Submission No 20

ANTI-DISCRIMINATION AMENDMENT (RELIGIOUS FREEDOMS AND EQUALITY) BILL 2020

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Submission to the Joint Select Committee on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020

Dear Committee

I am an Associate Professor of Constitutional Law at Monash University and a leading expert on religious freedom and separation of religion and state issues.

New South Wales is one of only two States (the other is South Australia) in which religious discrimination is not unlawful. This should be fixed. Religion or belief should be a protected attribute under the *Anti-Discrimination Act 1977* (NSW).

However, this Bill is poorly drafted and troubling. It will take away existing protections for a range of people, including people of faith.

Anti-discrimination laws should operate as “shields” to protect people from discrimination. This Bill operates as a “sword” granting a licence to discriminate against others.

This Bill should not proceed. Instead, the New South Wales Law Reform Commission should be tasked with undertaking an inquiry into how best to include religion or belief as a protected attribute in the *Anti-Discrimination Act 1977*.

This submission addresses the following selection of the many problems with this Bill:

1. The Bill protects criminal and other unlawful conduct.
2. The Bill permits corporations to sue other corporations for religious discrimination.
3. The Bill requires the NSW Government to tolerate and facilitate discrimination in the provision of government services.
4. The Bill forces businesses to do business with sexist and homophobic corporations
5. The Bill creates a licence to discriminate against people of faith.
6. The Bill encourages businesses to refuse to hire conservative Christians.
7. Significant parts of the Bill are likely to be inoperative by reason of section 109 of the *Australian Constitution*.
8. The Bill is inconsistent with international human rights norms.

I trust this submission is of assistance.

Yours sincerely

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1. The Bill protects criminal and other unlawful conduct.

The Bill proposes to create various rights and immunities in respect of engaging in "religious activities". The definition of religious activities is so broad that it protects conduct that is criminal or otherwise unlawful. The definition in proposed section 22K(1) states:

> ***religious activities*** includes engaging in religious activity, including 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 New South Wales or the Commonwealth.

The purpose of this drafting seems to be to protect:

- Activity that would constitute a criminal offence punishable otherwise than by imprisonment, such as by fines.
- Activity that would constitute a civil wrong, such as negligence, workplace bullying, sexual harassment, defamation, deceit, breach of contract, and racial vilification.

The Explanatory Memorandum does not explain the logic of this drafting.

By way of contrast, other States limit the definition to "lawful religious activity": eg *Equal Opportunity Act 2010* (Vic) s 4; *Anti-Discrimination Act 1991* (Qld) sch 1.

2. The Bill permits corporations to sue other corporations for religious discrimination.

The Explanatory Memorandum to the Bill makes clear that corporations – and not just human beings – will be able to bring religious discrimination complaints. This is inconsistent with the ordinary purpose of anti-discrimination laws, which is to protect human dignity.

Allowing a corporation to complain of religious discrimination on its own behalf appears to be an attempt to provoke Australian versions of the controversial US Supreme Court case *Burwell v Hobby Lobby*, 573 US _ (2014); 134 S Ct 2751.

In that case, the US Supreme Court struck down certain regulations made under the *Patient Protection and Affordable Care Act 2010* (US) (sometimes called 'Obamacare') requiring employers to fund workers' health insurance meeting minimum standards. The minimum standards included that the health insurance covered contraception. Hobby Lobby is a private for-profit company that operates a chain of an arts and craft stores. The owners of the company hold strong religious beliefs objecting to contraception.

A majority of the US Supreme Court held that the regulations constituted a burden on the free exercise of religion contrary to the *Religious Freedom Restoration Act 1993* (US) and were invalid. Justice Ruth Bader Ginsburg, who dissented, explained the effect of the majority's decision to be:

> In a decision of startling breadth, the Court holds that commercial enterprises, including corporations, along with partnerships and sole proprietorships, can opt out of any law (saving only tax laws) they judge incompatible with their sincerely held

> religious beliefs… In the Court's view, [the *Religious Freedom Restoration Act*] demands accommodation of a … corporation's religious beliefs no matter the impact that accommodation may have on third parties who do not share the corporation owners' religious faith.

The Bill allows discrimination complaints to be lodged by religious organisations and by ordinary, for-profit corporations (just like Hobby Lobby) that happen to be owned by religious individuals.

Corporations will be able to sue other corporations and private individuals. Corporations will also be able to sue the NSW Government.

3. The Bill requires the NSW Government to tolerate and facilitate discrimination in the provision of government services.

The NSW Government sometimes requires its contracted service providers to be inclusive and treat people with dignity as a condition of the contract. Many of those contractors would be "religious ethos organisations" for the purposes of this Bill.

