

**Submission
No 45**

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

Organisation: Department of Communities and Justice

Date Received: 21 August 2020



Law Reform and Legal Services
Department of Communities and Justice
Level 3, Henry Deane Building
20 Lee St
Sydney NSW 2000

The Hon Gabrielle Upton MP
Chair
Joint Select Committee on the Anti-Discrimination
Amendment (Religious Freedoms and Equality)
Bill 2020
Parliament House
Macquarie Street
Sydney NSW 2000

ReligiousFreedomsBill@parliament.nsw.gov.au

Dear Ms Upton

Department of Communities and Justice submission to Joint Select Committee on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020.

In accordance with your invitation to the Attorney General, I write to provide a submission from the Department of Communities and Justice to the Joint Select Committee on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020.

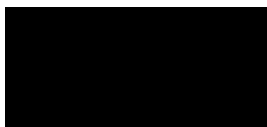
The submission seeks to provide the Committee with some background summarising:

- the current framework of anti-discrimination law in NSW, including existing protections and exemptions in the *Anti-Discrimination Act 1977* (NSW) (the **ADA**) for religious groups and organisations;
- protections for religious belief in other states and territories;
- how the Bill would amend the ADA;
- the Religious Discrimination Bill 2019 (Cth), and the effect of inconsistency between Commonwealth and state and territory anti-discrimination legislation; and
- the Australian Law Reform Commission review into the framework of religious exemptions in Australian anti-discrimination legislation.

This submission is made to provide Committee members with factual background and information. It does not state policy positions.

I hope that this submission will be of assistance to the Committee.

Yours faithfully



Paul McKnight
A/Deputy Secretary
Law Reform and Legal Services Division, Department of Communities and Justice

**Department of
Communities and Justice
August 2020**

**Submission to Inquiry into
the Anti-Discrimination
Amendment (Religious
Freedom and Equality) Bill
2020**



THIS PAGE LEFT INTENTIONALLY BLANK

Table of Contents

1. Introduction.....	5
2. The current framework of anti-discrimination law in NSW.....	5
3. Existing protections in relation to religious belief in NSW law.....	7
3.1 The ADA prohibits discrimination on the ground of race, which is defined to include ethno-religious origin.....	7
3.2 Existing religious exceptions in the ADA	8
3.3 Publicly threatening or inciting violence on the grounds of religion	8
4. Protections for religious belief in other states and territories.....	9
5. How the Private Member’s Bill would amend the ADA.....	9
6. Commonwealth legislation and proposed reforms.....	11
6.1 The Commonwealth Religious Discrimination Bill 2019	11
6.2 The ALRC Review	12
7. Consistency between Commonwealth and state discrimination laws	13
7.1 Interaction between NSW and Commonwealth complaints systems...	13
7.2 Inconsistency between state and Commonwealth laws	14
7.3 Differences between the Private Member’s Bill and the Commonwealth Bill	15

1. Introduction

The Department of Communities and Justice thanks the Committee for the opportunity to provide this factual submission to assist the Inquiry into the Anti-Discrimination Amendment (Freedoms and Equality) Bill 2020 (the **Private Member's Bill**).

The Department of Communities and Justice makes this submission to provide the Committee with information on the following:

- the current framework of anti-discrimination law in NSW;
- existing protections and exemptions in the *Anti-Discrimination Act 1977* (NSW) (the **ADA**) for religious groups and organisations;
- protections for religious belief in other states and territories;
- the consistency between the Private Member's Bill and the existing grounds of discrimination in the ADA;
- the Religious Discrimination Bill 2019 (Cth) (the **Commonwealth Bill**);
- the Australian Law Reform Commission (**ALRC**) review into the framework of religious exemptions in Australian anti-discrimination legislation (the **ALRC Review**); and
- the effect of inconsistency between Commonwealth and state and territory anti-discrimination legislation.

This submission is made to provide Committee members with factual background and information about the comparative legal landscape. It does not state policy positions.

2. The current framework of anti-discrimination law in NSW

The ADA makes it unlawful to discriminate against a person on the grounds of sex, race, age, disability, homosexuality, marital or domestic status, transgender status and carer's responsibilities, in the following areas of public life:

- work, including the hiring and engagement of workers, partnership arrangements consisting of 6 or more partners, membership to industrial organisations, the conduct of qualifying bodies and employment agencies, and the conduct of local government councillors;
- education;
- the provision of goods and services;
- the provision of accommodation; and
- membership and admission to registered clubs.

