

**Submission
No 39**

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

Organisation: Public Affairs Commission of the Anglican Church of Australia

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Anglican Church of Australia

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Submission of the Public Affairs Commission of the Anglican Church of Australia to the Joint Select Committee on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020

Background

1. We thank you for your invitation of 13 July 2020 to the Public Affairs Commission to make submissions to your committee on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 (“the Bill”).
2. This submission is made by the Public Affairs Commission (PAC) of the Anglican Church of Australia (ACA). The PAC is a body set up, amongst other matters, to respond to aspects of public affairs as referred by the Primate, Standing Committee or General Synod of the ACA or initiated by the PAC. The views expressed in this submission are only the views of the PAC and should not be taken to reflect the opinion of the ACA, the Primate, the Standing Committee or any of the Dioceses.

Support in principle for legislation against religious discrimination

3. The PAC has previously called for and supports the enactment of legislation to prevent direct and indirect discrimination on the grounds of religion. In recent times, there has been a frightening rise of hostility and discrimination against Muslims in particular, but there is often also indirect discrimination against a range of minority groups whose days of rest or religious obligations or clothing may not comply with typical community norms. We therefore support the principle of adding religious discrimination to the list of prohibited forms of discrimination in the *Anti-Discrimination Act 1977* (“ADA”). This would bring the ADA into line with the anti-discrimination or human rights legislation in most of the other States.
4. Religious freedom and protection from discrimination on the grounds of religion are vital aspects of universally recognised human rights. Such freedoms sit alongside other recognised rights to freedom from discrimination on grounds of race, gender, sexuality, disability etc. All such rights need to be protected as much as possible, especially for minority groups and those who are vulnerable. It is essential that the laws protecting against religious discrimination are designed in a way that is consistent with the operation of other anti-discrimination provisions in the ADA and do not derogate in any way from those protections.

5. The PAC has expressed a preference for legislation protecting all internationally-recognised human rights, but in the absence of such legislation in NSW, we support a single consolidated piece of anti-discrimination legislation such as ADA.
6. We do have serious concerns, however, about the form of the particular Bill and could **not** support it in its current form. Given time limitations, we highlight only some of the key concerns that we have identified below. There may be other aspects of concern that could be highlighted on a more detailed analysis.

Concerns about the Bill

Proposed s3 – Principles

7. The proposed s3 seeks to include reference to some UN instruments to which regard should be had in interpretations and decision-making under the ADA. While there is no problem in making reference to the key international human rights instruments and principles, we believe it is odd and inappropriate in a consolidated ADA to make reference only to declarations and principles relating to religious discrimination, such as the *UN Declaration on Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* and Article 18(3) of the *International Covenant on Civil and Political Rights* (ICCPR). The ADA prohibits a range of different forms of discrimination and there are many other UN conventions and declarations relevant to other aspects of anti-discrimination¹ which should either all be listed in the proposed section or all should be omitted.

Religious activities need to be protected but there need to be scope for limitations on these

8. The Bill seeks to prohibit discrimination on the grounds of religious belief (including the lack of belief) and also on the grounds of religious activities, which is widely defined, including activity motivated by a religious belief, as long as it is not activity that would constitute a criminal offence punishable by imprisonment under the laws of NSW or the Commonwealth – see s22K(1).

While it is essential that religious activities should be protected as part of religious freedom, we have concerns about the width and extent of the protection for protected religious activities provided for in the Bill, in contrast to the protection afforded to other aspects of discrimination in the ADA, and the potential licence for socially harmful behaviour under the heading of “protected religious activities”. We expand on this below.