For example, publicly-funded homelessness service providers in NSW must sign agreements promising to provide "reasonable access" to all clients "regardless of race, gender, age, pregnancy, marital status, disability, sexual preference, religion, cultural background, transgender or health status."

The clear purpose of proposed section 22Z(2) is to make clauses like this unlawful and permit discrimination in the provision of government services. In other words, proposed section 22Z(2) seems intended to allow service providers to refuse to provide access to homeless shelters to single mothers or LGBTI people, for example, if the service provider has religious views on those topics.

Example 5 on page 8 of the Explanatory Memorandum seems to envisage protecting government-funded disability services providers who make comments like "homosexuality is a disorder", "women should not be in positions of leadership over men" or "disability is a punishment for sin" to clients from losing their contracts.

Under this Bill it would be unlawful the NSW Government to ensure vulnerable people being provided with government services are treated with dignity and respect.

4. The Bill forces businesses to do business with sexist and homophobic corporations

This Bill allows companies to sue other companies for religious discrimination. Under this Bill, it will be unlawful for one company to refuse to do business with another company that engages in sexist and homophobic activity.

Here's an example. Advertising agency PCB recently announced that it will refuse to do any more work for skincare company Nivea after being told by Nivea officials that "We don't do

gay at Nivea." The comments were allegedly made after PCB pitched an ad featuring two men holding hands.

Under this Bill, the ad agency's refusal to work with Nivea would be unlawful religious discrimination if the "We don't do gay at Nivea" comment had a religious motivation. Refusing to provide services to a business because of a protected religious activity undertaken by that business or even by someone associated with that business (such as an employee) will be unlawful.

Even though Nivea itself never engaged in a religious activity, Nivea would still be able to complain that the ad agency subjected it to religious discrimination. It is enough that its employee had a personal religious motivation for the comments. It wouldn't matter that Nivea itself doesn't have any religious beliefs.

The Explanatory Memorandum does not explain the rationale for this outcome and the bizarre interference with freedom of contract.

5. The Bill creates a licence to discriminate against people of faith.

Proposed section 22M expressly permits "religious ethos organisations" to discriminate against people of faith. As noted above, "religious ethos organisation" is defined so broadly that it includes ordinary businesses that happen to owned by religious people.

For example, if a bakery is owned by a member of a fringe sect of Islam that believes Muslims should not work alongside Christians, this Bill permits the bakery to refuse to hire Christians as shop assistants or bakers.

The Explanatory Memorandum does not explain why this kind of conduct should be permitted.

6. The Bill encourages businesses to refuse to hire conservative Christians.

The Bill attempts to prevent conservative Christians being discriminated against in hiring and firing decisions on the basis of their beliefs. In practice, the Bill actually encourages employers to refuse to hire conservative Christians.

The Bill includes provisions that allow conservative Christians to ignore workplace codes of conduct in certain circumstances. For example, conservative Christian workers will not have to comply with some workplace codes of conduct that prohibit making comments on social media like those made by Israel Folau.

The reality is that many businesses take such codes of conduct seriously. Businesses have brands and reputations to think about. And many businesses genuinely want to create inclusive workplaces where gay people and other minorities feel welcome.

Under this Bill, life will be easier for businesses if they simply do not hire conservative Christians. That would avoid all the hassles, all the commercial impacts and the expensive lawyer fees involved in conservative Christians not having to comply with workplace codes of conduct.

Technically it will be unlawful under this Bill to refuse to hire someone because they are a conservative Christian. But the conservative Christian has to prove that the reason they didn't get the job was because they are a Christian. Actually proving that was the reason is extremely hard to do. And it is expensive to bring a discrimination case.

On the other hand, it is very easy for an employer to say that someone didn't get a job because of a poor interview performance or because there was a better candidate.

7. Significant parts of the Bill are likely to be inoperative by reason of section 109 of the *Australian Constitution*.

Parts of this Bill, if enacted, would be inoperative by reason of section 109 of the *Australian Constitution*.

Here's one example. As noted above, proposed section 22Z(2) makes it unlawful for the NSW Government to require its contracted service providers to refrain from discriminating against LGBTIQ people. However, the federal *Sex Discrimination Act 1984* makes it unlawful for the NSW Government to permit its contractors to discriminate against LGBTIQ people (see sections 22 and 105).

Here's another example. The Bill makes it unlawful for an employer to take action against religiously motivated workplace bullying. However, workplace bullying is unlawful under the *Fair Work Act 2009* (Cth) and *Work Health and Safety Act 2011* (Cth).