Discrimination is the prejudicial treatment of a person, or group of people, in connection with a characteristic that they have. Discrimination may be either 'direct' or 'indirect'.

'Direct' discrimination occurs when a person, or a group of people, is treated less favourably than another person or group because of their background or certain personal characteristics. For example, direct discrimination would occur if an employer refuses to hire a suitably qualified person for a position because they are of a particular race, and instead hired a less qualified person of a different racial background. This would amount to direct discrimination on the basis of race. Direct discrimination occurs:

- when a person is treated less favourably than another person;
- in circumstances that are the same or are not materially different; and
- by reason of a prohibited ground (for example, race, sex, or age).

'Indirect' discrimination occurs when an unreasonable rule or policy applies to everyone equally but has the effect of disadvantaging certain people because of a personal characteristic they share. For example, a policy that said only full-time workers will be promoted may be indirectly discriminatory to women (who are more likely to work part-time to accommodate their family responsibilities).

Indirect discrimination occurs when:

- a person imposes, or proposes to impose, a requirement or condition;
- the requirement or condition has, or is likely to have, the effect of disadvantaging persons that possess certain characteristics (for example, race, sex, or age) – i.e. a substantially higher proportion of persons who do not possess the relevant characteristic will be able to comply with the requirement or condition; and
- the requirement or condition is not reasonable in the circumstances.

Vilification on the grounds of race, homosexuality, transgender status or HIV/AIDS status is also unlawful. Vilification is defined in the ADA as a public act which incites hatred towards, serious contempt for, or severe ridicule of, a person or group of persons. In certain circumstances, vilification is a criminal offence. A person is guilty of such an offence where they, by a public act, intentionally or recklessly threaten or incite violence towards another person or a group of persons, on the ground of race, religious belief or affiliation, sexual orientation, gender identity, intersex status or HIV/AIDS status.¹

The ADA sets out the investigative powers of the President of the Anti-Discrimination Board (the **President**) and the procedures involved in making a complaint. It provides that the President is to investigate a complaint made under the ADA unless the President decides to decline the complaint for reasons set out in section 89B of the ADA. The reasons in section 89B include that:

- the conduct complained of does not amount to a contravention of the ADA; and
- all or part of the conduct complained of occurred more than 12 months before the complaint was made.

Under the ADA, the President has the discretion to endeavour to resolve a complaint by conciliation.² The ADA also provides the President with the power to refer complaints to the NSW Civil and Administrative Tribunal (the **Tribunal**) in certain circumstances, including where the President:

- has requested information or documents from a complainant or a person against whom a complaint is made, and they are not provided within the specified period, without reasonable excuse;³
- is of the opinion that a complaint cannot be resolved by conciliation, or has endeavoured to resolve a complaint by conciliation but has not been successful;⁴
- is of the opinion that the nature of a complaint is such that it should be referred to the Tribunal;⁵ or
- is satisfied that all parties wish the complaint to be referred to the Tribunal and that it is appropriate in the circumstances to do so.⁶

If the Tribunal finds that a complaint is substantiated in whole or in part, it may order any of the following remedies:

¹ *Crimes Act 1900* s 93Z.

² ADA s 91A(1).

³ ADA s 90B(5).

⁴ ADA ss 93C(a) and 93C(b).

⁵ ADA s 93C(c).

⁶ ADA s 93C(d).

- damages not exceeding \$100,000;
- an order enjoining the respondent from continuing or repeating any unlawful conduct;
- an order that the respondent perform any reasonable act to redress loss or damage suffered by the complainant;
- an order that the respondent publish an apology or retraction;
- in respect of a vilification complaint, an order that the respondent develop and implement a program or policy aimed at eliminating unlawful discrimination; and
- an order declaring a contract or agreement void.⁷

The annual report of the Anti-Discrimination Board (the **Board**) indicates that in 2018-2019:

- 26.6% of complaints were settled at, before or after conciliation;
- 14.6% of complaints were referred to the Tribunal following an unsuccessful conciliation;
- 21.3% of complaints were declined;
- 37.4% of complaints were withdrawn or abandoned.⁸

Section 119 of the ADA also provides that, for the purpose of promoting equality, the Board may, by resolution, determine to carry out investigations, research and inquiries relating to discrimination on a number of grounds, including religious or political conviction.⁹ This provision does not allow the Board to resolve individual discrimination complaints through conciliation or refer them to the Tribunal. Nor does it obligate the Board to investigate an instance of discrimination or give the Board the same investigative powers as those available to the President.

