

21 December 2020

Joint Select Committee on the Anti-Discrimination
Amendment (Religious Freedoms and Equality) Bill 2020
Parliament of New South Wales

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



Dear Chair,

Responses to Additional Questions

Please find following answers to the additional questions on notice sent on 25 November 2020.

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 will depend upon the nature of the conduct in issue and the terms of the Act, regulation, ordinance, by-law, rule, instrument, order etc under which it is said that the conduct is 'necessary' in order to comply with it.

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?*

While superficially the Bill appears to follow the overall structure of the Act – adding new protected attributes, by inserting a new Part – its approach and substance deviates significantly from the existing law. In part this appears to reflect the intent of the Bill to be, as its name suggests, a 'religious freedoms' Bill, rather than one that provides protection from discrimination as is otherwise the intention of the Act.

As set out in our submission to this Inquiry, the Bill includes a number of unique provisions not replicated in other Parts of the ADA. These include:

- a definition of 'religious activity' that seeks to extend protection to forms of otherwise unlawful conduct (see 2.2 of our submission);
- distortion of the test for indirect discrimination by the inclusion of unique 'protected activity' provisions that introduce unprecedented limitations on employers, qualifying bodies and educational authorities (see 2.3 of our submission);

- exceptions for religious organisations (including the definition of ‘religious ethos organisation’ in section 22K and the exception in section 22M) which are substantively different from, and adopt different tests to, the existing exception in section 56 of the Act (see 2.5 and 2.6 of our submission);
- the granting of standing for ‘religious ethos organisations’ (see 2.9 of our submission);
- distinct provisions relating to state laws and programs (see 2.10 of our submission); and
- the inability of the President to grant exemptions in relation to discrimination on the basis of religious belief and activity (see 2.11 of our submission).

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?*

No. Assessing the overall strength of protection for the different grounds contained in the Act requires consideration of a range of factors.

Some religious groups already enjoy vilification protection under the Act, because the Act’s definition of race includes ‘ethno-religious’ origin. The Bill does not alter this inconsistency, whereby some religious groups such as Jewish people or Sikhs, are protected against vilification, while others are not.

While the Bill does not propose to extend vilification protections to all religious groups, in some respects it would provide stronger protections against discrimination for religious belief than for existing attributes. This is the case, for example, with the ‘protected activity’ provisions (see 2.3 of our submission); the provisions giving standing to ‘religious ethos organisations’ (see 2.9 of our submission); and the protections in relation to state laws and programs (see 2.10 of our submission).

We note that PIAC has, in any event, called for the introduction of vilification protection for religious belief in our submission to this inquiry (see 2.12 of our submission)

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?*

We refer again to our submission to the inquiry, and our answers to the previous two questions.

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 premise of this question that ‘gay and religious rights’ are necessarily opposed is rejected. Evidence provided by others to the inquiry has identified the intersectionality of identities of LGBTQ people of faith, including their needs to be protected against discrimination on the basis of both their sexual orientation, gender identity or sex characteristics and their faith.

We reiterate concerns expressed in our submission to the inquiry that the Bill undermines the rights of a wide range of individuals across society, including people from minority faiths. In particular, the Bill

- does not cover all people of faith equally, because it allows and encourages unnecessary and unjustified discrimination by religious organisations against other individuals and organisations of different faith or no faith; and
- undermines anti-discrimination coverage for other protected attributes under the ADA, especially sex, marital or domestic status, homosexuality and transgender status.

The Siracusa Principles provide guidance in resolving tensions between human rights. They are not appropriate in the context of narrow anti-discrimination legislation which does not seek to provide a broader human rights framework.

In the context of an anti-discrimination Act, PIAC supports narrow, clear and carefully drafted exceptions. These must be justified in each circumstance (reflecting that exceptions necessarily limit the rights of others to be protected against discrimination) and provide certainty so that participants in public life can easily understand when and in what circumstances they may be discriminated against. The *Anti-Discrimination Act 1998* (Tas) provides an example of how this can be done.

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?*

We invite the Committee to read our submission and evidence and withdraw the question which is both inaccurate and irrelevant.

Our submission does not refer to Christians, including born-again Christians. The only reference to Christians in our evidence at the hearing on 23 October 2020 was as part of the following answer, in response to a question from Mr Dib:

PIAC is seeking to recognise that religious organisations will want to – and people of faith will want to – be able to have children in religious schools and that means having them discriminate at the point of admission on the basis of religion. So admitting only students who are Christian students, or whose parents adhere to that faith – so at the point of admission. Once a child is admitted to the school, we say they should not then be treated less favourably because, for example, they start to question their faith, particularly when we have kids being enrolled in primary school, they really do not know what they believe.

7. *Would your organisation refuse employment to someone who:*
- Opposes same-sex marriage and supports traditional marriage?*
 - Believes in the literal teachings of the Bible?*

PIAC does not discriminate in employment on the basis of religious belief.

8. *In the possible example of an openly gay employee at a printing firm asked to work on a job printing protest leaflets about the Gay Mardi Gras and the way in which it spreads diseases like AIDS, if the worker refused and was sacked,*
- What action does PIAC believe should be available to the worker under i) NSW anti-discrimination laws and ii) any associated unfair dismissal law?*
 - Ideally, should the worker be reinstated?*
 - Rather than sacking the worker, should the company allocate the job to another employee (willing to do it) instead?*

d. What should the company do if none of its staff and management are prepared to work on the job?

9. How does PIAC answer the questions above in the equivalent scenario of a Jewish printer being asked to print materials reflecting the teachings of Satanism?

We answer questions 8 and 9 together.

