



## **Additional questions**

### **Professor Simon Rice, Australian Discrimination Law Experts Group**

I appeared as a witness on 23 October 2020 before the Joint Select Committee on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020. Since then, individual members of the Committee have invited me to answer the following questions.

- 1. 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?**

This question cannot be answered generally. The operation of s 54 as a defence to a claim of discrimination depends on the terms and source of the requirement relied on, and the nature of the conduct engaged in; see Neil Rees, Simon Rice and Dominique Allen *Australian Anti-Discrimination and Equal Opportunity Law*, Federation Press, 3<sup>rd</sup> ed. 2018, chapter 15.10 and in particular paragraphs 15.10.22; 15.10.24; and 15.10.27.

It seems that s 22Z of the Bill would affect the operation of s 54; see (9b) below.

- 2. 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?**

Points of difference between the Bill and the current Act include:

- i. unlike protections for attributes in the current Act (and in similar laws in Australia), the Bill extends protection of an attribute ('engaging in religious activity') to include some conduct that is illegal
- ii. unlike arrangements under the current Act (or similar laws in Australia), the Bill removes an aspect of the protected attribute – 'protected activity' – from the scope of the prohibition against indirect discrimination, allowing conduct that would ordinarily fail the 'reasonableness' test
- iii. unlike arrangements under the current Act (or similar laws in Australia), the Bill enables an entity, rather than only a person, to complain that it has been the subject of discrimination



- iv. unlike arrangements under the current Act (or similar laws in Australia), the Bill sets a threshold of 'genuine belief', rather than objective evidence of doctrine, in order to except discriminatory conduct
- v. unlike arrangements under the current Act (or similar laws in Australia), the Bill sets a threshold of 'conducted in accordance with' religious beliefs, rather than 'established for religious purposes', in order to except discriminatory conduct
- vi. unlike provisions applying to other attributes in the current Act (and in similar laws in Australia), the Bill prevents the granting of a discrimination exemption for the attribute of religious beliefs or religious activities
- vii. unlike the current Act (or similar laws in Australia), the Bill requires that regard be had to select international human rights treaties for the purposes of interpretation in respect of only one of the protected attributes
- viii. unlike provisions applying to other attributes in the current Act, the Bill prohibits discrimination on the ground of religious beliefs or religious activities in State functions and programs
- ix. unlike provisions applying to some other attributes in the current Act, the Bill does not prohibit vilification on the ground of religious beliefs or religious activities

**3. 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?**

As the question states, the Act currently protects some attributes against vilification, and the Bill does not propose the same protection for the attribute of religious beliefs or religious activities. In this regard, the Bill reflects the more limited protections provided to other attributes, such as sex and disability.

**4. 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?**

Neither the submission of the Australian Discrimination Law Experts Group nor my evidence to the Committee refers to a 'hierarchy of protections'. My evidence to the Committee did not refer to a 'special treatment'.

The submission of the Australian Discrimination Law Experts Group identifies the 'protected activity' provisions as 'special provisions' which, in the absence of any equivalent elsewhere in the Act, they undoubtedly are.



The same submission identifies s 22M of the Bill as a ‘special exception’ and explains why this is so: the provision extends the existing exception for charities and bodies expressly established for a religious purpose, to charities or bodies with a religious affiliation or connection.

The same submission addresses the issue of ‘future belief’ in the Bill and explains its argument (see page 8).

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

The Siracusa Principles represent the conventional means of accommodating competing human rights in a given situation. They are not reflected in the Act and cannot now be imported into the Act, which is designed to protect against and remedy discrimination, not to enable and promote a balanced and comprehensive approach to human rights.

**6. 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?**

Neither the submission of the Australian Discrimination Law Experts Group nor my evidence to the Committee refers to the beliefs and statements of born-again Christians.

**7. 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 submission of the Australian Discrimination Law Experts Group and my evidence relate to technical expertise in anti-discrimination law.