The exercise of the President's powers under the ADA is underpinned by the principle that the ADA is beneficial legislation that confers rights and remedies. A party to a complaint must be afforded procedural fairness before the decision maker makes any decisions that might deprive a person of redress for an alleged breach of the ADA.

3. Existing protections in relation to religious belief in NSW law

3.1 The ADA prohibits discrimination on the ground of race, which is defined to include ethno-religious origin

The ADA currently has no explicit protections against discrimination on the grounds of religious belief or activity. However, it does provide that it is unlawful to discriminate on the grounds of race. Under the ADA, race is defined to include colour, nationality, descent and ethnic, ethno-religious or national origin.

Ethno-religious origin has been interpreted by the Tribunal to only include some religious groups, such as Jewish people and Sikhs, where there is a strong association between the group's nationality or ethnicity, culture, history and their religious beliefs and practices.¹⁰ Decisions of the Tribunal have found that Muslims are not an ethno-religious group, on the basis that they do not share a common racial, national or ethnic origin. However, it has been accepted that Middle Eastern Muslim is a race within the definition of ethno-religious origin.¹¹

More recent decisions of the Tribunal have suggested that a group may have a common ethno-religious origin despite not being from a 'common racial stock'¹² if the group is a segment of the population distinguished from others by a sufficient combination of shared customs, beliefs, traditions and characteristics derived from a common past.¹³

⁷ ADA s 108(2).

⁸ Anti-Discrimination Board of NSW, *Annual Report 2018-19*, p.12.

⁹ ADA s 119(1)(a)(iv).

¹⁰ *Khan v Commissioner, Department of Corrective Services* [2002] NSWADT 131.

¹¹ *Haider v Combined District Radio Cabs Pty Ltd t/as Central Coast Taxis* [2008] NSWADT 123.

¹² *Ekeri v Nine Network Australia Pty Limited* [2019] NSWCATAD 29, citing Richardson J in *King-Ansell v Police* (1979) 2 NZLR 531.

¹³ *Ekeri v Nine Network Australia Pty Limited* [2019] NSWCATAD 29.

While these decisions assist in defining the concept of ethno-religious origin, it should be noted that they have limited precedent value, as the Tribunal is not bound by the doctrine of precedent or *stare decisis* to follow earlier decisions of the Tribunal. However, it has been the practice of the Tribunal to follow earlier decisions to maintain confidence in the consistency of its decision-making.

3.2 Existing religious exceptions in the ADA

The ADA does not include religion as a ground of discrimination. However, religious bodies and private educational authorities do get the benefit of exceptions from the application of the ADA in particular circumstances. These exceptions are intended to guarantee the rights of religious groups to practice their religious beliefs in certain circumstances where the practice is relevant to their religion.¹⁴ Section 56 provides that nothing in the ADA affects:

- the ordination or appointment of priests, ministers of religion or members of any religious order;
- the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order;
- the appointment of any other person in any capacity by a body established to propagate religion; or
- any other act or practice of a body established to propagate religion that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.

The ADA also includes exceptions from discrimination for private educational authorities, which include faith-based schools, non-government schools, and private colleges and universities.¹⁵

Under the ADA, it is generally unlawful for educational authorities to discriminate against a student, prospective student (including by refusing an application) or to expel a student on the grounds of race, sex, marital or domestic status, disability, homosexuality or age or on transgender grounds. This includes discrimination against a student by refusing an application for entry or dismissing the student from a school on any of these grounds.

The ADA also makes it generally unlawful to discriminate against employees, including prospective employees, and other workplace participants, including teachers for educational authorities.

However, the ADA provides that these provisions (other than discrimination on the grounds of race) do not apply to private educational authorities, meaning that they will not breach the ADA if they discriminate against students, potential students, job applicants and existing employees on the grounds of sex, transgender status, marital or domestic status, disability, homosexuality and age.

3.3 Publicly threatening or inciting violence on the grounds of religion

The ADA contains a number of provisions that make it a civil contravention to publicly incite hatred towards, serious contempt for, or severe ridicule of a person on particular grounds, including race. As discussed above, race includes a person's ethno-religious origin. However, these civil protections in the ADA do not extend to religious vilification.

Section 93Z of the *Crimes Act 1900* (NSW) makes it a criminal offence to publicly threaten or incite violence towards a person on a number of grounds, including specific religious belief or affiliation. It prescribes a maximum penalty of 3 years imprisonment and/or 100 penalty units. Further, it clarifies that it is not necessary to adduce evidence of the state of mind of any other person apart from the accused, including evidence that another person has acted as a result of the accused's alleged vilifying conduct.

