requirements and industry standards of the employment. It would be difficult for people who wear religious symbols or clothes, and for employers, to confidently apply the test in section 22N(6) to the full variety of situations that may arise in practice.

Even if people who wear religious symbols or clothes were to satisfy the proposed test, the protection they would receive is limited. Section 22N(6) only prevents an employer from 'refusing the employee permission to wear any religious symbol or religious clothing during work hours'. The limitations of the protection in section 22N(6) include:

- The references to ‘customer service requirements’ and ‘industry standards’ are broad, and may entrench existing discrimination against employees or potential employees who wear religious symbols or clothing;
- It is unlikely that section 22N(6) would prevent an employer from discriminating against people who wear religious symbols or clothing in other ways, such as by refusing to hire such a person;
- Section 22N(6) does not prevent discrimination against people who wear religious symbols or clothing in housing, the provision of goods and services, accommodation, registered clubs or other areas of life; and
- Given that sections of an Act must be interpreted in the context of the Act as a whole,¹ section 22N(6) could limit potentially broader protections for people who wear religious symbols or clothing in other sections of the Bill – for example, the protections against discrimination in work in sections 22N(1)–(2).

Question on Notice 2: Giving organisations a broad licence to discriminate

We took a question on notice from Dr Joe McGirr, MP as to why Kingsford Legal Centre describes section 22M of the Bill as granting organisations a broad licence to discriminate.

Answer to Question on Notice 2

By stating that ‘a religious ethos organisation is taken not to discriminate against another person’ in certain circumstances, section 22M negates the Act’s present protections against discrimination for diverse groups of people in those circumstances.

Further, section 22M will partly undo many of the Bill’s new protections against religious discrimination before they even take effect. This could have a negative impact on people of any religion in a particular case. We are especially concerned about the impact of section 22M on people who hold minority religious beliefs and people who are not religious.

The most concerning aspect of section 22M is that it would create exemptions from discrimination protection for conduct that is not actually in accordance with an organisation’s religion. This is because section 22M grants exemptions on the basis of a subjective, ‘genuinely believes’ test. As noted on page 6 of our submission, people genuinely hold all sorts of beliefs that do not belong to any particular religion, including beliefs that are false, discriminatory, misguided or otherwise harmful. Further, it will often be difficult or impossible to prove that a belief is genuinely held, regardless of whether that claim is true.

Section 22M also explicitly authorises ‘religious ethos organisations’ to give preference to persons of the same religion – for example, by hiring or prioritising service delivery to a person because they have a particular religion.² We have given legal help to people who have experienced this problem, even without section 22M. Section 22M will worsen the problem, especially for people who hold minority religious beliefs and people who are not religious. It should be noted that the definition of ‘religious ethos organisation’ does not just include schools and charities run by religious organisations, but also applies to a broad range of bodies that could potentially include commercial businesses and bodies providing essential community services.

¹ *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355, 381 [69].

² See pages 7–8 of our submission.

At the hearing on 6 November 2020, we referred to a case study of a client we helped, which is relevant to this question on notice. We have provided more information on this case study below.

Bilal's story³

Bilal went back to University to retrain as a maths teacher after previously working in another profession. He received excellent grades during his studies, and successfully completed his practical experience. He applied for a position as a maths teacher at an independent Christian school not far from his home. After sending his application, he received a call from the school to ask him if he was Christian. He explained that he was a Muslim. The school then told him that they would not consider his application, as they only employed Christian staff. Bilal was hurt and upset that his application was not even going to be considered because of his religion, and because he did not think that his religion was relevant to his ability to teach maths to high school students.

Section 22M will worsen the problem highlighted by Bilal's story.

Neither section 3 of the Bill generally, nor its specific reference to the Siracusa Principles, changes the above analysis regarding section 22M.

Question on Notice 3: Registered clubs

We took a question on notice from Ms Robyn Preston, MP as to why the registered clubs exception in section 22Y of the Bill should be defined by reference to 'the principal object' of a registered club.

Answer to Question on Notice 3

Proposed section 22Y(3) would allow registered clubs to engage in religious discrimination 'if the *objects* of the registered club include providing benefits for persons with specified religious beliefs or religious activities' (emphasis added). This is inconsistent with the equivalent provisions for other protected attributes in the Act. For example, section 20A(3) of the Act allows for registered clubs to provide benefits for persons of a specified race if the *principal object* of the club is to do so. Proposed section 22Y does not require that the *principal object* of a club must be for the benefit of people with specified religious beliefs or religious activities. This creates inconsistency in the Act, and uncertainty in the application of the proposed provision.

