



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: HRC:RHas2006238

15 December 2020

The Hon Gabrielle Upton MP
Chair

Joint Select Committee on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020
Parliament House, Macquarie Street
Sydney NSW 2000

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

Dear Ms Upton,

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

The Law Society received eight additional questions from the Joint Select Committee on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 (“the Bill”) on 9 December 2020. Our responses are below.

1. Following the questions asked by members of the committee during the public hearings, is there any additional information you would like to share or further clarification you would like to provide?

The Law Society has no further information to share beyond our responses in this letter, our original submission, our evidence provided to the Joint Select Committee on 6 November 2020, and the subsequent answers provided to questions taken on notice.

2. Given the impact of section 54 of the NSW Anti-Discrimination Act 1977 do you acknowledge that, if enacted, the proposed Bill cannot render unlawful compliance with any other NSW Act, regulation or by-law, including the 2019 Abortion Act, existing health legislation, the COVID health orders, domestic violence laws, sexual abuse laws, NSW Crimes Act, the Local Government Act, business regulations, consumer protection, education statutes and industrial relations laws?

The Law Society is concerned that there are provisions in the Bill, including proposed ss 22N and 22Z, that may conflict with s 54 of the *Anti-Discrimination Act 1977* (NSW) (“ADA”). This concern is shared by Anti-Discrimination NSW, the NSW state government body that administers the ADA.¹ The Law Society’s views on ss 22N and 22Z of the Bill are set out in further detail at pages 3-6 of our response to the Joint Select Committee’s questions on notice dated 27 November 2020.

¹ Anti-Discrimination NSW, ‘Submission to the Inquiry into the Anti-Discrimination Amendment (Complaint Handling) Bill 2020’ (21 August 2020), 11.

While the Law Society does not provide legal advice, we note that if the Bill is passed in its current form, a court or tribunal may be required to reconcile the conflicts between s 54 in the ADA and provisions in the Bill by interpreting the provisions in a way that would best achieve the purpose or object of the Bill.² The judicial resolution of the issue would not be certain, and, in the interim, there may be confusion among those required to comply with the ADA as to how to abide by their obligations under existing laws and regulations in light of the provisions in the Bill.

- 3. Do you agree with submissions from the Australian National Imams Council, the Anglican Archbishop of Sydney and the Catholic Archdiocese of Sydney that the Bill generally fits the structure and intent of the remainder of the NSW Anti-Discrimination Act? If not, what is the unacceptable point of difference you have identified?**

The Law Society's earlier submission dated 20 August 2020 identifies how the Bill diverges from the approach in the ADA in relation to existing protected attributes. We direct the Joint Select Committee to pages 1-3 of that submission.

- 4. Given that the Bill – unlike other parts of the Act for HIV/AIDS, Homosexual, Transgender and Racial Vilification – offers no protections for Religious Vilification, do you acknowledge that these other attributes are afforded stronger protections than those proposed in the Bill? If not, why?**

We refer to the Law Society's submission dated 20 August 2020 which noted uncertainties presented by the Bill, including in respect of the broad definitions of "religious activities" and "religious ethos organisation" and the proposed test for determining when a belief is held. As a result of these uncertainties, it is difficult to provide an assessment of whether the Bill provides 'stronger' protections for religious activities and religious beliefs than are available for existing protected attributes in the ADA, particularly given the complexity of the ADA and the exceptions available under Part 6 of the Act. For further detail, please see the answers provided to questions taken on notice during the hearing on 6 November 2020.

- 5. Given that s22Z of the Bill is similar to the provisions for Sexual Harassment in the existing Act and non-government schools and charities are already exempted (re s.22M) and the existing Disability provisions cover 'Future Belief', how can your argument of 'special treatment' or a 'hierarchy of protections' for religion be sustained?**

We are unable to provide a response as the Law Society's previous submissions did not include the terms "special treatment" or "hierarchy of protections".

- 6. If not by the Siracusa Principles how can any clash of gay and religious rights be reconciled in an Act such as this?**

The Law Society supports legislative protections for the right against religious discrimination and the right to freedom of religion, as stated in our earlier submission to the Joint Select Committee dated 20 August 2020. However, our view is that an anti-discrimination law is not an appropriate legislative mechanism to allow consideration of limitations on the right to freedom of religion alongside the need to protect other human rights. For this reason, the Law Society suggested in our 20 August 2020 and 27 November 2020 submissions to the Joint Select Committee that NSW would benefit

² *Interpretation Act 1987* (NSW) s 33; *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404.

from a well-drafted Human Rights Act containing a clear mechanism to consider and balance competing rights. As noted in our 20 August 2020 submission, this is the approach followed in Queensland, Victoria, the ACT, Canada, and New Zealand, among other jurisdictions.

- 7. Why has your submission/evidence to the Committee prioritised a concern about the beliefs and statements of born-again Christians that are integral to the spiritual faith and existence of these citizens? If all human rights are equal, as they should be, isn't it time for the gay-Left community to learn to tolerate the different beliefs, values and moral code of law-abiding born-again Christians and indeed where any illegality might exist, vice versa?**

We are unable to provide a response as the basis of this question does not appear to be consistent with our submission or with evidence provided by the Law Society to the Joint Select Committee.

- 8. Would your organisation refuse employment to someone who:**
- a. opposes same-sex marriage and supports traditional marriage?**
 - b. believes in the literal teachings of the Bible?**

The Law Society complies with all applicable state and federal employment law legislation. We are proud to have a diverse workplace culture that brings together people from all disciplines and walks of life.

Please direct any further queries in the first instance to Andrew Small, Policy Lawyer, on

[REDACTED]

Yours sincerely,

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Richard Harvey
President