Submission
No 34

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

Organisation: Australian Discrimination Law Experts Group

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Submission by the Australian Discrimination Law Experts Group (ADLEG)

to the Parliament of New South Wales Joint Select Committee

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

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1. Australian Discrimination Law Experts Group

We make this submission on behalf of the undersigned members of the Australian Discrimination Law Experts Group (**ADLEG**), a group of legal academics with significant experience and expertise in discrimination and equality law and policy. This submission focuses on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 (NSW) and responds to the terms of reference of the Joint Select Committee on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020.

We are happy to answer any questions about the submission or other related issues, or to provide further information on any of the areas covered. Please let us know if we can be of further assistance in this inquiry, by emailing

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2. Summary

As set out in further detail below, our recommendations are as follows (all sections refer to the proposed new sections of the *Anti-Discrimination Act 1977* (NSW) as identified in the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020):

2.1 APPROACHING REFORM TO THE *ANTI-DISCRIMINATION ACT 1977* (NSW)

Recommendation 1: The New South Wales Parliament not pass the Bill in its current form given its underlying flaws and implications for the fundamental rights and freedoms of others.

Recommendation 2: The Joint Select Committee recommend a wider, expert review of the *Anti-Discrimination Act 1977* (NSW), which includes consideration of how religious belief and activity should be added and constructed as protected attributes.

2.2 PROTECTED ATTRIBUTES

Recommendation 3: The definition of 'religious beliefs' in section 22K be amended to mean: 'holding or not holding a religious belief'.

Recommendation 4: The definition of 'genuinely believes' in section 22K be removed from the Bill.

Recommendation 5: Section 22KA be removed from the Bill.

Recommendation 6: Section 22KB(1) be amended to read: 'A reference in this Part to a person's religious belief is a reference to a religious belief: (a) that a person holds, or (b) that a person is thought to hold (whether or not the person in fact holds the religious belief)', or (c) that a person held in the past, or (d) that a person will hold in the future'.

Recommendation 7: The definition of 'religious activities' in section 22K be amended to mean: 'engaging in, not engaging in or refusing to engage in a lawful religious activity'.

Recommendation 8: Section 22KB(2) be amended to read: 'A reference in this Part to a person's religious activity is a reference to a religious activity: (a) that a person engages in, or (b) that a person is thought to engage in, or (c) that a person engaged in in the past, or (d) that a person will engage in in the future'.

2.3 'PROTECTED ACTIVITY' PROVISIONS

Recommendation 9: Sections 22N(3), (4), and (5) be removed from the Bill.

Recommendation 10: Sections 22S(2), (3), (4), and (5) and 22V(3), (4), (5), and (6) be removed from the Bill.

Recommendation 11: Section 22N(9) be removed from the Bill.

2.4 State laws and programs

Recommendation 12: Section 22Z(2) be removed from the Bill.

Recommendation 13: The protection afforded by section 22Z(1) be extended to all other protected attributes under the *Anti-Discrimination Act 1977* (NSW).

2.5 Religious ethos organisation exceptions

Recommendation 14: Section 22M be removed from the Bill.

2.6 Other matters

Recommendation 15: A definition of 'aggrieved person' be added to section 4 of the *Anti-Discrimination Act 1977* to mean natural persons, and sections 22L(1) and (2) be amended to read: 'A person (*the perpetrator*) discriminates against another person (*aggrieved person*)…'.

Recommendation 16: A prohibition of vilification on the grounds of religious belief and activity be added to the Bill, reflecting the language in sections 20C, 38S, 49ZT, and 49ZXB of the *Anti-Discrimination Act 1977* (NSW).

Recommendation 17: The proposed amendment to section 126(1) be removed from the Bill.

Recommendation 18: Section 3 be amended to include reference to a wider range of international human rights instruments, and the Joint Select Committee review the effect of including and applying the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* in the proposed section 3(2).

Recommendation 19: Section 22N(6) be removed from the Bill.

Recommendation 20: The capacity for complicity claims to be made under the Bill be explicitly balanced against the fundamental rights and freedoms of others, including the right to equality and non-discrimination.

3. Introduction

We support the prohibition of religious discrimination through the introduction of shield-like protections to mirror how other attributes are already protected under existing Australian discrimination laws. New South Wales (**NSW**) lags far behind almost all other states and territories in its failure to prohibit religious discrimination.[1] Only 'ethno-religious origin' is currently protected as a religious attribute under the *Anti-Discrimination Act 1977* (NSW) (***ADA***), within the definition of 'race';[2] its scope remains complex and unclear, except that it likely includes Jewish and Sikh persons.[3] As such, we welcome the long-overdue addition of religious belief and activity as protected attributes in the *ADA*.

However, the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 (NSW) (**the Bill**) goes far beyond what is necessary to prohibit religious discrimination in NSW. The Bill is flawed as it privileges and prioritises religious belief and activity over other protected attributes, provides exceptions for a wide range of organisations in relation to a vast array of potentially unlawful conduct, and allows religious organisations to refuse to comply with, and avoid liability under, some existing NSW laws where they conflict with their own beliefs. Furthermore, the Bill's wide definition of 'religious activity' to exclude only those unlawful acts which are punishable by imprisonment will mean that employers cannot sanction employees for criminal acts with lower forms of punishment and other breaches of non-criminal laws—such as harassment, tortious acts such as battery, assault and negligence, and breaches of consumer and corporations laws—where such acts are religiously motivated.

We are therefore unable to support the Bill in its present form. We propose several amendments to ensure the Bill aligns more closely with the protection offered to other attributes under existing Australian discrimination laws, maximises its ability to achieve its underlying aim of prohibiting religious discrimination, and ensures other existing protections and laws are not unduly affected.

However, we submit that a better path forward to prohibit religious discrimination would be to conduct a wider, expert review of the *ADA*. As detailed in Part 4 below, the *ADA* is out-of-date and has many underlying problems. It requires significant changes and widespread overhaul. Adding the attributes of religious belief and activity to the existing *ADA* will only be a stop-gap measure until a new, or drastically amended, NSW discrimination law is enacted.

Recommendation 1: The New South Wales Parliament not pass the Bill in its current form given its underlying flaws and implications for the fundamental rights and freedoms of others.

1 Six states and territories prohibit religious discrimination. Only New South Wales and South Australia, which prohibits discrimination on the basis of religious appearance or dress, have thus far failed to do so: see *Equal Opportunity Act 1984* (SA) s 85T(5).

2 *Anti-Discrimination Act 1977* (NSW) s 4.

3 See *Khan v Commissioner of Corrective Services* [2002] NSWADT 131; *Abdulrahman v Toll Pty Ltd* [2006] NSWADT 221; *Jones and Harbour Radio Pty Ltd v Trad* [2011] NSWADTAP 19.

4. Approaching reform to the *Anti-Discrimination Act 1977* (NSW)

4.1 APPROACHING NEW AMENDMENTS THROUGH A WIDER, EXPERT REVIEW

Whatever the merits of a proposed amendment in its own right, no amendment should be made to the *ADA* in its current form.

The *ADA* is a very old statute in discrimination law terms. Its design reflects an approach to addressing discrimination that is two generations old, and that has been superseded by developments in Australia and internationally. The problem is not just that the design is old, but that the design has been shown over time to be inadequate to the task it seeks to perform. The policy that underpins the design of the *ADA* is flawed in two fundamental respects. First, the design of the *ADA* presumes that a person who has been subject to discriminatory or vilifying treatment has the knowledge, capacity and resources to prove a claim against the perpetrator who is, by definition, in a more powerful position. Second, the design of the *ADA* presumes that individual complaints—whether resolved by conciliation or adjudication—will change the social behaviours and structures that lead to discriminatory and vilifying conduct.

