

**Submission
No 23**

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

Organisation: NSW Jewish Board of Deputies

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NEW SOUTH WALES JEWISH BOARD OF DEPUTIES LTD

The Representative Organisation of NSW Jewry

ועד הקהילה היהודית בנ. ס.ו.

President: Lesli Berger
Chief Executive Officer: Vic Alhadeff



20 August 2020

The Hon. Gabrielle Upton MP

Committee Chair

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

Parliament House

Macquarie Street

Sydney NSW 2000

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

Dear Chairperson

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

The NSW Jewish Board of Deputies is the official elected representative roof-body of the Jewish Community in New South Wales, with 55 major Jewish organisations in NSW as its constituents. It is recognised by the NSW State Government, its agencies, the media and other ethnic and religious groups as the representative body of the Jewish Community and speaks on its behalf on all matters affecting the status, welfare and interests of New South Wales Jewry.

We appreciate the opportunity to make a submission to the Joint Select Committee in relation to the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 (“the Bill”).

1. The need for new legislation

Although Australia overall remains a stable, vibrant and tolerant democracy, where Jews face no official discrimination, and are free to observe their faith and traditions, unofficial antisemitism is becoming more serious, and there have been worrying signs that it is creeping into mainstream institutions.

There were 368 recorded antisemitic incidents in Australia during the year ending 30 September 2019, according to the annual Report on Antisemitism in Australia, published by the Executive Council of Australian Jewry (ECAJ), which is the national roof body of the Australian Jewish community, of which the NSW Jewish Board of Deputies is the NSW State constituent. The incidents were logged by the ECAJ, Jewish community roof bodies in each State, and other Jewish community groups and included physical assaults, abuse and harassment, vandalism, graffiti, hate and threats communicated directly by email, letters, telephone calls, posters, stickers and leaflets. The total figure consists of 225 attacks and 143 threats.

The overall number of antisemitic incidents continued at, and slightly exceeded, the unusually high number logged during 2018, which saw a 59% increase over the previous year. In 2019 there was also a marked increase in the seriousness of the incidents recorded. Especially concerning was the 30% spike in the number of reported incidents involving direct verbal abuse, harassment and intimidation, from 88 in 2018 to 114 in 2019, and the more than doubling of the number of reported graffiti attacks, from 46 to 95.

The sharp jump in reported incidents of verbal abuse, harassment and intimidation demonstrates that antisemites felt increasingly emboldened to behave in an aggressive, confrontational and menacing way towards Jews who were doing nothing more than going about their daily lives. Jews continued to be verbally abused and harassed around synagogues on a regular basis, especially over the Jewish Sabbath, and on other Jewish holy days and festivals. These are periods when many Jews are congregating at, and walking to or from, synagogue, providing antisemites with an easy target from the safety of their vehicles.

Behind the statistics are the lived experiences of individual people, as recorded in the ECAJ reports, which involve:

- Refusal to supply a good or service to a person who is, or is believed to be, Jewish;
- antisemitic verbal abuse and bullying of Jewish students as young as five years old at public and private schools, resulting in their departure from those schools;
- Victimisation of employees in the workplace because they are, or are believed to be, Jewish, with employers unwilling to intervene, and resulting in the employees being forced or pressured out of their employment; and
- Jewish university students being confronted in class with anti-Jewish statements, including statements which deny, relativise or trivialise the Holocaust, by lecturers and tutors.

Whether or not these cases involved discrimination on the ground of race or on the ground of religion, or some combination, would almost certainly have been irrelevant in the minds of both the perpetrators and those who were targeted. It is therefore anomalous in our view that the law in NSW (and Federally) prohibits discrimination on the ground of race, but not on the ground of religion.

We therefore affirm the need for legislation to address discrimination on the ground of religion, as recommended by the Report of the Expert Panel on Religious Freedom which was released in December 2018.

In essence, the Bill would amend the Anti-Discrimination Act 1977 (NSW) (the ADA) so as make it unlawful to discriminate against others in various aspects of public life on the basis of their religious beliefs or activities or their non-belief. It would deem the conduct of religious ethos organisations in giving preference to persons of the same religion in certain contexts not to constitute discrimination.

The Bill seeks to implement Recommendations 2 (“Siracusa Principles”), 3 (“Objects Clauses”) and 16 (“discrimination on the basis of religious belief or activity”) of the Report of the Expert Panel. Understandably, it does not address other Recommendations, which relate to exemptions for religious bodies in current anti-discrimination law, because these have been referred to the Australian Law Reform Commission.

What follows in this submission is a brief analysis of some of the provisions of the Bill rather than a comprehensive survey and assessment.

2. Specific provisions of the Bill

The sections referred to below are sections of the ADA if the Bill were enacted in its present form.

(a) Section 3 - Principles of Act

- The purpose of this section, according to the Explanatory Note, is to establish interpretive principles for the whole of the ADA, and not only for the proposed new Part 2B. However, the Instruments enumerated in ss. 3(1) appear to be directed only to a person’s right to manifest their religion or belief and to relate mainly to matters addressed in proposed Part 2B. Other international human rights treaties to which Australia is a party and which bear directly on other Parts of the ADA are not included.

