



Additional questions - Department of Communities and Justice

1. Why did Mr McKnight invent the nonsense proposition of a religion motivated by racial slurs and discrimination, when clearly offences of this kind would be covered by other parts of the NSW Anti-Discrimination Act and the use of the proposed Siracusa Principles?
2. In any case in (1) above, why should employers be anointed as judge and jury in determining if something was a racial slur, when such matters should be determined by the NSW Anti-Discrimination Board or the Australian Human Rights Commission?
3. Why did these departmental officials change their advice from the earlier briefing to the Committee (31 August 2020) when they set out very clearly that:
 - This Bill adds new protections to the NSW Anti-Discrimination Act; it doesn't take any away.
 - The Bill does not affect protections for other protected attributes under the Act.
 - The Bill is "broadly consistent with the Anti-Discrimination Act".
 - It creates no new exceptions elsewhere in the Act.
 - It has no direct implications for the NSW Abortion Act or Crimes Act vilification provisions.
 - On the slides provided the question was asked: "Is there a risk that this Bill creates a hierarchy of protections where religious freedoms are placed above other protected attributes within the Act?" The answer was 'No'.
4. In light of (3) above why should the witnesses be regarded as reliable and consistent sources of advice for the Committee?
5. Why was different advice provided on the question of the Covid Health Orders at the briefing on 31 August, when no mention was made of the spurious Victorian example and legal 'interpretation' given on 16 November? If the departmental advice is not consistent how can it be regarded as credible?
6. 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, education statutes and industrial relations laws?
7. 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?
8. 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



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EQUALITY) BILL 2020

that these other attributes are afforded stronger protections than those proposed in the Bill?
If not, why?

9. 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 any argument of 'special treatment' or a 'hierarchy of protections' for religion be sustained?
10. If not by the Siracusa Principles how can any clash of gay and religious rights be reconciled in an Act such as this?

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Joint Select Committee on the Anti-Discrimination
Amendment (Religious Freedoms and
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Dear Ms Upton

Additional Questions – Department of Communities and Justice

I thank you for the opportunity to appear before the Committee to provide evidence on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 (the **Bill**). I have set out below my responses to the additional questions from the Committee. Please note that I have prepared these responses in line with the Department's role to provide factual information about the existing law and the terms of the Bill to inform the Committee's deliberations. I do not express a policy view on the terms of the Bill.

There is some suggestion in some of the questions that the information provided to the Committee by the Department at a private briefing held at the Committee's request and formal evidence may be inconsistent. At all times, of course, departmental officials have attempted to be as helpful and clear as we can with the Committee, and to address its questions as fully and accurately as we can.

I do not consider that the information provided is inconsistent. Of course, answers may have become refined over the period between appearances with the benefit of further consideration and review of submissions to the Committee.

I express answers to the questions below as succinctly as possible. The law in this area is complex, and the Bill's provisions are also complex. I would be happy to further clarify any points if required.

Question 1

The Bill proposes to insert a new s 22K into the *Anti-Discrimination Act 1977* (**ADA**) that defines religious belief as having a religious belief, conviction, opinion or affiliation, and religious activities to include an activity motivated by a religious belief (not including any activity that would constitute an offence punishable by imprisonment under the law of NSW or the Commonwealth).

This definition does not exclude religious activities that would be a civil contravention of Commonwealth or NSW laws, such as discrimination or civil vilification under the ADA. In practice, this means that a religious activity that amounts to vilification or discrimination under any of the grounds in the ADA, such as homosexual or racial vilification, would fall within the definition of religious activity while at the same time being unlawful under the ADA.

For example, a person making vilifying statements that are motivated by their genuine religious belief (see proposed s 22KA) may be held liable in civil proceedings in the NSW Civil and Administrative Tribunal for the vilification of an aggrieved colleague.

At the same time, disciplinary action for breach of any applicable workplace policies to do with respectful workplace behaviour may amount to religious discrimination under the terms of the Bill:

- If the statements are made during work time and in the workplace, the question is whether the workplace policy amounts to indirect discrimination on the ground of religion because the policy limits religious activity, or whether these are reasonable requirements or conditions.
- If the views are expressed outside the workplace and outside work time, they may amount to protected activity under the Bill. If so, any disciplinary action by the employer may be unlawful under proposed ss 22N(3) and (4).

There could also be complex interactions between the Bill and other grounds of discrimination in the ADA, in practice. For example, where a manager in a business expresses religious beliefs that could amount to discrimination against another employee on a protected ground such as sex (for instance, to do with the appropriateness of certain kinds of work for a particular sex), the aggrieved employee could still make a complaint against the first employee for discrimination on that ground. If the employer takes action to prevent the employee from expressing these religious beliefs in some circumstances, this may amount to religious discrimination under the terms of the Bill. However, if the employer does not take such action, it may be vicariously liable for the discrimination under s 53 of the ADA.

Siracusa Principles

The question refers to the Siracusa Principles, so it may be helpful to explain our understanding of the nature and role of those Principles.

The role of the Siracusa Principles is to provide guidance on the interpretation of the International Covenant on Civil and Political Rights (ICCPR). They relate to all rights under the ICCPR.