It has been known for many years that an individual complaints model such as is in the *ADA* is wholly inadequate for the aspiration in the Act's long title: 'to promote equality of opportunity between all persons'. The *ADA* does not make available to NSW citizens the tools for pursing equality that are well-established and accepted in discrimination and equality laws in Australia and internationally, such as special measures, positive duties, conduct standards, justifiable limits, representative actions, recognition of intersectionality, investigation and inquiry mechanisms, and accessible dispute procedures.

Detailed and extensive reforms recommended by the NSW Law Reform Commission in 1999[4] were not acted on. Since then there have been substantial inquiries into—and reforms of—discrimination and equality laws in, for example, Australia,[5] Victoria,[6] the ACT,[7] the United

4 NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977* (1999).

5 Human Rights and Anti-Discrimination Bill 2012 (Cth) and Commonwealth Attorney-General's Department, *Human Rights and Anti-Discrimination Bill 2012 Explanatory Notes* (November 2012) <http://www.ag.gov.au/Consultations/Pages/ConsolidationofCommonwealthanti-discriminationlaws.aspx>.

6 *An Equality Act for a Fairer Victoria: Equal Opportunity Review, Final Report* (Victorian Department of Justice, 2008); *Exceptions and Exemptions to the Equal Opportunity Act 1995, Final Report* (Victorian Scrutiny of Acts and Regulations Committee, 56th Parliament, November 2009).

7 *Review of the Discrimination Act 1991 (ACT), Final Report*, LRAC 3 FP (ACT Law Reform Advisory Council, 2015).

Kingdom,[8] and Europe.[9] Scholarship on discrimination laws has considerably enhanced our understanding of how legislative measures can promote equality.

Even without a fundamental redesign of the *ADA*, there are many ways in which the Act is out of step with discrimination protections that are available in other states and territories, leaving people in NSW exposed to disadvantage, harm and loss. These shortcomings include inadequate coverage of protected attributes, inadequate protection against vilification, extensive exceptions that allow discriminatory conduct without justification, and onerous procedural provisions for complaint and proof.

While it may be tempting to 'patch up' the *ADA* with further ad hoc amendments, such an approach condemns those who would be protected to the burden and ineffectiveness of the Act's outdated mechanisms. The people of NSW urgently need their state discrimination laws to be subject to the type of expert review, and resulting reforms, that have taken place in Victoria, the ACT, and the United Kingdom.

Recommendation 2: The Joint Select Committee recommend a wider, expert review of the *Anti-Discrimination Act 1977* (NSW), which includes consideration of how religious belief and activity should be added and constructed as protected attributes.

8 Bob Hepple, Mary Coussey and Tufyal Choudhury, *Equality, A New Framework: Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation* (Hart Publishing, 2000); United Kingdom Government, Department for Communities and Local Government, *A Framework for Fairness: Proposals for a Single Equality Bill for Great Britain* (2007); United Kingdom Government, Equalities Office, Framework for a Fairer Future: The Equality Bill: (Government Response to the Consultation, 2008); United Kingdom Government, *New Opportunities White Paper* (2009).

9 See, eg, Council of the European Communities Directives 75/117, 76/207, 2000/43, 2000/78, 2004/113/EC; European Parliament and Council Directives 2000/43/EC, 2000/78/EC, 2004/113/EC, 2006/54/EC.

5. Protected attributes

However, assuming that this Bill does proceed and a wider *ADA* review is not conducted, we propose several key amendments in the parts below. These amendments will ensure the Bill aligns the protection provided more closely with the protection offered to other attributes under existing Australian discrimination laws, maximises its ability to achieve its underlying aim of prohibiting religious discrimination, and ensures other existing protections and laws are not unduly affected.

5.1 Definition of 'religious belief'

The Bill adds two new protected attributes to the *ADA*: 'religious belief' and 'religious activity'. Both of these definitions as they are currently crafted are problematic.

First, though the explanatory notes posit that religious belief and non-religious belief are equally protected,[10] section 22K defines 'religious belief' as either:

(a) having a religious conviction, belief, opinion or affiliation, or

(b) not have any religious conviction, belief, opinion or affiliation.[11]

Such a definition—particularly the phrasing 'not have *any*' to denote the negative definition in subsection (b)—would appear to exclude protection for persons who are agnostic, as agnostics neither believe nor disbelieve in religious doctrine. They do not necessarily reject *any* religious conviction, belief, opinion or affiliation; their absence of belief or disbelief would therefore likely not be captured by section 22K. This definition also appears to exclude 'lapsed' believers (for example, a 'lapsed Catholic'), as such persons cannot be said to hold a religious conviction, belief, opinion or affiliation but it equally cannot be said that such a person does not have *any* religious conviction at all.

Second, the explanatory notes posit that the standard for determining the existence of the religious beliefs is intended to be entirely subjective, 'as a means to avoid courts determining matters of religious doctrine or disputation'.[12] This is reflected in section 22KA, which provides that a person holds a religious belief 'if the person genuinely believes the belief'. 'Genuinely believes' is defined in section 22K to mean that a person's holding of the religious belief 'is sincere and is not fictitious, capricious or an artifice'. This approach is justified in the explanatory notes on the basis that that such an approach is consistent with *Church of the New Faith v Commissioner for Payroll Tax (Vic)*.[13] However, the reliance on this case is misguided and misleading as it fails to acknowledge the findings in that decision. While Mason ACJ and Brennan J concluded that a narrow definition of a religious institution in the context of fiscal legislation should not be adopted, their Honours also rejected an approach that was entirely subjective, labelling it as not acceptable. As their Honours stated:

10 Explanatory Notes, Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020, 2.

11 Note also the incorrect grammar in s 22K(b): the reference should be to 'not having' rather than 'not have'.

12 Explanatory Notes, Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020, 2.

13 Explanatory Notes, Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020, 2; *Church of the New Faith v Commissioner for Payroll Tax (Vic)* (1983) 154 CLR 120.

> The mantle of immunity would soon be in tatters if it were wrapped around beliefs, practice and observances of every kind whenever a group of adherents chose to call them a religion.[14]

Other judgments go further and provide a list of indicia for determining if a collection of beliefs constitute a religion, indicating the superior court jurisprudence has not concluded that determining a religious belief or the existence of a religion is entirely subjective. Further, in *OV and OW v Members of the Board of Wesley Mission Council*, the NSW Court of Appeal cautioned against the use of determinations in a constitutional context on the nature of religion given the different statutory context.[15] The approach taken in section 22KA of this Bill is messy, unclear and too weighed towards subjective inquiries.

Third, section 22KB expands the definition of 'religious belief' to include religious beliefs that a person currently holds, is thought to hold, has held in the past or is thought to have held in the past, and will hold in the future or is thought they will hold in the future. The inclusion of future imputed beliefs extends the protection offered by the 'religious belief' attribute too far: it is a very low bar to only have to establish that another person thought a person may at some unknown stage in the future come to hold a particular religious belief.

There is no such provision with respect to discrimination on the basis of religious belief in any other state or territory legislation. Such a provision appears to be based on the *ADA*'s definition of disability in existing section 49A, which includes future imputed disabilities. However, attributes such as disability, or indeed other non-belief attributes such as sex or race, are far easier to ascertain than belief systems, especially when considering *future imputed* disabilities vis-à-vis *future imputed* beliefs; the latter remains too indeterminate. Section 22KB may also partially be adopted from the *Disability Discrimination Act 1992* (Cth), which includes disabilities that (i) presently exist, (ii) previously existed, (iii) may exist in the future, *or* (iv) are imputed to a person.[16] However, that definition does not allow for those four categories to be combined. The definition does not include, for instance, a future imputed disability; the disability must be a future disability *or* an imputed disability. This Bill combines these categories and, most problematically, includes future imputed religious beliefs which would be impossible to speculate on or disprove. We are not aware of any other existing discrimination laws which do this for *belief*-based attributes, and there is no justification given for this unique definition. Allowing the definition to apply to beliefs which presently, previously or may in future exist, and separating out imputed beliefs, already provides depth and breadth in protection.