In other words, this Bill makes it unlawful to do something which federal law commands be done. In many situations, it will be impossible to simultaneously obey both this Bill and various federal laws.

Section 109 of the *Australian Constitution* has the effect that federal law prevails over State law in cases of inconsistency. Several parts of this Bill are inconsistent with federal laws. To the extent of those inconsistencies, the Bill would be inoperative (or – to use to the language of section 109 of the *Australian Constitution* – "invalid").

8. The Bill is inconsistent with international human rights norms.

The Bill is inconsistent with international human rights norms in at least two ways. First, it gives greater protection to religion than to non-religion. Secondly, it permits infringement of rights recognised by international human rights law.

Uneven protection of non-religion

The Bill gives greater protection to religion than to non-religion. The various rights and immunities granted to “religious ethos organisations” do not extend to organisations conducted in accordance with the doctrines, tenets, beliefs or teachings of a non-religious belief system.

Each limb of the definition of “religious ethos organisation” refers to “a particular religion”. While “religious belief” is defined to include not holding a religious belief, that definition does not have the effect of allowing humanism or atheism, for example, to be considered “a particular religion”. The result is that organisations devoted to promoting humanism or atheism do not get the benefit of the various rights and immunities granted to organisations devoted to promoting Islam or Christianity.

It is not consistent with international human rights law to give greater protection to religion than to non-religion.

The UN Human Rights Committee states in *General Comment 22: Article 18 (Freedom of Thought, Conscience or Religion)* at para [1]:

> The Committee draws the attention of States parties to the fact that the freedom of thought and the freedom of conscience are protected equally with the freedom of religion and belief.

Article 2(1) of the *International Covenant on Civil and Political Rights* (ICCPR) provides that countries must respect and ensure to all individuals the rights guaranteed by the ICCPR without discrimination. Article 26 provides that “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.”

The UN Human Rights Committee states in *General Comment 18: Articles 2.1 and 26 (Non Discrimination)* at para [4] that while countries have discretion to “determine appropriate measures to implement” the ICCPR, those measures must be in “conformity with the principles of non-discrimination and equality before the law and equal protection of the law”. As the Committee notes at para [8], the basic principle is about ensuring the “enjoyment of rights and freedoms *on an equal footing*” (emphasis added).

Because the definition of “religious ethos organisation” (i) discriminates between religious and non-religious beliefs and (ii) does not ensure the enjoyment of rights and freedoms on an equal footing, there is a sufficient basis for a conclusion that the provisions of the Bill dealing with religious ethos organisations are inconsistent with international human rights law.

Infringement of rights recognised by international law

The licence the Bill grants to “religious ethos organisations” to discriminate against others is not consistent with international human rights law.

The Report of the Special Rapporteur on Freedom of Religion and Belief submitted to the UN Human Rights Council on 28 February 2018 (document A/HRC/37/49) states:

> 37. Religious discrimination does not only take place when an individual's right to manifest their religion or belief freely is restricted or interfered with by the State or non State actors. It can also take place when an individual's enjoyment of other fundamental rights — for example the right to health, education, expression — is restricted or interfered with by State or non-State actors in the name of religion, or on the basis of a person's religion or belief.
> …
> 39. The Special Rapporteur also notes with concern the increasing trend by some States, groups and individuals, to invoke "religious liberty" concerns in order to justify differential treatment against particular individuals or groups, including women and members of the lesbian, gay, bisexual, transgender and intersex community. This trend is most often seen within the context of conscientious objection, including of government officials, regarding the provision of certain goods or services to members of the public.
> 40. … It should be noted, however, that the jurisprudence of the Human Rights Committee and the regional human rights courts uphold that it is not permissible for individuals or groups to invoke "religious liberty" to perpetuate discrimination against groups in vulnerable situations, including lesbian, gay, bisexual, transgender and intersex persons, when it comes to the provision of goods or services in the public sphere.
> …
> 42. The Special Rapporteur would like to reiterate that freedom of religion or belief can never be used to justify violations of the rights of women and girls, and that it can no longer be taboo to demand that women's rights take priority over intolerant beliefs used to justify gender discrimination. It would be contrary to both women's human rights as well as freedom of religion or belief provisions to allow one set of rights (i.e. women's rights) to be undermined on the basis of claims made in defence of the right to freedom of religion or belief.

The Special Rapporteur's understanding of the international human rights jurisprudence therefore suggests that the very broad right given to religious ethos organisations to discriminate against others is "contrary to" international human rights law.

According to the Special Rapporteur, subjecting your rights to interference by reason of my religious beliefs, and vice versa, is

- a form of religious discrimination,
- a breach of the right to freedom of religion or belief, and
- a breach of other rights protected by international law.