The Siracusa Principles resulted from a 1984 conference of non-governmental organisations, initiated by the American Association for the International Commission of Jurists. They represent the considered views of international law experts on the ICCPR, and have been influential in the interpretation of the ICCPR. As an interpretative tool at international law, the Principles sit alongside other material, including UN General Assembly declarations, UN Committee reports and special rapporteur reports, in assisting the understanding of international law.

They focus on interpreting the rights in the ICCPR in a fulsome and rights-affirming way, and comment particularly on:

- How to regard the allowable limitations on rights under the ICCPR (limitations are allowed in some cases to "protect public safety, order, health, morals or the fundamental rights and freedoms of others" (see Art 18 – in relation to freedom to manifest religious belief).
- The circumstances when ICCPR rights can be derogated from (that is, suspended entirely) in times of emergency – a particularly urgent issue at the time in history when the Siracusa Principles were developed.

Both the *Religious Freedom Review* (chaired by the Hon Philip Ruddock) and the Australian Law Reform Commission's report on *Traditional Rights and Freedoms* (ALRC, Report 129) refer to the Siracusa Principles. The Ruddock review's recommendation was to take the Siracusa Principles into account in drafting laws, with a view to ensuring domestic law is appropriately balanced and consistent with international human rights law.

The Siracusa Principles are helpful to legislators and policy makers in determining what the law should be, and in assessing a law's consistency with international norms. It is not clear that they are particularly helpful to individual decision makers, especially in determining how individuals' rights should be balanced.

As a general point, I refer to our earlier presentation on the way in which international law is referred to in the Bill. In requiring fundamental regard to be had to various international instruments, the Bill goes far beyond how the common law accords status to these instruments (see ALRC, Report 129 p38 and 39 for a discussion of the common law position), and far beyond any other Australian legislation.

Question 2

Businesses and employers routinely set workplace operating policies and procedures to ensure compliance with employment laws and other work, health and safety standards. Respectful behaviour and anti-bullying are commonly the subject of such workplace policies.

Separately, a complaint about behaviour in the workplace may be made under anti-discrimination legislation. As noted, s 53 of the ADA makes an employer vicariously responsible for any discriminatory act done by a person as the agent or employee of the employer unless the employer did not, either before or after the doing of the act, authorise the agent or employee, either expressly or by implication, to do the act.

Question 3

The Bill's effect on other protected attributes in the ADA

The Bill proposes to amend the ADA to prohibit discrimination on the ground of a person's religious beliefs or religious activities, including a lack of religious conviction, belief, opinion or affiliation, in work and other areas. It does not propose to amend sections relating to other protected grounds in the ADA.

However, as noted above, there could be complex interactions between the Bill and the other grounds of discrimination in practice.

The Bill and the ADA

The ways in which the Bill amends the ADA are set out in broad terms in the Department's submission to the Committee.

The Bill is broadly consistent with the ADA in that it proposes to provide protection against discrimination on the ground of religious belief or activity in addition to the existing grounds of discrimination under the ADA, and covers the areas of public life where discrimination on protected grounds is unlawful (e.g. employment).

However, the Bill includes a number of provisions that have no counterpart in the other parts of the ADA. Many of these key differences were set out in the Department's written submission to the Committee, to which I refer the Committee.

To briefly recap, the Bill:

- Covers discrimination in the course of administering a State law or a State program. This area is currently confined to protection from sexual harassment. This is further discussed below.
- Creates the concept of "protected activity", giving special protection to religious activity by an employee outside a workplace and worktime. No such concept applies to other grounds.
- Creates special protection for religious ethos organisations who are empowered to discriminate on the basis of religion, and who have special protections in relation to the State law and programs area. This is also expanded on below.
- Does not allow for the President to issue exemptions under s 126 in relation to religion. This power is often used to advance the interests of particular groups in the community (for instance, to provide for a range of employment and education programs targeting Aboriginal people or women).

Implications for the Abortion Law Reform Act 2019 and Crimes Act 1900

Abortion was decriminalised in October 2019 with the passage of the *Abortion Law Reform Act 2019* (the **2019 Act**). Under s 9 of the 2019 Act, registered health practitioners who have a conscientious objection to abortion must provide information about how to contact or locate a registered health practitioner who is reasonably believed not to have a conscientious objection, or transfer care to another registered health practitioner or to a health service provider at which the termination can be performed.

The Bill itself does not amend or affect these provisions directly.

I note a number of submissions from professional bodies on the interactions between the 2019 Act and the Bill raise issues for consideration. One issue that is arguably unclear and requires further consideration is whether disciplinary action for professional misconduct taken against a medical practitioner for failure to comply with s 9 of the 2019 Act on the basis of religious objection to such referral may amount to discrimination under proposed s 22S.

In relation to the *Crimes Act 1900*, the Bill's proposed s 22K defines religious activities to include an activity motivated by a religious belief but does not include any activity that would constitute an offence punishable by imprisonment under the law of NSW or the Commonwealth. As the serious vilification offences in s 93Z of the *Crimes Act 1900* are punishable by imprisonment for up to 3 years, offending conduct under this provision would not be a religious activity within the meaning of proposed s 22K.