Other state discrimination laws define religious belief more simply and clearly. For example, the *Anti-Discrimination Act 1991* (Qld) defines religious belief as:

> holding or not holding a religious belief.[17]

14 *Church of the New Faith v Commissioner for Payroll Tax (Vic)* (1983) 154 CLR 120, [10].

15 *OV and OW v Members of the Board of Wesley Mission Council* (2010) 79 NSWLR 606, 616 (Basten JA and Handley AJA). See also Carolyn Evans, *Legal Protection of Religious Freedom in Australia* (Federation Press, 2012) 157.

16 *Disability Discrimination Act 1992* (Cth) s 4.

17 *Anti-Discrimination Act 1991* (Qld) Schedule (Dictionary).

This definition is clear, allows for a wide variety of beliefs and non-beliefs to be incorporated for protection and allows for appropriate objective and subjective inquiries from courts as to the nature of the belief.

Recommendation 3: The definition of 'religious beliefs' in section 22K be amended to mean: 'holding or not holding a religious belief'.

Recommendation 4: The definition of 'genuinely believes' in section 22K be removed from the Bill.

Recommendation 5: Section 22KA be removed from the Bill.

Recommendation 6: Section 22KB(1) be amended to read: 'A reference in this Part to a person's religious belief is a reference to a religious belief: (a) that a person holds, or (b) that a person is thought to hold (whether or not the person in fact holds the religious belief)', or (c) that a person held in the past, or (d) that a person will hold in the future.'

5.2 DEFINITION OF 'RELIGIOUS ACTIVITY'

As with 'religious belief', the operational definition of religious activity in section 22K is also not symmetrical. 'Religious activity' is defined in section 22K of the Bill as engaging in religious activity, including an activity motivated by a religious belief. This definition does not provide for protection for persons who are not engaging in, or refusing to engage in a religious activity. This means that such a provision is unlikely to provide symmetrical protection for all religious and non-religious persons as it appears to focus on the engagement in religious activities rather than the non-engagement in religious activity. This is then confused in section 22KB(2), in which a religious activity is then described as a 'religious activity that a person engages in, does not engage in or refuses to engage in.' Sections 22K and 22KB appear to be at odds with one another as to whether the activity requires engagement or can also allow for refusal or non-engagement. Symmetry should be achieved in the section 22K definition, since section 22KB is focused on extending the definition to 'past, future and presumed' beliefs and activities. Attempting to achieve symmetry through the inclusion of 'not engaging in' and 'refusing to engage in' religious activities in section 22KB, rather than the operative definitional section of section 22K, only serves to confuse the scope of the protections offered.

Furthermore, the section 22K definition of 'religious activity' excludes 'any activity that would constitute an offence punishable by imprisonment under the law of New South Wales or the Commonwealth'. This means that unlawful criminal acts with punishment below the level of imprisonment can still be protected, and endorsed, as lawful religious activities under the *ADA*; employers, goods and service providers, education providers and accommodation providers would not be able to treat an individual differently based upon them committing such criminal offences where they are religiously-motivated. This also means that various different breaches of non-criminal laws can be sanctioned as lawful religious activities under the *ADA* and thereby protected from adverse treatment from an employer, education provider, goods and service provider or accommodation provider: whether that be harassment, bullying, breaches of contract, tortious acts such as assault, battery or negligence, or breaches of consumer or corporations laws. For example, this would seem to make it very difficult for an employer to sanction an employee

(Person A) who has bullied another employee (Person B) in the workplace where that workplace bullying is in any way motivated by a subjective religious belief of Person A. This would also mean that schools cannot sanction students for bullying or harassment where it is religiously-motivated. The bar for exclusion from the definition 'religious activity' should not be set as high as imprisonable offences; all unlawful acts should be excluded regardless of the potential punishment that can be imposed for said acts.

The definition of 'religious activity' in section 22KB also includes future imputed religious activities. This is problematic for the same reasons as identified above with respect to future imputed religious beliefs.

Clearer provisions are provided for in other state legislation. For example, the *Equal Opportunity Act 2010* (Vic) defines religious activity as:

> engaging in, not engaging in or refusing to engage in a lawful religious activity.[18]

Such a definition encapsulates not only engaging in religious activity, but also not engaging or refusing to engage in religious activity, encompassing a wider range of possible activities and provides better protection for those who do not have religious belief and allows for the limitation of activities to lawful activities.

Recommendation 7: The definition of 'religious activities' in section 22K be amended to mean: 'engaging in, not engaging in or refusing to engage in a lawful religious activity'.

Recommendation 8: Section 22KB(2) be amended to read: 'A reference in this Part to a person's religious activity is a reference to a religious activity: (a) that a person engages in, or (b) that a person is thought to engage in, or (c) that a person engaged in in the past, or (d) that a person will engage in in the future'.

18 *Equal Opportunity Act 2010* (Vic) s 4(1).

6. ‘Protected activity’ provisions

6.1 ‘PROTECTED ACTIVITY’ CLAIMS

The proposed sections 22L(1)(b) and (2)(b) in the Bill prohibit indirect discrimination on the basis of religious belief and activity, reflecting the structure of other Australian discrimination laws by defining indirect discrimination as the imposition of a requirement or condition or practice which has, or is likely to have, the effect of disadvantaging persons who possess the protected attribute (in this case, a particular religious belief or activity). These proposed sections also reflect the structure of other Australian discrimination laws by providing a ‘reasonableness’ defence to indirect discrimination.

Under these provisions, and these provisions alone, indirect discrimination under this Bill would work in the same way as it does under other discrimination laws in Australia. Consider the example of a law firm that imposes a requirement that all employees must work between 9 am and 1 pm on Sundays. This might *prima facie* disadvantage those of a religious faith which requires or expects observance of that faith and/or attendance at religious ceremonies and events on Sundays. This may not be a disadvantage that can be overcome or mitigated, and it may be unclear why a law firm would require work to be completed in those hours when courts are not open on Sundays and clients are less likely to be working at that time. As such, it may be that this requirement is found to be unreasonable, and therefore unlawful indirect discrimination. The situation may be different for employers with stronger justifications for requiring work to be conducted on weekends, such as real estate agencies. The advantage of the general ‘reasonableness’ test is that individual circumstances of the relevant parties can be taken into account and weighed against each other in coming to a decision on whether the requirement or condition in question amounts to indirect discrimination.

However, the proposed ‘protected activity’ provisions found throughout the Bill effectively circumvent and override this general ‘reasonableness’ defence and the general prohibition on indirect discrimination on the basis of religious belief or activity. In particular, the proposed section 22N(3) provides that it is unlawful for an employer to:

> (a) restrict, limit, prohibit or otherwise prevent an employee from engaging in a protected activity, or
>
> (b) punish or sanction an employee for doing so, or because their associate has done so.

This ‘protected activity’ prohibition is a separate unlawful act under the Bill, which is defined outside of the general prohibitions on direct and indirect discrimination. As a result, this has the effect of creating a legal presumption that any employer requirements or conditions which restrict ‘protected activity’ are unlawful acts of discrimination, rather than assessing this through the ordinary ‘reasonableness’ test used to assess all other indirect discrimination claims under Australian discrimination laws.

‘Protected activity’ is then defined in section 22N(4)(a)(i) and (b) to mean a ‘religious activity’ performed by the employee or an associate of the employee that occurs at a time other than when the employee is performing work and at a place other than the employer’s place of work. An

employee also has to establish that their conduct meets one of three limbs under section 22N(4)(a)(ii) to make out their 'protected activity' discrimination case:

- that it does not include any direct criticism of the employer; or
- that it does not include any attack on the employer; or
- that it does not cause any direct and material financial detriment to the employer.