¹⁴ NSW Law Reform Commission Report No. 92: Review of the *Anti-Discrimination Act 1977* (NSW) p. 6.71.

¹⁵ See ADA ss 25(3)(c), 31A(3)(a), 38C(3)(c), 38(K)(3), 40(3)(c), 46A(3), 49D(3)(c), 49L(3)(a), 49ZH(3)(c), 49ZO(3), and 49 ZYL(3).

4. Protections for religious belief in other states and territories

Anti-discrimination legislation in Queensland, Victoria, Western Australia, Tasmania, the Australian Capital Territory and the Northern Territory includes protections for religious belief.¹⁶ In particular:

- in Queensland, it is unlawful to discriminate on the ground of 'religious belief or activity', or association with a person identified because of their religious belief or activity;¹⁷
- in Victoria, it is unlawful to discriminate on the ground of 'religious belief or activity';¹⁸
- in Western Australia, it is unlawful to discriminate on the ground of 'religious conviction,' or because of an absence of religious conviction;¹⁹
- in Tasmania, it is unlawful to discriminate on the grounds of 'religious activity' and 'religious belief or affiliation';²⁰
- in the Australian Capital Territory, it is unlawful to discriminate on the ground of 'religious conviction' or based on association with a person identified by reference to his or her religious conviction;²¹ and
- in the Northern Territory, it is unlawful to discriminate on the ground of 'religious belief or activity'.²²

In these jurisdictions, prohibitions against discrimination on the basis of religious, belief, activity, or conviction operate in a broadly similar way to those for other protected attributes in the relevant state or territory law.

5. How the Private Member's Bill would amend the ADA

The following section outlines the proposed amendments to the ADA made by the Private Member's Bill, noting key areas in which the proposed protections from discrimination on the ground of religious beliefs or activities differ from existing protections in the ADA.

The Private Members Bill would amend the ADA to:

- Insert principles, requiring that the Minister, the Board, the President of the Board, and the Tribunal, when making determinations under the ADA, must have fundamental regard to:
 - the *International Covenant on Civil and Political Rights (ICCPR)*;
 - the *UN Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief* (the **Religious Discrimination Declaration**); and
 - the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* (the **Siracusa Principles**).²³
- There are no other general principles of interpretation in the ADA. The proposed section does not require consideration of other human rights treaties that may also be relevant to existing grounds of discrimination, such as the International Convention on the Elimination of All Forms of Racial Discrimination, and the Convention on the Elimination of All Forms of Discrimination against Women.
- Define religious belief or activity:
 - Religious beliefs include having a religious conviction, belief, opinion or affiliation, or not

¹⁶ South Australia provides limited protection from discrimination based on religious dress or appearance in work or study: *Equal Opportunity Act 1984 (SA)* s 85T.

¹⁷ *Anti-Discrimination Act 1991 (Qld)* s 7.

¹⁸ *Equal Opportunity Act 2010 (Vic)* s 6.

¹⁹ *Equal Opportunity Act 1984 (WA)* ss 4(3) and 53.

²⁰ *Anti-Discrimination Act 1998 (Tas)* s 16.

²¹ *Discrimination Act 1991 (ACT)* s 7(1).

²² *Anti-Discrimination Act 1992 (NT)* s 19(1).

²³ Private Member's Bill sch1 item 1, proposed s 3.

having a religious conviction, belief, opinion or affiliation. A belief is held when a person genuinely believes the belief.

- Religious activities are defined to include engaging in a religious activity, including an activity motivated by a religious belief, but do not include activities that would be an offence punishable by imprisonment under the law of NSW or the Commonwealth.²⁴ This may include conduct that contravenes existing provisions of the ADA, such as discrimination or vilification.

Both religious beliefs and activities are defined to include a past, future and presumed religious belief or activity.²⁵ This mirrors a provision that applies to disability discrimination.²⁶ The other protected grounds in the ADA do not provide protection in relation to past, future or presumed status, though a person who is thought to be homosexual but is not, is covered by the Act.²⁷

- Define discrimination on the grounds of religious beliefs or religious activities to include direct and indirect discrimination.²⁸

These provisions mirror those relating to existing grounds.