9. Protections against discrimination for religious activities are necessary. Concepts of religious freedom cover both religious beliefs and religious activities. Religious freedom includes the freedom to manifest and act out beliefs in the public sphere and

¹ Such as, the *Convention on Elimination of All Forms of Racial Discrimination*, the *Convention on the Elimination of All Forms of Discrimination Against Women*, the *Convention of Rights of Persons with Disabilities*, the *Declaration on the Rights of Indigenous Peoples*, the *Convention on the Rights of the Child*, and many others.

in public discourse. Religious vocation and practice is a way of life and thus extends to all aspects of life, including the political, social and the economic aspects. For some, especially Indigenous religions, it includes the need to protect and maintain sacred areas including land and waters. In the case of an organisation set up for religious purposes, where the whole enterprise may be designed to advance the religious mission, issues of religious practice and vocation apply not only to the work of ministers of religion but also to lay members of staff. It is therefore appropriate that the Bill recognises that prohibition against religious discrimination should extend to religious activities.

10. At the same time, while freedom as to belief and conscience is usually absolute, freedom to manifest this has never been recognised in international law as absolute. Article 18(3) of the ICCPR allows for “such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.” Freedom from other forms of discrimination (such as on the grounds of gender, sexuality, religion and the like) are also fundamental human rights and freedoms. Article 18(3) of the ICCPR recognises that religious freedom can be limited to protect such other freedoms and health and safety of others.

We are concerned that the Bill does not provide adequate mechanisms for ensuring that religiously-motivated protected activities do not prevail over the fundamental rights of others and over attempts by employers and others to protect such rights and to enforce public safety, order and health. The limitation that it does not amount to an offence punishable by imprisonment is too narrow as many other statutory or contractual requirements to protect health and safety, including the other provisions of the ADA, do not give rise to imprisonment.

Definition of religious activities is too wide

11. The definition of religious activities in s22K as including religiously-motivated activity does not have any qualification or limitation based on whether the doctrines of a religion actually require the activity, so something could be a religious activity just because someone believes, for religious reasons, that it might be a good idea. It is a very subjective test based on the genuine belief of the individual, even if no one else of the religion believes they need to carry out the activity. This could be problematic if entirely optional and idiosyncratic beliefs are to be protected even where they may be harmful to others.

Consideration could be given to rectify this by protecting only religious activities that a substantial number of persons in senior positions or leadership roles or with authority to determine such matters in that same religion could reasonably consider to be required by the doctrines, tenets, beliefs or teachings of the religion. This would not require unanimity or even a majority view but would ensure that such activities do not flow from just an idiosyncratic interpretation of doctrine by a small minority within the religion.

Need to have means of allowing for neutral laws and conditions that are reasonably necessary

12. The Bill also treats protected religious activities differently from the other aspects of the ADA. The structure of the ADA and a common approach of other anti-discrimination legislation is to prohibit direct discrimination against a person for the relevant protected attribute, such as sex, marital status, sexual identity, race, age, disability etc, as well as indirect discrimination.

In the direct discrimination situations, there is no assessment as to whether the discrimination is reasonable in the circumstances, because it is assumed that it cannot be reasonable to discriminate against someone for what they are. Direct discrimination extends to characteristics of or imputed to people with the protected attribute.

Consequences of the protected attribute, such as activities that they can or cannot engage in, are usually dealt with under the indirect discrimination provisions. It can be indirect discrimination to impose apparently neutral conditions that a substantially higher proportion of people without the protected attribute can comply but not the aggrieved person. In such indirect discrimination, the person imposing the condition has to show it is reasonable, which enables an assessment as to the necessity and appropriateness of the condition in all the circumstances.² Tests of reasonableness of conditions enable a consideration of whether other reasonable alternatives to accommodate the religious needs of people, in ways which do not harm others, are available.

Section 22L of the Bill adopts this usual approach by prohibiting direct and indirect discrimination on the grounds of religious belief and activity. These indirect discrimination provisions can give protection to people whose religious beliefs mean that they cannot carry out certain activities required of them (perhaps to work on certain days of rest) or are prevented from carrying out certain activities (such as take a break for required prayer times). This provision would enable protection in most of the examples set out in Explanatory Memorandum.

The Bill, however, goes further to provide for protected activities, such as in relation to employment in s22N(3) and (4), qualifying bodies in s23S(2) and (3) or education in s22V(3) and (4). There could then be discrimination for imposing neutral conditions prohibiting activities which may be considered to be harmful, if it turns out that those activities are religiously-motivated. There is no scope for considering whether those conditions are reasonable. Rules preventing protected activities (which happen to be religiously-motivated) could fall foul of the ADA no matter how reasonable those rules may be in the circumstances.