However, because section 22N(4)(a)(ii) provides three options for employees, it will effectively operate in practice as an exception provision: an activity will be taken outside the realm of 'protected activity' when an employer can establish all three of those limbs (ie, that it *did* include a direct criticism of them, an attack on then, and caused them direct and material financial detriment). We term this an 'exception' provision because it is likely to be the only way in which an employer can avoid liability for a 'protected activity' claim; the proof threshold for a 'protected activity' claim is low, particularly compared to those required for direct and indirect discrimination claims.

This type of 'protected activity' provision is not found in *any* other Australian discrimination law, which adequately address the issue through ordinary indirect discrimination provisions (including the 'reasonableness' defence). While these provisions clearly target an Israel Folau-type situation, this situation can already be, and is more appropriately, captured by the ordinary indirect discrimination provisions in the proposed sections 22L(1)(b) and (2)(b) without requiring additional special provisions. Instead, the current situation under the Bill is that where an employer imposes a requirement or condition that restricts the expression of religious beliefs or conducting of religious activities, this would be unlawful indirect discrimination unless the employer can prove a narrow exception, discussed below. Work health and safety laws impose a positive duty on employers to prevent harm from bullying, harassment and discrimination;[19] this obligation should not be undermined by a new and novel framing that makes the employer's capacity to fulfil this obligation more difficult.

Under the proposed section 22N(3), religious beliefs and activities would have greater protection from employer intervention than activities conducted or beliefs held for any other reason. For employers, it would mean that measures to protect their reputation through codes of conduct would need to be applied differently in respect of employees making statements or conducting activities on the basis of religious belief and employees making statements or conducting activities on some other basis, such as a social, cultural, political, scientific, or considered belief. Importantly, this 'protected activity' provision would apply to a number of professions where conduct outside the workplace can impact on the role itself, such as police officers, teachers and doctors. Allowing police officers, teachers and doctors to lawfully breach employment codes of conduct would likely undermine community confidence in these professions and the important societal roles they play.

The explanatory notes provide an example of an airline that:

19 See generally Belinda Smith, Melanie Schleiger and Liam Elphick, 'Preventing Sexual Harassment in Work: Exploring the Promise of Work Health and Safety Laws' (2019) 32(2) *Australian Journal of Labour Law* 219.

> has created a new staff policy celebrating same-sex marriage, requiring its on-flight stewards to wear a commitment ring in support of the policy while also banning Christian crosses in staff jewellery, given the Christian commitment to male-female marriage. The requirement to wear a commitment ring breaches Section 22N(1)(c) and the ban on crosses breaches 22N(6) and possibly 22N(1)(c).[20]

However, it fails to note that under this Bill, an airline would remain free to sanction an employee who wore a rainbow badge in support of same-sex marriage, or whose partner publicly promoted equal rights for LGBTIQ+ people, if this conduct was not motivated by religious belief. This creates a double standard in protection, depending on whether one's views are religiously motivated or otherwise motivated. To use another example, an employer might impose a rule that bans employees from engaging publicly in controversial political debates. If a gay employee is restricted by this rule from publicly supporting marriage equality as a result, they could argue an indirect discrimination case under protections for sexual orientation discrimination under the *ADA*, but the rule will be lawful if the employer can establish that the rule was 'reasonable' based on the balancing factors. Differently, a religious employee in the same situation (for instance, an employee restricted from publicly opposing marriage equality on the basis of their religious beliefs) could argue an indirect discrimination case under this Bill, and the rule would be *presumed* unlawful unless the employer can prove the narrow exception made available in section 22N(4)(a)(ii). This exception only applies where the protected activity:

- includes a direct criticism of the employer; and
- includes an attack on the employer; and
- causes 'direct and material financial detriment' to the employer.

As per section 22N(5), 'direct and material financial detriment' does not include a boycott or secondary boycott of the employer by other persons, nor the withdrawal of sponsorship or other financial or corporate support for the employer by other persons; that is, in the Israel Folau case, a withdrawal of sponsorship from Qantas would not have been enough to constitute 'direct and material financial detriment' to Rugby Australia. This would seem to exclude almost *all* financial detriments that an employer could face as a consequence of their employees' protected activity. It is difficult to conceive of what type of financial detriment an employer could rely upon to meet the definition of 'direct and material financial detriment'. This would seem to render it highly unlikely that an employer will be able to defend a 'protected activity' claim, since 'direct and material financial detriment' must be proven.

This exception thereby sets an almost impossibly high standard of proof for employers, which is much harder to prove than the general standard of 'reasonableness' found in all other indirect discrimination prohibitions in Australian discrimination laws. The operation of these proposed provisions is likely to significantly curtail the capacity of employers to enforce codes of conduct to promote the safety and equality of their workforce, and to protect their brand or reputations. This could present practical implementation challenges for employers, who would be placed in the position of having to determine the motivation of an employee before they could enforce any

20 Explanatory Notes, Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020, 6.

codes of conduct, and would have to treat religiously motivated conduct differently to conduct that is motivated by any other personal belief.

As a matter of equality, there should not be one rule for indirect discrimination on the basis of race, sex, disability and age, and another rule for indirect discrimination on the basis of religion. Employer rules restricting protected activity should be considered under the same 'reasonableness' test under the *ADA*, whether it has a disadvantageous effect on the basis of religion and/or any other protected attribute. If enacted into law, the 'protected activity' prohibition would mean that religious activity and activity that is motivated by religious belief would enjoy greater protection from employer intervention or sanction than any other activity. This outcome would privilege the right to engage in religious activity and activity motivated by religious belief, which has been very broadly defined, over other human rights, such as the right to equality and non-discrimination, the rights of children, and the right to privacy and reputation.

Furthermore, a consequence of these 'protected activity' provisions is that employers will, in some circumstances, be forced to engage in unlawful discrimination. For instance, assume that an employee (Person A) is bullying another employee (Person B) outside the workplace but in a work-connected context, such as a conference dinner attended by several work colleagues. Assume that this bullying is on the grounds of Person B's homosexuality, owing to Person A's religiously-motivated concerns with homosexuality. If Person B makes a complaint to their employer, the employer would face an impossible choice: sanction Person A for the bullying, which could lead to a 'protected activity' discrimination claim by Person A on the basis of restricting Person A's expression of religious belief outside of the workplace; or allow the bullying to continue without sanction, which could lead to a homosexuality discrimination claim by Person B under section 49ZH of the *ADA* for failing to take steps to address the homophobic bullying. This is an unconscionable burden for legislation to impose on employers, and is a wholly disproportionate measure to protect religious freedom. One fundamental tenet of the rule of law is that laws need to be drafted so that people are able to comply with them; this Bill, in some cases, would not allow employers to comply with legal obligations to their employees.

In the absence in NSW of a human rights mechanism that enables the proportionate accommodation of conflicting rights, no single protected attribute should be given legislated priority over another. There is no rational basis for a legislature to choose to privilege one protected attribute over another. The *ADA* is designed to ensure equal protection for each attribute; none is protected in such a way that it diminished the protection of another. The current Bill ought not change that balance.

Recommendation 9: Sections 22N(3), (4), and (5) be removed from the Bill.