Some examples of these other treaties and the parts of the ADA to which they relate are:

- o Convention on the Elimination of All Forms of Racial Discrimination (discrimination on the ground of race);
- o Convention on the Elimination of All Forms of Discrimination against Women (sexual harassment, discrimination on the ground of sex, discrimination on the ground of marital or domestic status);
- o Convention on the Rights of the Child (discrimination on the ground of sex);
- o Convention on the Rights of Persons with Disabilities (discrimination on the ground of disability); and
- o United Nations Declaration on the Rights of Indigenous Persons (as a non-legally binding document) and the International Covenant on Economic, Social and Cultural Rights (discrimination against indigenous people on the ground of race).

The foregoing list may not be exhaustive.

Recommendation 1: Section 3 should be amended to include reference to all international instruments to which Australia is a party, or which Australia has endorsed, and which are relevant to the protections conferred by various Parts of the ADA, but subject to any reservations to such instruments that have formally been made by Australia.

- The expression “shall have fundamental regard to” is used in section 3. Presumably this expression is intended to have the same meaning that has been attributed to it in case law. Nevertheless, for landmark human rights legislation of the kind that the Bill proposes, it is desirable in our view to encourage public understanding and acceptance of its provisions, and for key expressions such as this to be explained.

Recommendation 2: Add at the end of subsection 3(1) [Note: This provision requires the foregoing instruments to be a fundamental element in, or a focal point of, the decision making process of those carrying out functions and making determinations under this Act].

(b) Section 22K – definition of “religious ethos organisation”

- The concept of a “religious ethos organisation” is critical to the scheme of the Bill, which deems various forms of preferencing by such organisations of people who share the organisation’s religious ethos not to be discrimination. The definition in s.22K extends to three categories of organisations but each such category is limited to organisations which are “conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion”.

In the Jewish community, which has the characteristics of both an ethnic and a faith community, certain organisations such as welfare societies, sports clubs and youth groups were established by the community, and have long operated, to meet the special needs of members of the Jewish community, or to overcome prejudice and disadvantage, even though such organisations may not operate strictly in accordance with the doctrines, tenets, beliefs or teachings of Judaism, or any stream of Judaism. We would therefore recommend that such an organisation also fall within the definition of a religious ethos organisation.

Recommendation 3: In section 22K, add to definition of “religious ethos organisation” the following:

(d) an organisation that provides persons of a particular religious association, affiliation or belief with goods or services for the purpose of promoting their welfare in order to meet the special needs of such persons, or to overcome prejudice and disadvantage arising from such religious association, affiliation or belief.

- The definition of “religious ethos organisation” requires that it conduct itself in accordance with “a

particular religion". There are several streams of Judaism just as there are many denominations and streams of other religions. It should be made clear that the references in the Bill to "a particular religion" include a reference to a denomination, sect, stream or tradition of a religion.

Recommendation 4: Add a subsection to section 22K which provides that any references in the Bill to "a particular religion" include a reference to a denomination, sect, stream or tradition of a religion.

- The Bill does not establish a test for determining whether a body "is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion". One way of creating more certainty about the matter would be to give organisations claiming to be religious ethos organisations the option of registering as such with NSW Fair Trading. Registration would not be compulsory. Registration would create a presumption in favour of the organisation being deemed to be a "religious ethos organisation" under the ADA, and might forestall much litigation. However, non-registration by an organisation would not create any presumption against it being deemed to be a "religious ethos organisation" under the ADA.

Eligibility for registration would be determined by the organisation providing evidence to NSW Fair Trading that adherence to, or affiliation with, the doctrines, tenets, beliefs, or teachings of a particular religion is:

- (a) included in the governing documents, organising principles, statement of beliefs or statement of values of the organisation; or
- (b) included in a statement of beliefs (or similar) which has been adopted by the governing body of the organisation; or
- (c) demonstrated by consistent conduct of the organisation.

Recommendation 5: Add a further subsection to section 22K which provides for a scheme for optional registration of religious ethos organisations with NSW Fair Trading.

(c) Section 22M – meaning of "genuinely believes" in relation to religious ethos organisations
Under section 22M of the Bill, a religious ethos organisation is taken not to discriminate against a person on the ground of the person's religious beliefs or religious activities by engaging in conduct if the organisation "genuinely believes" certain things about the conduct. What is the test for determining whether an organisation, as distinct from a human being, "genuinely believes" something? A further provision needs to be added to the Bill which defines the expression "genuinely believes" in relation to a religious ethos organisation.

The rationale for section 22M is set out in the Explanatory Note to the Bill (at page 3) which states:

'General Comment 18 of the United Nations Human Rights Committee recognises that "not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate" under the International Convention on Civil and Political Rights'.