Clubs play a significant role in many communities, particularly in regional, rural and remote NSW. To fulfil this important role in many small towns, some clubs may have been created by religious organisations to further multiple objects for the broader community and to provide a range of services and benefits. Clubs should not be able to discriminate against members or potential members on the basis of their religion (or of having no religion) if the pursuit of religious objectives is not their *principal object*, rather than one of many objectives, services and functions by the Club in the community.

Question on Notice 4: Impact of the Bill on employers and managing unacceptable behaviour in the workplace

We took a question on notice from Ms Jenny Leong, MP as to:

- How the Bill would have applied to a situation during the marriage equality plebiscite in which two employees were engaging in unacceptable bullying or behaviour around their advocacy for a 'yes' and a 'no' vote; and

³ We have changed the client's name and removed identifying information to protect confidentiality.

- The challenge that employers would have in trying to balance the protected attributes that currently exist in the Act with the Bill's broad protections for religious ethos and religious activity.

Answer to Question on Notice 4

The Bill is difficult to reconcile with existing discrimination protections in the Act. It is also difficult to reconcile with existing protections under a broad range of NSW and Commonwealth laws, including employment protections under the *Fair Work Act 2009* (Cth) and *Industrial Relations Act 1996* (NSW). The Bill will create difficulties for employers and employees alike in understanding their rights and responsibilities under the law. It is likely to generate significant litigation, as parties go to court in an attempt to resolve highly complex questions of law. This could cost employers and employees thousands of dollars in legal fees.

Section 22L of the Bill could potentially protect bullying and other unacceptable behaviour in the workplace if such behaviour were motivated by a religious belief. This would mean that a person who was motivated by a religious belief to engage in bullying or other unacceptable behaviour in the workplace while advocating against marriage equality would be protected by the Bill. If an employer directed the person to stop engaging in such behaviour in the workplace, the employer could be liable for religious discrimination under the Bill. This provision could protect any unacceptable conduct that was motivated by religious belief. The protection would not be extended to the same conduct motivated by other reasons, including someone who has been threatened for being in a same-sex relationship or for having another protected attribute.

Reconciling the Bill with the Act's existing protections for diverse groups of people will be a major challenge for employers and employees alike. For example, an employee who was motivated by a religious belief to treat women differently from men in the workplace would likely be protected by the Bill, yet an employer who condones that behaviour may breach the Act's protections against sex discrimination. Similar challenges could arise in relation to any of the protected attributes under the Act – including sex, race, transgender status, marital or domestic status, disability, carer responsibilities, homosexuality, HIV/AIDS status and age. Similar challenges could also arise in reconciling the Bill with Commonwealth discrimination laws – including the *Racial Discrimination Act 1975*, *Sex Discrimination Act 1984*, *Disability Discrimination Act 1992* and *Age Discrimination Act 2004*.

In such situations, it will often be difficult or impossible for employers to know what is the lawful course of action. Likewise, it will often be difficult or impossible for employees to know when the law protects them. It is undesirable to introduce such confusion into the law.

Question on Notice 5: Organisations that get public money or provide services in areas of governmental responsibility

We took a question on notice from Ms Robyn Preston, MP as to our recommendation that the definition of 'religious ethos organisation' should not include organisations that get public money or provide services in areas of governmental responsibility (**Recommendation 6**). The question was whether this would be a disincentive for religious organisations that have halls to apply for grants to improve the asset, and whether our recommendation would also apply to council assets, such as community halls.

Answer to Question on Notice 5

The Bill's definition of 'religious ethos organisations' must be read in light of the broad licence to discriminate that section 22M of the Bill would grant uniquely to such organisations.⁴ Our primary recommendation regarding 'religious ethos organisations' is that this broad licence should not be granted (**Recommendation 7**).

If the Committee does not adopt Recommendation 7, then we submit Recommendation 6 as an alternative to limit the negative impact of section 22M. Recommendation 6 would not negatively affect religious organisations that comply with standard discrimination requirements. It would simply hold such organisations to the same standards that apply to other organisations.

Recommendation 6 may create an incentive for religious organisations that apply for grants of public money to comply with standard discrimination requirements. It could be described as a disincentive only in the sense that it would deny special privileges to some organisations that wish to engage in discrimination.

A local council is unlikely to meet the definition of a 'religious ethos organisation' under the Bill. It will therefore not obtain a licence to discriminate under section 22M. This is appropriate – as governmental bodies, local councils should not engage in discrimination.

If we can be of further assistance to the Committee, please contact us at [REDACTED].

Yours Faithfully
KINGSFORD LEGAL CENTRE

[REDACTED]

Dianne Anagnos
Principal Solicitor

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⁴ See pages 7–8 of our submission and our answer to Question on Notice 2 above.