6.2 EXTENSION TO QUALIFYING BODIES AND EDUCATION

The above 'protected activity' prohibitions also apply to qualifying bodies under proposed section 22S and to education-providers, as regards protected activity undertaken by students, under proposed section 22V. As above, there is no reason to grant special privileges to only religiously-motivated beliefs and activities and no other protected attributes under the *ADA*. These privileges and the definition of religious activity to include various unlawful acts would likely mean that, for instance, a legal accreditation board cannot sanction a lawyer or restrict or

remove their practicing certificate on the basis that the lawyer has committed a particularly wrongful or dishonest unlawful act—as long as that act is grounded in their subjective religious belief/s, and not punishable by imprisonment. Nor could, for example, a school sanction a student for bullying another student after school so long as their bullying is based upon religious doctrine, or else they could be subjected to 'protected activity' discrimination claim.[21] In relation to these proposed sections 22S and 22V, the explanatory notes provide the following example:

> On his Facebook page, a university social work student declares his support for traditional Christian views of marriage, between a man and a woman. This causes a controversy on campus but initially, university management stays out of it. The student declares publicly that while he is a committed Christian, as a future social worker he will readily look after people of all religions, sexuality and married type. But this is not good enough for the national social worker accreditation body, which says the student will not be admitted to the profession when he graduates. The university buckles under this edict and suspends the student from his course. The accreditation body has breached Section 22S, while the university has breached both sections 22S and 22V.[22]

However, if the student in question made more extreme public remarks, including those that were demeaning or denigrating towards LGBTIQ+ individuals or that questioned their capacity to parent, the accreditation body and university would potentially also be in breach of proposed sections 22S and 22V respectively unless they could establish that the remarks were not motivated by his religious beliefs.

As above, the 'protected activity' prohibitions are unnecessary. Such claims can already be, and are more adequately, addressed through the ordinary prohibitions on direct and indirect discrimination—as would any existing claims based on other protected attributes under the *ADA*.

Recommendation 10: Sections 22S(2), (3), (4), and (5) and 22V(3), (4), (5), and (6) be removed from the Bill.

6.3 Exceptions for Religious Bodies

The proposed section 22N(9) exacerbates the potentially unequal impact of the protected activity provisions because it provides for a blanket exception for 'religious ethos organisations' and bodies 'established to propagate religion under section 56.' This means that such organisations would, paradoxically, have far *greater* freedom to restrict, prohibit and sanction religious activity or religiously motivated activity, in contrast to the stringent obligations placed on all other employers. There is no explanation given for this double standard. If the protected activity provisions remain, however inadvisable, then this inconsistency should be resolved by at the very least exposing religious ethos organisations and bodies established to propagate religion to the same prohibitions on restricting protected activity as all other employers.

Recommendation 11: Section 22N(9) be removed from the Bill.

[21] This is explicitly contemplated by the explanatory notes, whereby a government school rule barring students from proselytising or sharing sacred religious texts with other students for the purposes of providing a 'safe environment' for all students is described as unlawful: Explanatory Notes, Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020, 8.

[22] Explanatory Notes, Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020, 7.

7. State laws and programs

7.1 SCOPE AND EXTENSION TO RELIGIOUS ETHOS ORGANISATIONS

The proposed section 22Z(1) provides that it is unlawful to religiously discriminate against another person in the course of performing functions under State law or for the purposes of a State program. This general type of provision is not uncommon in discrimination laws: similar provisions on the 'administration' of Commonwealth laws and programs are found in federal discrimination laws.[23] The *ADA* itself contains a similar provision: section 22J, which makes it unlawful for a person to sexually harass another person in the course of performing any function under a State law or for the purposes of a State program. Section 22Z(1) is similar in language to section 22J. We support the prohibition of discrimination in the administration of State laws and programs; however, this extension should apply to *all* discrimination under the *ADA*, not just religious discrimination. There is no rational basis for such protection applying only on the basis of religious belief and activity and not on the basis of any other protected attributes.

By contrast, section 22Z(2) is unique and not found in section 22J or anywhere else in the *ADA*: it provides that it is unlawful discrimination if a person requires any religious ethos organisation to engage in conduct, including use of its property, in a manner contrary to the organisation's doctrines, tenets, beliefs or teachings if this occurs in the course of performing any function under a State law or for the purposes of a State program. As discussed in Part 9.1 below, this provides standing to religious organisations (who are not natural persons) to bring discrimination claims despite these claims being based on *human* rights—but this provision also seemingly allows religious ethos organisations to challenge the operation of NSW laws, delegated legislation, orders made under such laws and by-laws, and governmental programs. The extension of this protection to religious ethos organisations is unorthodox and not found in any other federal, state or territory discrimination laws. We are concerned that this could mean, for instance, that religious organisations may be able to challenge and avoid criminal laws imposing duties to report child abuse and neglect to authorities if this was contrary to the organisation's doctrines, such as where an organisation opposes unsealing the confessional. No other organisations could challenge such laws or avoid their remit. This could have the effect of overriding existing legal protections and privileging one protected attribute (religious belief or activity) over others. Local governments may also be unable to impose existing noise restrictions on noise caused by religious observance or ceremonies,[24] and the state government may be unable to impose health quarantine restrictions on religious ceremonies owing to the COVID-19 pandemic.[25]

Recommendation 12: Section 22Z(2) be removed from the Bill.

23 See, eg, *Disability Discrimination Act 1992* (Cth) s 29; *Sex Discrimination Act 1984* (Cth) s 26.

24 See, eg, Tony Moore, 'Gold Coast council recommends mosque, rejects 4am prayer time', *Brisbane Times* (online at 10 September 2014) <https://www.brisbanetimes.com.au/national/queensland/gold-coast-council-recommends-mosque-rejects-4am-prayer-time-20140910-10exx5.html>.

25 See, eg, Alex Wigglesworth and Paul Sisson, 'Church services move to California beaches, sparking fears of coronavirus outbreaks', *Los Angeles Times* (online at 28 July 2020) <https://www.latimes.com/california/story/2020-07-28/church-services-move-to-california-beaches-sparking-fears-of-coronavirus-outbreaks>.

Recommendation 13: The protection afforded by section 22Z(1) be extended to all other protected attributes under the *Anti-Discrimination Act 1977* (NSW).

8. Religious ethos organisation exceptions

8.1 TEST FOR RELIGIOUS ETHOS ORGANISATION EXCEPTIONS

The proposed section 22M(1) provides that a religious ethos organisation does not discriminate under *any provision of the Part 2B* (religious discrimination) if they engage in conduct if the organisation 'genuinely believes' the conduct:

(a) is consistent with the doctrines, tenets, beliefs or teachings of the religion of the organisation; or

(b) is required because of the religious susceptibilities of the adherents of the religion of the organisation; or

(c) furthers or aids the organisation in acting in accordance with the doctrines, tenets, beliefs or teachings of the religion of the organisation.

This would allow religious ethos organisations to discriminate against people of other religious beliefs or faiths, or against people of no religious beliefs or faith.

Only one of the above three limbs needs to be met in order for otherwise religiously discriminatory conduct to be lawful. Equivalent religious body exceptions under existing federal, state and territory discrimination laws apply only on the basis of *two* limbs: where (1) conduct 'conforms to' religious doctrine and/or (2) conduct 'is necessary to avoid injury to' religious susceptibilities.[26] This two-limb test is already found in the *ADA*, in respect of excepting religious bodies from all prohibitions on discrimination under the Act.[27] While this two-limb test is somewhat similar to the tests proposed under sections 22M(1)(a) and (b),[28] the section 22M(1)(c) test is merely whether the conduct 'furthers or aids' a religious ethos organisation in acting in accordance with their religious doctrines. This does not require that the conduct indeed *is itself in accordance with* their religious doctrines. This third limb under section 22M(1)(c) is unorthodox, wide in scope, and easier to satisfy than *any* religious body exception test found in *any* other existing federal, state or territory discrimination law in Australia. This significantly undermines the purpose of this Bill—to prohibit religious discrimination—by providing a much wider exception than seen in other comparable discrimination laws.

Furthermore, even in respect to the other two limbs, the section 22M test is impermissibly wide because a religious ethos organisation only needs to 'genuinely believe' that their conduct is consistent with religious doctrine or is required because of the religious susceptibilities of their

26 *Sex Discrimination Act 1984* (Cth) s 37; *Age Discrimination Act 2004* (Cth) s 35; *Anti-Discrimination Act 1998* (Tas) s 52(d); *Anti-Discrimination Act 1991* (Qld) s 109(1)(d); *Equal Opportunity Act 1984* (SA) s 50(1)(c); *Equal Opportunity Act 1984* (WA) s 72(d); *Equal Opportunity Act 2010* (Vic) s 82(2)(a); *Anti-Discrimination Act 1992* (NT) s 51(d); Discrimination Act 1991 (ACT) s 32(d).