Any answer to this hypothetical question would depend on a range of factors, including issues of work health and safety, making it impossible to provide a definitive answer.

However, we note there are substantive differences between the hypothetical example in question 8, and the scenario referred to in question 9 (and in the Explanatory Notes to the Bill), including:

- In the 'Mardi Gras' example, it is possible such leaflets may be considered vilification on the basis of either homosexuality (section 49ZT), or HIV/AIDS (section 49ZXB), or both. There is no indication in the corresponding example of the 'Jewish publisher' that the materials sought to be published amount to vilification. It may therefore be unlawful for the 'Mardi Gras' leaflets to be published.
- There is no indication that the person seeking to print 'protest leaflets about the Gay Mardi Gras and the way in which it spreads diseases like AIDS' is related to a protected attribute, either existing or proposed. Homophobia and spreading stigma about HIV are not protected attributes. Choosing to refuse to service a customer on this basis is therefore not necessarily unlawful. This differs from the 'Jewish publisher' example which does involve direct discrimination against the Satanist customer on the basis of their religious belief.

We remain concerned about the implications of the Jewish publisher example, as outlined in our submission at 2.13.

10. What does PIAC think of the ruling in Ontario (Human Rights Commission) v Brockie where the Ontario Superior Court of Justice held that the Ontario Human Rights Commission 'ought not to require Mr Brockie to print material of a nature that could reasonably be considered to be in direct conflict with the core element of his religious beliefs', (the beliefs in question concerned beliefs on the immorality of same-sex conduct)?

This decision was decided in a jurisdiction with a comprehensive Charter of Rights and Freedoms. There is no such Human Rights Act or Charter here, at either Commonwealth or NSW level, with a potentially significant impact on the outcome of any similar case.

PIAC supports the introduction of a Human Rights Act in both NSW, and at Commonwealth level. We do not, however, support the piecemeal and highly selective attempt to introduce only some elements of international human rights law for the reasons set out in our submission (see 2.13).

11. (a) What is your view of the connection between s54 of the Principal Act and proposed s22Z of the Bill?

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

The Bill does not attempt to assist in understanding the interaction between these two sections and this will be another complexity introduced by the Bill through which a Court will ultimately need to work.

Whether s 22Z prevails over s 54 will depend upon the extent to which there is inconsistency between them. Section 54 provides for an exemption for conduct that is 'necessary in order to comply with a requirement' of an Act, regulation etc. Section 22Z makes it unlawful to do certain acts 'in the course of performing' functions and responsibilities under State laws or programs.

As a later section, a 22Z arguably makes conduct done under a State law or program unlawful *despite it being necessary* to comply with an Act, regulation etc.

12. 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?

Yes. There are inconsistencies created by the ongoing protection of Sikhism and Judaism under the protected attribute of race (because of the inclusion of 'ethno-religious' groups within that definition), as well as under proposed Part 2B which adds religious belief and activity as new protected attributes.

For example, an employer may seek to rely on the narrower criteria within section 22N(6) in order to prohibit a Sikh employee from wearing religious dress in the workplace. However, there is no equivalent limitation in section 8 of the Act (which covers discrimination on the basis of race in relation to employment) creating uncertainty about the obligations of the employer and the rights of the employee.

Similarly, religious ethos organisations, broadly defined under section 22K of the Bill, may believe they are able to exclude Jewish employees and/or people accessing their services under the comparatively wide terms of section 22M. However, in practice, only a more limited range of organisations, using the narrower test in existing section 56(d) of the Act, would be able to do so.

In contrast, in both examples the employer and religious ethos organisation would likely be able to discriminate against Muslim employees, including on the basis of their religious dress, and against Muslim people accessing services under the broader tests proposed in the Bill.

These inconsistencies are exacerbated because of the many unique features of the proposed Bill compared to the existing protected attributes under the Act: see our responses to questions 2, 3 and 4 above.

We therefore reiterate our support for standard protections for religious belief and activity, on the same basis as existing attributes in the Act, as opposed to the 'bespoke' approach adopted in the Bill.

Although PIAC argues for consistency in protection in any changes made to the Act, we do not support removing 'ethno-religious' from the definition of race without broader changes that would ensure Jewish and Sikh people maintain the protection currently available under the Act.

13. 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?

No. We are not aware of any other Australian anti-discrimination law which highlights just one individual sub-clause of one individual Article of an international human rights instrument and provides how its interpretation should affect the operation of the entire Act (as section 3 of the

Bill, and its explicit references to Article 18(3) of the *International Covenant on Civil and Political Rights*, does).

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

It is unclear how the changes proposed to the principles of the Act would impact upon the operation of the Bill or the Act more generally, but it is capable of altering the way the Act has been interpreted and applied to date.

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

We refer the Committee to our submission (see 2.6), which noted that:

the proposed section purports to apply an entirely subjective test based on what ‘the organisation genuinely believes’. It is not clear how the ‘genuine belief’ of an *organisation* – as distinct from a natural person – could or would be determined. This formulation is entirely novel, flawed and should be removed. [emphasis in original]

We also note that, by way of comparison, the wording of the existing general religious exception in section 56(d) of the Act avoids this problem by providing

Nothing in this Act affects- ... (d) any other act or practice of a body established to propagate religious that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.

This is another reason to remove the unnecessary, and unique, approach to religious exceptions in the Bill contained in the proposed definition of religious ethos organisation in section 22K, and the general religious exception proposed in section 22M.

Yours sincerely

A solid black rectangular box used to redact the signature of Jonathon Hunyor.

Jonathon Hunyor
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Public Interest Advocacy Centre