As a general observation, an organisation is obliged to comply with relevant laws. Current law might prohibit such a refusal depending on the terms of the refusal and the particular teaching.



**8. Do you now acknowledge that the NSW Bill has not been based on the Porter Bill in Canberra and in fact, it has been deliberately drafted to avoid the problems encountered by the Porter Bill in its consultation/feedback process?**

Neither the submission of the Australian Discrimination Law Experts Group nor my evidence to the Committee compares this Bill to the 'Porter Bill'. I am not aware of the intention of the drafter of the Bill.

**9. (a) what is your view of the connection between s54 of the Principal Act and proposed s22Z of the Bill?**

The two provisions can be read together to an extent: see (b) below.

**(b) if legislated, would s22Z prevail over s54 because it was a later piece of legislation?**

Section 22Z would prevail over s 54 only if and to the extent they are interpreted to be inconsistent; see Rees, Rice and Allen, paragraph 15.10.3. Following that through:

- i. Section 54 allows conduct that would otherwise be unlawful discrimination only if the conduct is 'necessary'; what is 'necessary' is construed narrowly and strictly, minimising the occasions of permitted discrimination (see Rees, Rice and Allen [15.10.26]-[15.10.29], and the High Court decision of *Waters v Public Transport Corporation*).
- ii. Section 22Z (as worded) would prohibit all discriminatory conduct under a State law or program, whether necessary or not.
- iii. So it seems that s 22Z – a later provision – is inconsistent with the permission granted by s 54 *in relation to things done under a State law or program*. Put another way, the effect of s 22Z is that s 54 would continue to allow necessary conduct that would otherwise be unlawful discrimination unless it is conduct under a State law or program.

**10. Do you foresee any problems if the Bill were enacted because the 'ethno religious' provisions of the Act remain and because Sikhism and Judaism would undoubtedly be religions?**

Enactment of the Bill is not inconsistent with continuing protection for 'ethno-religious' status.

Protection for religious belief is protection only for religious belief and not for ethnicity. Protection for ethnicity is protection only for ethnicity and not for religious belief. When the two attributes are indivisibly connected (such as for Sikhism and Judaism) continuing protection for that single attribute is appropriate. A person with that attribute should not have to – and may not be able to – distinguish



between their religious belief and their ethnicity when complaining of discriminatory conduct.

**11. Are you aware of any other jurisdictions where the instruments and principles of Section 3 of the Bill are used in the way proposed in the Bill rather than as things to have regard to when drafting legislation?**

There are no other jurisdictions where the instruments and principles of s 3 of the Bill are used in the way proposed in the Bill; that is, to require that regard be had to select international human rights treaties for the purposes of interpretation in respect of only one of the protected attributes.

As the question suggests, a drafter may have regard to Australia's international human rights obligations when drafting legislation. Those obligations can be, explicitly or impliedly, relevant to interpretation of the legislation (see Justine Nolan, Adam McBeth and Simon Rice, *The International Law of Human Rights*, OUP, 2<sup>nd</sup> ed, 2017, 321-322).

I note that the Preamble to the Queensland *Anti-Discrimination Act* has an inclusive list of some international human rights treaties to which Australia is a party, only to give context to, and to support the constitutional validity of, the Queensland Parliament's legislating 'to extend Commonwealth legislation'.

**12. If the Bill were enacted is Section 3 capable of overturning voiding or altering actions allowed or required by other provisions of the Bill?**

Section 3 is capable of affecting the way the provisions are interpreted and of rendering irrelevant the way the provisions have been interpreted to date.

**13. How can it be said (in reference to Section 22M) that an organisation can hold a belief?**

Such a provision would have to be interpreted to give it practical meaning. A possible interpretation, consistent with other provisions in the Act relating to religious organisations, would be to have regard to be the religious doctrine according to which the organisation was established.

I trust that these responses will assist the Committee.

**Professor Simon Rice, OAM**  
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