27 *Anti-Discrimination Act 1977* (NSW) s 56(d).

28 On slight differences between the language of these two limbs under federal, state and territory discrimination laws, see Liam Elphick, 'Sexual Orientation and "Gay Wedding Cake" Cases Under Australian Anti-Discrimination Legislation: A Fuller Approach to Religious Exemptions' (2017) 38 *Adelaide Law Review* 149, 158-61.

adherents. This is a solely subjective test; the religious body would not be required to establish *any* recognised religious or doctrinal basis for its conduct. The religious body would not need to establish that their conduct *is consistent* with religious doctrine, but rather just that they believe it is consistent with religious doctrine. Equivalent religious body exceptions at the federal, state and territory level require that conduct 'conforms to' religious doctrine or 'is necessary to avoid injury to' religious susceptibilities, which sets an objective standard. This standard is preferable as it is stronger, clearer and would not unduly weaken the effect of the prohibition on religious discrimination.

There are good reasons for excepting some conduct by religious ethos organisations from prohibitions on religious discrimination. For instance, it is likely appropriate if an Anglican school requires its religious education teachers to be of the same faith. However, the section 22M test is too wide and unduly frustrates the very purpose of this Bill: to prohibit religious discrimination. Further examples are provided in Parts 8.2 and 8.3 below.

The *ADA* already has a general exception for religious bodies in section 56:

> Nothing in this Act affects:
>
> (a) the ordination or appointment of priests, ministers of religion or members of any religious order,
>
> (b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order,
>
> (c) the appointment of any other person in any capacity by a body established to propagate religion, or
>
> (d) 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.

Were the proposed Part 2B under the Bill to become law, section 56 would apply equally to religious discrimination: that is, when religious bodies meet one of the four tests in section 56, their actions would not be found to discriminate on the basis of religious belief or activity. Section 56(d) already effectively operates in the same way as other federal, state and territory discrimination laws, by setting an objective standard and requiring that conduct 'conforms to' religious doctrine or 'is necessary to avoid injury to' religious susceptibilities. This is a far preferable test to the proposed section 22M, particularly section 22M(1)(c) which is impermissibly wide. The existing exception in section 56(d)—and indeed section 56(c) since this refers to the 'appointment of any other person in any capacity' by a religious body—will still allow key religious activities and appointments to be excepted from the prohibition on religious discrimination, in recognition of a religious body's right to exercise their religious freedom in relation to core activities and doctrine.

8.2 SCOPE OF RELIGIOUS SCHOOL EXCEPTION

A further problem is that the religious ethos organisation exclusion in proposed section 22M applies to *all* conduct engaged in by religious educational institutions. For instance, a student may join a religious school in Year 1 and at the time be of the school's faith. Halfway through

Year 12, that student may decide they do not identify strongly with that religion anymore. Sections 22K and 22M would allow the school to expel that student on the basis that they do not share the same religious beliefs as the school. By contrast, equivalent provisions in Tasmanian, Queensland, Northern Territory and Australian Capital Territory laws allow schools to discriminate on the ground of religion at the time of admission—that is, their first enrolment at that school—but not once a student is a member of the school community.[29]

Religiously affiliated educational institutions are already dealt with by other relevant exceptions in the Bill: for example, religious discrimination is permitted in employment where, because of religious belief or lack thereof, a person is unable to carry out the inherent requirements of the job under the proposed section 22U. This would already allow religious schools to employ applicants of the same faith for roles in which faith is relevant. To the extent that religious schools are permitted to preference students of the same faith, this should only apply at the stage of admission and not at any later stage, owing to the disproportionate adverse effect this will have on students in later years of schooling as they develop their own sense of identity. As such, if section 22M is retained, against our below recommendation, then it should be amended to ensure the religious school exception applies only at the stage of admission. This can be done by drawing on the proposed section 22V of the Bill, which already separates the prohibition on discrimination in education into: (i) the stage of admission to the school in section 22V(1); and (ii) post-admission in section 22V(2). Section 22M should not apply to section 22V(2), thereby maintaining the prohibition on post-admission discrimination against students.

8.3 DEFINITION OF 'RELIGIOUS ETHOS ORGANISATION'

Religious ethos organisations are defined in section 22K of the Bill to mean:

> (a) a private educational authority that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion; or
>
> (b) a charity registered with the Australian Charities and Not-for-profits Commission under the *Australian Charities and Not-for-profits Commission Act 2012* of the Commonwealth that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion; or
>
> (c) any other body that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion.

By contrast, existing religious body exceptions in the *ADA* apply to 'bodies established to propagate religion'.[30] In *OV and OW v Members of the Board of Wesley Mission Council*, the New South Wales Administrative Decisions Tribunal, on the basis of guidance from the New South Wales Court of Appeal, held that Wesley Dalmar Child and Family Care, a foster care agency attached to the Wesley Mission, was a body established to propagate religion.[31] The scope of bodies that fall within the section 56 religious body exception is, therefore, fairly wide

29 *Anti-Discrimination Act 1998* (Tas) ss 51A(2), (3); *Anti-Discrimination Act 1991* (Qld) s 41(a); *Discrimination Act 1991* (ACT) s 46; *Anti-Discrimination Act 1992* (NT) s 30(2).

30 *Anti-Discrimination Act 1977* (NSW) s 56(d).

31 *OV and OW v Members of the Board of Wesley Mission Council* [2010] NSWADT 293 (10 December 2010).

in its current formulation in the *ADA*. Extending religious body exceptions even further to any bodies that are merely 'conducted in accordance with' religious beliefs would have the effect of permitting a vast array bodies with non-religious primary purposes to discriminate on the basis of religious belief and activity. For instance, charities with the primary purpose of advancing health or public welfare which have ancillary religious purposes or connections would be captured by this section 22K definition. As a result, various NSW-based charities that provide a vast array of public services and benefits, and which are often funded by the public, would be captured by this definition. This would allow those bodies to discriminate widely, in ways that charities without any religious affiliation or connection could not. This would exacerbate what is already an uneven playing field in the various industries and markets in which not-for-profit organisations compete.

Take for example a soup kitchen affiliated to one particular religion. Sections 22K and 22M would allow the soup kitchen to require that *any* volunteer helping serve bowls of soup is of the same religion. It would also allow the soup kitchen to refuse to serve soup to any persons who are of a different religious faith, or of no religious faith, or to require recipients to participate in religious activities in order to receive food. Similarly, a homeless shelter could refuse to provide shelter to a person who did not have the same religious beliefs. Outside of charities, this broad definition could also allow, for instance, a religious hospital to sack a doctor who expresses pro-choice views, and allow a religious aged-care facility to refuse to hire an atheist care worker.

Religiously affiliated charities and bodies are already captured by other relevant exceptions in the Bill and in the *ADA*: the governing rules of charities, and conduct engaged in to give effect to such rules, are excepted under the existing section 55; and religious discrimination is permitted in employment where, because of religious belief or lack thereof, a person is unable to carry out the inherent requirements of the job under the proposed section 22U. The latter would also allow religiously affiliated charities and bodies to employ applicants of the same faith for roles in which faith is relevant: for instance, leadership roles.

While there may be a basis for the proposed section 22M exception for those charities and bodies that are expressly established for a religious purpose, there appears to be no basis for extending this exception to charities or bodies with a religious affiliation or connection, where their main purpose is to provide public goods, services or facilities such as food, shelter or healthcare. There is no rational basis for requiring doctors or aged-care workers or to express the same religious beliefs and practices as the religion to which their employer is associated. Section 22M is, in its current form, an unwarranted limitation on freedom of speech, opinion and belief. Many organisations it captures are conducted for commercial purposes or for health- or welfare-related purposes. They should not be afforded special exceptions which permit unlawful discrimination.