Questions 5 and 6

Section 54 of the ADA provides that nothing in the ADA renders unlawful anything done by a person if it was necessary for the person to do it in order to comply with the requirement of another Act, any regulation, ordinance, by-law or other instrument, or an order of the NSW Civil and Administrative Tribunal or any court. This would include actions taken where necessary to comply with a Public Health Order.

However, an issue that requires further consideration is what effect the Bill, if enacted, could have on the Minister's power to make directions by Public Health Order that would limit a person's ability to engage in religious activities. The exercise of the Minister's discretion would appear likely to be the exercise of a function under State law, and may enliven proposed s 22Z, giving grounds for a complaint of discrimination.

Question 7

I refer to the Department's submission and my response to question 3 regarding the Bill's similarities and differences with existing protections in the ADA.

Consistent with my role, I express no policy view.

Question 8

As noted, the Bill does not include protection from vilification on the grounds of religious belief and activity.

The ADA provides protection from vilification on the basis of race, transgender status, homosexuality, and HIV/AIDS infection. It does not include such provisions in relation to sex, marital or domestic status, disability, carer status or age.

Vilification where covered occurs where a person, by a public act, incites hatred towards, serious contempt for, or severe ridicule of a person or group on the basis of their protected attribute.

I note that s 93Z of the *Crimes Act 1900* makes it a criminal offence for a person to, by a public act, intentionally or recklessly threaten or incite violence towards another person or group of persons on the ground of religion, among other grounds.

I also refer the Committee to questions 1 and 10 where other differences and interactions with other grounds of discrimination are expanded on.

Question 9

Sexual harassment and State law

Proposed s 22Z is similar to the provision relating to sexual harassment in s 22J of the ADA. Section 22J provides that it is unlawful for a person to sexually harass another person in the course of performing any function under or carrying out any other responsibility in the administration of, a State law, or for the purposes of a State program. However, this is not mirrored in any other parts of the ADA relating to other grounds of discrimination.

It is relevant to note that sexual harassment is the result of harassing actions in a workplace. Discrimination can be the result of actions, but it can also relate to decision making. The

administration of State law and programs includes a very wide range of decisions of Ministers and other public officers in a very broad range of contexts.

Future states

Section 49A of the ADA provides that a reference to a person's disability is a reference to a disability that the person will have in the future, or that it is thought the person will have in the future. This arises to protect situations where the cause of a future disability is known but the disability itself has not yet manifested – for instance, a genetic predisposition to a disease, or an early and largely asymptomatic stage of a disease. No other grounds of discrimination in the ADA make it unlawful to discriminate against a person on the basis of a characteristic that the person may have in the future.

Question 10

I refer to my response to question 1 above regarding the Siracusa Principles. These Principles support the concept inherent in the ICCPR that State laws should fully protect all ICCPR rights, including freedom of religion (art 18) and freedom from discrimination (art 26).

The Bill, in the context of the ADA, provides for a number of interactions between the anti-discrimination rights related to religion and those related to other grounds (which include, but would not be limited to, homosexuality). I express no policy view about the appropriateness of these interactions.

It is helpful to include reference to the existing law for context.

1. The existing law under the ADA is preserved in relation to exemptions from the existing grounds of discrimination. Relevantly this means:
 - (a) **All** private educational authorities, which include faith-based schools, non-government schools, and private colleges and universities, are exempted from provisions making it unlawful for educational authorities to discriminate against a student or prospective student on the grounds of sex, marital or domestic status, disability, homosexuality, age or on transgender grounds. Race discrimination remains unlawful.
 - (b) A broad exception applies to protect religious interests in s 56, which provides that nothing in the ADA affects:
 - the ordination or appointment of priests, ministers of religion or members of any religious order,
 - the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order,
 - the appointment of any other person in any capacity by a body established to propagate religion, or
 - any other act or practice of a body established to propagate religion that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.
2. (a) Under the Bill, “religious ethos organisations” may discriminate on the basis of religion if required by their religious ethos (proposed s 22M). The term “religious ethos organisation” covers a broader range of organisations than those covered by “a body established to propagate religion” under s 56. Consequently, a religious ethos organisation, unless it is also covered by s 56, for the most part must comply with the law about discrimination on other grounds.
 - (b) There is one exception to this proposition. Under proposed s 22Z(2), a religious ethos organisation cannot be required to do anything contrary to its religious ethos in relation to administration of a State law or program. How this provision would operate is not completely clear. It may prevent the State imposing requirements that prevent discrimination on other grounds where that may offend the organisation’s religious ethos. This restriction may extend to requiring a State decision maker not to take into account those religious objections or views, even if it might affect the delivery of the program. Its effect is unclear on, for example, programs that specifically target the health of LGBTIQ+

groups, or programs informed by a gendered analysis to target prevention of domestic violence.

3. Finally, in relation to employed individuals, the "protected activity" provisions in relation to employment mean that workplace policies protecting against bullying and harassment, or against discrimination generally, cannot be applied outside of work time and the workplace. I refer to question 1 above for commentary.

I trust this information assists the Committee.

Yours sincerely



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