It is difficult to square the subjectivity of the expression "genuinely believes" in section 22M with the requirement that "the criteria for such differentiation are ...objective". For this reason, we also recommend that the definition of the expression "genuinely believes" in relation to a religious ethos organisation expressly excludes a belief which is fictitious, capricious or an artifice. This will make the definition of that expression align with the current Bill's definition of "genuinely believes" in relation to a person.

Recommendation 6: Add a further subsection to section 22M which defines the expression “genuinely believes” in relation to a religious ethos organisation and expressly excludes a belief which is fictitious, capricious or an artifice.

(d) Section 22N – exclusion of adverse action by an employer against employee in respect of “protected activity”

We understand the need to protect employees from punitive action by an employer solely as a consequence of views expressed by the employee outside the work context. We do, however, believe that exceptions should apply if an organisation engages an employee or contractor specifically as a brand ambassador, and that role, and the constraints on the employee’s conduct that it requires, are accepted freely and explicitly by the employee as essential requirements of the duties of the position. Constraints on the behaviour of the employee or contractor could be justified if the relevant contract of engagement sets these out clearly and explicitly, and they are necessary for the effective performance of the duties for which the employee or contractor has been engaged.

Similarly, if set out clearly and explicitly in the relevant contract of engagement, there should be no impediment to a religious body requiring an employee or contractor not to engage at any time in forms of conduct, including the making of statements, which are openly disrespectful of the religion or its adherents, even if such statements are ostensibly made as statements of religious belief. Subsection 22N(9) seems to allow for this. However, there appears to be a drafting error in that subsection. It excludes the operation of “subclauses (4) and (5)” with regard to certain faith-based bodies. Those subsections elaborate on the meaning of certain acts that are nominated in subsection (3). The exclusion therefore cannot be effective unless it applies to subclauses (3), (4) and (5), rather than “subclauses (4) and (5)”. This should be corrected in the Bill.

Recommendation 7: Add a further subsection to section 22N which provides an exception if (a) an organisation engages an employee or contractor specifically as a brand ambassador, and that role, and the constraints on the employee’s conduct that it requires, are accepted freely and explicitly by the employee as essential requirements of the duties of the position; (b) constraints on the behaviour of the employee or contractor are clearly and explicitly set out in the relevant contract of engagement; and (c) such constraints are necessary for the effective performance of the duties for which the employee or contractor has been engaged. Also, in subsection 22N(9), amend “subclauses (4) and (5)” to read “subclauses (3), (4) and (5)”.

(e) Potential conflict with other sections of the ADA

Although we believe it is implicit that the provisions proposed to be introduced into the ADA by the Bill would not limit or otherwise affect the operation of any existing provisions of the ADA, we believe that this needs to be stated explicitly for the removal of doubt. In particular, our organisation is opposed to any attempt to repeal or weaken the operation of any of the existing anti-vilification provisions of the ADA.

We believe that the abuse of these provisions that has occurred by the lodgement from time to time of certain complaints which are vexatious, frivolous or otherwise manifestly lacking in merit can and should be dealt with by the tightening of laws and regulations governing the complaints process.

Our community is all too familiar with public statements that have been made, ostensibly as statements of religious belief, which incite hatred or violence and are prohibited under the ADA and other State and Federal legislation. Such statements have a long and blood-soaked history.

It would be possible to argue that such statements are not genuinely believed, but this overlooks the reality

that it is possible even for bigoted ideas to be genuinely believed by some people.

It would also be possible to argue that such statements are not statements of religious belief at all, but rather statements supposedly about history, politics and other matters. However, these statements are often put forward under the rubric of religious doctrine, and by reference to theological works which were once, but may no longer be, reflective of the orthodox views of a religion.

Finally, one could argue that such statements are capricious, but that could devolve into a question of theological authenticity or merit, and the court becoming an arbiter of doctrine, which in our view would be inappropriate.

For these reasons, we strongly recommend that a provision be added to the Bill expressly removing any doubt that the Bill's provisions do not impact on the existing provisions of the ADA.

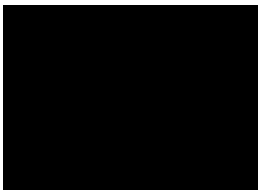
Recommendation 8: Add a provision to the Bill to the effect that nothing in Part 2B excludes, qualifies, limits or restricts the operation of any provision of any other part of the ADA.

(f) Other provisions of the Bill

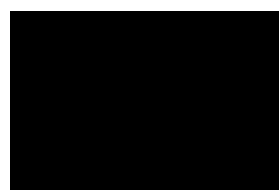
We have objections to certain other provisions of the Bill, but these would be obviated if our Recommendation 3 is adopted. If our Recommendation 3 is not adopted, we reserve the right to put forward these objections if and when the Bill, or an amended version of it, is again submitted to public scrutiny.

3. Conclusion

Subject to adoption of the recommendations in this submission, especially Recommendations 3 and 8, our organisation supports the Bill.



Lesli Berger
President



Vic Alhadeff
Chief Executive Officer