Almost all existing religious body exceptions in Australian discrimination laws apply uniformly to 'bodies established for religious purposes'.[32] The *ADA* already has a similar religious body

32 *Sex Discrimination Act 1984* (Cth) s 37(1)(d); *Age Discrimination Act 2004* (Cth) s 35; *Anti-Discrimination Act 1998* (Tas) s 52(d); *Anti-Discrimination Act 1991* (Qld) s 109(1)(d); *Equal Opportunity Act 1984* (SA) s 50(1)(c); *Equal Opportunity Act 1984* (WA) s 72(d); *Equal Opportunity Act 2010* (Vic) s 82(2)(a); *Anti-Discrimination Act 1992* (NT) s 51(d); *Discrimination Act 1991* (ACT) s 32(d).

exception provision in section 56 which would equally apply to discrimination on the basis of religious belief and activity if the proposed Part 2B of the Bill becomes law. Organisations that engage solely or primarily in commercial, charitable, health or welfare activities should not be granted a *carte blanche* exception from the operation of this Bill solely by reason of having a connection with a particular religion.

For the reasons provided in Parts 8.1, 8.2 and 8.3, the proposed section 22M would significantly undermine the purpose of the Bill: to prohibit religious discrimination. It is unnecessary considering core religious conduct would already be excepted by operation of section 56 of the *ADA*, without requiring any further amendments.

Recommendation 14: Section 22M be removed from the Bill.

9. Other matters

9.1 STANDING FOR RELIGIOUS ORGANISATIONS

The proposed section 22Z(2) provides *explicit* standing for religious ethos organisations to bring a claim of discrimination against other persons where such organisations are required to engage in conduct in a manner contrary to their religious doctrines in the course of performing a function under a State law or for the purposes of a State program.

Furthermore, religious ethos organisations are *implicitly* granted standing under the Bill's general prohibitions on direct and indirect discrimination on the basis of religious belief and religious activity in proposed section 22L. 'Person' is not defined in the *ADA* or this Bill, meaning that under statutory interpretation principles the definition of 'person' falls back to that found in the *Interpretation Act 1987* (NSW) section 21: '***person*** includes an individual, a corporation and a body corporate or politic'. Owing to the inability of bodies corporate to be characterised in a manner pertaining to sex, race, age, disability or other protected attributes, the *ADA* currently allows only natural persons to bring a claim of discrimination; no other organisations which support or are tied to other protected attributes have standing to bring discrimination claims. This is the case without requiring specific definitions of 'person' to exclude bodies corporate, owing solely to the limited character that organisations can take in regard to those protected attributes. However, while bodies corporate cannot be of a sex or race character, they clearly can be of a religious character. As section 22L of the Bill provides that a person can discriminate against 'another person', this means that religious bodies corporate and other bodies with a religious character *can* bring claims for direct and indirect discrimination under the Bill, in addition to being able to bring claims under the section 22Z prohibition regarding State laws and programs.

Human rights are expressly designed to protect innately *human* characteristics. This is also consistent with international approaches to the right to conscience and belief in article 18 of the *International Covenant on Civil and Political Rights* (***ICCPR***). As the Special Rapporteur has observed with respect to article 18 of the *ICCPR*, this is a right which is held by individuals.[33] While bodies corporate and other organisations should, consistent with other prohibitions in the *ADA*, be prohibited from *engaging in* discriminatory conduct, such bodies should not be permitted to themselves *bring a claim of* discrimination. As above in Recommendation 10, section 22Z(2) should be removed.

Recommendation 15: A definition of 'aggrieved person' be added to section 4 of the *Anti-Discrimination Act 1977* to mean natural persons, and sections 22L(1) and (2) be amended to read: 'A person (*the perpetrator*) discriminates against another person (*aggrieved person*)…'.

[33] Ahmed Shaheed, *Report of the Special Rapporteur on freedom of religion and belief*, UN Doc A/HRC/34/50 (17 January 2017) [24].

9.2 VILIFICATION PROTECTION

The Bill does not currently include vilification protection on the grounds of religious belief and activity. The *ADA* provides protection from vilification on the basis of race (section 20C, which includes ethno-religious status so likely at least protects Jewish and Sikh persons), transgender status (section 38S), homosexuality (section 49ZT), and HIV/AIDS infection (section 49ZXB). Vilification in each of these instances 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.

There is no reason to protect vilification on the basis of the above attributes but not on the basis of religious belief and activity. Four of the other seven state and territory discrimination laws already prohibit religious vilification.[34] Muslim, Christian and other faith groups deserve protection from vilification in the same way that Jewish and Sikh groups are already protected.

Recommendation 16: A prohibition of vilification on the grounds of religious belief and activity be added to the Bill, reflecting the language in sections 20C, 38S, 49ZT, and 49ZXB of the *Anti-Discrimination Act 1977* (NSW).

9.3 AD HOC EXEMPTIONS

The *ADA* allows for ad hoc exemptions to be granted by the President of the Anti-Discrimination Board under section 126(1) in respect of a person or class of persons, an activity or class of activity, or any other matter or circumstance. Such exemptions are granted only on the written application of a person, with various controls and limits outlined in section 126.

The Bill proposes to amend section 126 such that exemptions cannot be granted with respect to Part 2B, being discrimination on the ground of religious beliefs or religious activities. This means that exemptions could be granted on the basis of sex discrimination, race discrimination, age discrimination, disability discrimination, and all other types of discrimination under the *ADA,* except for religious discrimination.

No reason is offered in the Bill or the explanatory notes for this special privilege. To the extent to which ad hoc exemptions are available on the basis of other protected attributes, they should equally be available on the basis of religious belief or activity.

Recommendation 17: The proposed amendment to section 126(1) be removed from the Bill.

9.4 OBJECTS CLAUSE

In principle, we support the inclusion of an objects clause in the *ADA*. However, we consider that more work will need to be done to ensure that the objects clause appropriately represents the scope and purpose of the Act and in particular emphasises the need to eliminate discrimination.

[34] *Racial and Religious Tolerance Act 2001* (Vic) s 8(1); *Discrimination Act 1998* (Tas) s 19(d); *Anti-Discrimination Act 1991* (Qld) s 124A(1); *Discrimination Act 1991* (ACT) s 67A(1)(f).

We support the identification of relevant international human rights instruments in the objects clause but note that there are a number of other relevant international conventions that should be also listed in any proposed objects clause to ensure that the objects reflect the body of the legislation. In particular, we suggest that a useful illustration is provided by the preamble of the *Anti-Discrimination Act 1991* (Qld). The Preamble to the *Anti-Discrimination Act 1991* (Qld) emphasises that the international community has long recognised the need to preserve and protect the principles of dignity and equality for everyone and lists the following relevant instructions that the Commonwealth has ratified including:

(a) the *International Convention on the Elimination of All Forms of Racial Discrimination*;

(b) the *Convention on the Elimination of All Forms of Discrimination Against Women*;

(c) the *International Labour Organisation Convention No 111 – Discrimination (Employment and Occupation)*;

(d) the *International Labour Organisation Convention No 156 – Workers with Family Responsibilities*;

(e) the *International Covenant on Civil and Political Rights*;

(f) the *Convention on the Rights of the Child*;

(g) the *Declaration on the Rights of Mentally Retarded Persons*; and

(h) the *Declaration on the Rights of Disabled Persons*.

We suggest that any reference to international conventions in the objects clause should include a reference to the core international human rights instruments to ensure clarity and consistency of purpose in the *ADA*; this would include the instruments listed in (a) to (f) above from the *Anti-Discrimination Act 1991* (Qld), as well as the *International Covenant on Economic, Social and Cultural Rights* and the *Convention on the Rights of Persons with Disabilities*. The proposed objects section in its current form is inconsistent in relying on only one international convention, one declaration, and a Principles document, but then departing from their formulations and other relevant international human rights instruments in matters of substance and the balancing of competing rights.