13. This may mean, for example, that if employees genuinely believe that they should contact customers or clients (or in the case of teachers, students) to tell them they will go to hell unless they convert to a particular religion, this would be a religious activity

² An example would be requiring all employees to work on a Saturday which would be indirectly discriminatory to people whose religion prohibits this, but then the test would be to what extent is such a blanket rule reasonable in all the circumstances. It might be reasonable if the nature of the business was primarily to operate on Saturdays and no other reasonable alternatives are possible.

that the employer cannot prohibit, even if those customers or clients are traumatised and may take their business elsewhere and even if sponsors withdraw their sponsorship. In the case of employees, the religious activity is only protected if it occurs out of the workplace or while not performing work, but that does not stop someone from doing it out of hours or in a public setting.

14. The failure to have considerations of reasonableness will result in the failure to consider the impacts of the religious activities on the fundamental rights and health and safety of others where the activity does not result in an offence punishable by imprisonment. This fails to adopt the limitations set out in Article 18(3) of the ICCPR to which the Bill seeks to refer.
15. The preferable approach would be to remove the concept of protected activity and treat religious discrimination in the same way as other aspects of discrimination under the ADA.

Religious ethos organisation

16. We support the ability of religious ethos organisations to give preference to persons of the same religion as the religious ethos organisation in employment situations, subject to a narrower definition of “religious ethos organisations” outlined below. However, the preference provision in s22M(2) does require some limitations. It should be made clear that such preference provisions are only relevant where places or services are limited and there is demand for them from people of the same religion. This would usually not be an issue in large religious organisations. The preference provisions should not allow discrimination *against* people of particular religions or lack of religion if there are no people of the same religion needing to take up places or services.
17. While it will often be necessary for religious bodies to be able to discriminate on the grounds of religion, it is important to make it clear that the exceptions for religious ethos organisations in s22M(1) should not be able to be used to circumvent the other anti-discrimination provisions in the ADA by enabling such organisations to claim that they are discriminating on the grounds of religious belief and activity rather than on grounds of sex, gender, sexuality and the like. Those types of discrimination are already protected by religious body exemptions in s56 and care needs to be taken to ensure that the exceptions in the Bill do not enable an undermining of the other ADA protections.
18. Other limitations on preferences are necessary when it comes to provision of services. We do not believe it is appropriate for any preferences in provisions of services in larger organisations like hospitals and welfare agencies which are set up and funded to provide services to a wide range of people in need. There also needs to be limitations to prevent people from being removed from services provided by such organisations, such as schools or hospitals or aged care etc, on grounds of religious belief if beliefs change or if their places are later required by others.

19. Further, the definition of a religious ethos organisation in s22K appears to be rather wide in referring to bodies conducted “in accordance with” doctrines, tenets, beliefs or teachings of a particular religion. This could include organisations or individuals that may be totally independent from any religious institutions and be set up primarily for secular purposes, but which merely choose to conduct themselves in accordance with the doctrines of a religion. We prefer to refer to bodies or organisations “established for religious purposes”. This term could be defined to ensure that religious purposes are not read too narrowly as religious bodies could engage in welfare, education, social justice and other activities as part of their religious purpose.

Conclusion

20. While the PAC believes it is essential for prohibition against discrimination on the grounds of religion, or the lack thereof, to be included in the ADA, the PAC does not support the particular Bill. We urge that changes are made to add religious discrimination prohibitions into the ADA in line with the form of provisions relating to the other anti-discrimination provisions.

There will need to be some exceptions to the religious discrimination provisions for bodies established for religious purposes to be able to give preferences to people of their own religion and to act in accordance with the religious purposes for which they were set up, but care needs to be taken so that the exceptions do not undermine the other protections under the ADA which are also vital and to be supported.

Yours faithfully,

Dr Carolyn Tan,
Chair of the Public Affairs Commission