With respect to the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, it appears these principles of interpretation are only applied by the Bill to the interpretation of article 18(3) in section 3(2). Further work should be done to explore the effect of including and applying the *Siracusa Principles* in this way.

Recommendation 18: Section 3 be amended to include reference to a wider range of international human rights instruments, and the Joint Select Committee review the effect of including and applying the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* in the proposed section 3(2).

9.5 Religious symbols and clothing

Section 22N(6) prohibits employers from refusing employees permission to wear a religious symbol or religious clothing during work hours if certain conditions are met. This provision is unnecessary, as it would already be unlawful for an employer to refuse employees permission to wear a religious symbol or religious clothing during work hours under the general prohibition on indirect discrimination on the basis of religious belief or activity in section 22L(1)(b) (and through application to the employment context in section 22N(2)). For example, the case example given in the explanatory notes, *Azmi v Kirklees Metropolitan BC*, is not a case concerning discrimination on the basis of religious dress, but a claim regarding indirect discrimination on the basis of religious belief.

The explanatory notes to the Bill provide that section 22N is 'modelled on existing protections in Western Australia (**WA**), the Australian Capital Territory (**ACT**) and the Northern Territory (**NT**).'[35] However, none of the discrimination laws in WA, the ACT or the NT refer to religious symbols or clothing. The relevant provisions in those three jurisdictions prohibit an employer from refusing an employee permission to carry out a religious 'practice' or 'activity'.[36]

Furthermore, the provisions in WA, the ACT and the NT provide that such a refusal is unlawful only where the religious practice or activity is (a) of a kind recognised as necessary or desirable by persons of the same religious belief as the employee; (b) the performance of the practice or activity during working hours is reasonable; *and* (c) the employer is not subjected to any detriment.[37] Therefore, not only do those three jurisdictions not refer to religious symbols or clothing, but the test used to assess the prohibition is also entirely different to this Bill. Under the proposed section 22N(6), the first 'necessary or desirable' element and second 'reasonableness' element are utilised, but the third 'detriment' element is omitted. Furthermore, the 'reasonableness' element is defined by reference to 'the workplace safety, productivity, communications and customer service requirements of that employment, and the industry standards of that employment'. No other state or territory discrimination law uses these matters to define reasonableness for the purposes of a discrimination prohibition. Relying on existing productivity and industry standards to assess whether an employer is acting 'reasonably' has the effect of shielding discriminatory practices from liability where such practices are well-entrenched in the relevant industry, thereby entrenching existing inequalities and limiting the prohibition on discrimination on the basis of religious symbols and clothing. It likely also restricts the general indirect discrimination prohibition in section 22L(1)(b) which would otherwise prevent employers from refusing employees permission to wear a religious symbol or clothing during work hours.

Section 22N(6) is unique in the Australian discrimination law landscape. The explanatory notes to this provision suggest that its purpose is to prevent the wearing of full-face coverings in the

35 Explanatory Notes, Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020, 3.

36 *Equal Opportunity Act 1984* (WA) s 54(3); *Anti-Discrimination Act 1992* (NT) s 31(3); *Discrimination Act 1991* (ACT) s 11.

37 *Equal Opportunity Act 1984* (WA) s 54(3); *Anti-Discrimination Act 1992* (NT) s 31(3); *Discrimination Act 1991* (ACT) s 11.

workplace, by not providing women with any protection if an employer prohibits them from doing so.[38] This sort of provision should not be included in the Bill without strong justification as to why it is necessary, why the general prohibition in section 22L(1)(b) is insufficient, and why discrimination claims on the basis of religious symbols or clothing should be more difficult to prove than other religious discrimination claims.

Recommendation 19: Section 22N(6) be removed from the Bill.

9.6 COMPLICITY CLAIMS (*GUEST CONTRIBUTION BY ANGUS MCLEAY*)

The Bill enables individuals and 'religious ethos organisations' to make conscience-based complicity claims (**complicity claims**) against others across areas of public life. Complicity claims involve a refusal by an objector to be involved with others based on the presumed behaviour, identity or beliefs of the third parties. They are distinct from traditional conscientious objections where the objector seeks to avoid direct and personal involvement in conduct they deem to be objectionable: for instance, where a doctor does not wish to be involved in voluntary assisted dying. When there is a weak and indirect connection between the objector and the third parties, complicity claims can greatly magnify in scope. For instance, complicity claims in healthcare go beyond a healthcare worker refusing to directly perform a particular procedure (a first-party objection). Complicity refusals can permeate the broader healthcare system, from manufacturing, delivery and referrals, to the provision of medicine, counselling or information. They may also target particular groups based on sexuality, gender or other characteristics. In workplaces, objectors can refuse to work with colleagues, comply with policies or follow lawful employer directions.

The expansive definition of 'religious activity' in sections 22K and 22KB in the Bill captures complicity claims.[39] The explanatory notes provide the example of a complicity claim in a workplace where a Jewish employee of a (non-religious) publisher refuses to process a job from a Satanist customer (the example implies the objection is on religious grounds).[40] The explanatory notes provide that under section 22L the employer is required to accommodate her objection, not just where it could be performed by other employees of the publisher, but also where 'alternative publishers are reasonably available to facilitate the order',[41] leading to a loss of income for the employer. Another complicity claim example in the explanatory notes is a refusal of conference facilities by a 'religious ethos organisation'. Under section 22M, the refusal is deemed lawful because the conference operator believes that accepting the booking would be 'inconsistent' with its religious beliefs.[42] The Bill permits religious bodies to make such objections, but protects them from being objected to on analogous grounds by others. For

38 Explanatory Notes, Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020, 6.

39 The Bill describes religious activity as 'motivated' rather than 'manifested' whereas the international instruments it claims to adopt use the latter term. In the conscientious objector case of *Arrowsmith v UK* (1978) 3 ERR 218, the European Commission stated at [44]: 'It is not enough merely to assert a connection between a person's conduct and the belief he or she professed to manifest. Nor is it enough to assert that in the applicant's view her conduct was dictated by a moral imperative of the belief held…'.

40 Explanatory Notes, Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020, 5.

41 Explanatory Notes, Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020, 5.

42 Explanatory Notes, Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020, 5-6.

example, in the publisher example the Satanist is, in effect, refused access to a particular publishing service on the basis of their religious beliefs, that is, they are religiously discriminated against.

Complicity claims can exact a heavy burden on others who are denied access to public goods, such as healthcare, education and other services, or employment, on the basis of individual religious conscience alone.[43] As objections based on the presumed views, identity and conduct of specific third parties, complicity claims also readily convey negative judgements on the moral worth of others, which makes the claims socially divisive. Beyond avoiding 'direct and material financial' impact, the Bill has little to stop complicity claims creating unreasonable burdens nor does the Bill limit their potential interference with the fundamental rights and freedoms of others. The explanatory notes do recognise in the example of Employer D that individuals may cause detriment to others based on religious motives,[44] which implies that complicity claims may also cause detriment. However, section 22M of the Bill entirely excludes consideration of detriment from complicity claims where an objector is a 'religious ethos organisation'.

International human rights law, and in particular article 18(3) of the *ICCPR*, recognises that the manifestation of religious belief can be limited where that limit is necessary to protect the fundamental rights and freedoms of others. Given the reliance of this Bill, in its proposed new objects section, on international human rights law instruments, protections for complicity claims under this Bill should be limited in the same way.

Recommendation 20: The capacity for complicity claims to be made under the Bill be explicitly balanced against the fundamental rights and freedoms of others, including the right to equality and non-discrimination.

43 As distinct from the more objective 'belief, teaching, doctrine or tenet'.

44 Explanatory Notes, Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020, 6.