- Proscribe discrimination in specified areas of public life, namely:
 - work, including against applicants and employees, commission agents, contract workers, in partnerships, and by industrial organisations, qualifying bodies and employment agencies;
 - education;
 - provision of goods and service;
 - accommodation;
 - registered clubs; and
 - in the course of performing any function under a State law or for the purposes of a State program, or in the course of carrying out any other responsibility for the administration of a State law or the conduct of a State program.²⁹

These are consistent with the areas in which existing grounds of discrimination are prohibited, except that the Private Member's Bill also makes discrimination in relation to state laws or programs unlawful.³⁰ The ADA currently only specifically prohibits sexual harassment that occurs in the course of performing a function or responsibility under a state law or for a state program.³¹

- Provide that a religious ethos organisation may be discriminated against where it is required to engage in conduct in a manner which is contrary to the doctrines, tenets, beliefs or teachings of that organisation in the course of performing a function under or carrying out any responsibility for the administration of a state law or for the purpose of a state program.³²

Generally, the focus of discrimination law is the protection of natural persons from discrimination.³³ The explanatory notes to the second exposure draft of the Commonwealth Bill state that it is intended primarily to protect individuals from discrimination and that it is not envisaged that non-natural persons, such as bodies corporate, will hold or engage in religious beliefs or activities.³⁴

²⁴ Private Member's Bill sch1 item 2, proposed s 22K(1).

²⁵ Private Member's Bill sch 1 item 2, proposed s 22KB.

²⁶ ADA s 49A.

²⁷ ADA s 49ZF.

²⁸ Private Member's Bill sch 1 item 2, proposed s 22L.

²⁹ Private Member's Bill sch 1 item 2, proposed ss 22N- 22Z.

³⁰ Private Member's Bill sch 1 item 2, proposed s 22Z.

³¹ ADA s 22J.

³² Private Member's Bill sch 1 item 2, proposed s 22Z(2).

³³ Australian Human Rights Commission, *Religious Freedom Bills: Submission to the Attorney-General's Department* (27 September 2019) [12].

³⁴ Second Religious Discrimination Bill 2019, Explanatory Notes, p. 10. The Victorian Supreme Court of Appeal has found that the right to freedom of religious belief can only be enjoyed by natural person and a corporation cannot have a conscious state of

- Create an exception for religious ethos organisations (private education authorities, charities and other bodies conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion)³⁵ from discrimination on the ground of a person's religious beliefs or activities if they engage in conduct that is required because of the religious susceptibilities of the adherents of the religion or is consistent with its doctrines, tenets, beliefs or teaching.³⁶

This exception is in addition to the existing religious exceptions in the ADA for the appointment and training of priests and ministers and for any other act or practice of a religious body that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.³⁷ Religious beliefs are defined to include not having a religious conviction, belief, opinion or affiliation.

- Provide that it is unlawful for an employer, a qualifying body, or an educational authority to restrict, limit, prohibit or otherwise prevent a person, including employees and students, from engaging in a protected activity, or punish or sanction a person for engaging in a protected activity or because an associate of the person engaged in a protected activity.³⁸

'Protected activity' is defined broadly as a religious activity that occurs at a time and place other than when the person is performing work, and does not criticise or 'attack' the employer, qualifying body, or educational authority or cause any direct and material financial detriment to them.³⁹

The Private Member's Bill also provides that the provisions relating to the prevention of a person from engaging in a protected activity do not apply to a religious ethos organisation or a body established to propagate religion under s 56 of the ADA.⁴⁰

- Create an exception from discrimination on the grounds of religious beliefs or activities in respect of work or employment where the services of a person of a particular religious association, affiliation or belief are required for genuine occupational reasons. These are defined to include participation in ritual or custom, an artistic performance, working in a place in which food or drink is provided and consumed, and providing services for the purposes of promoting the welfare of a person with a particular religious association, affiliation or belief.⁴¹
- Provide that the President may not grant exemptions under s 126 of the ADA in respect of religious discrimination.⁴² Section 126 currently allows the President to grant an exemption from the application of the ADA in respect of a person, an activity, or any other matter or circumstance as specified in the order.

6. Commonwealth legislation and proposed reforms

Commonwealth law prohibits discrimination on a number of overlapping grounds with the ADA. There is no prohibition on religious discrimination at the Commonwealth level. However, the Commonwealth Government has announced its intention to legislate to make religion an additional ground of discrimination. This section outlines these proposed reforms, and the following section discusses the effect of inconsistency between Commonwealth and state laws.

6.1 The Commonwealth Religious Discrimination Bill 2019

mind amounting to a religious belief: *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 308 ALR 615, 706 [413].

³⁵ Private Member's Bill sch 1 item 2, proposed s 22K.

³⁶ Private Member's Bill sch 1 item 2, proposed s 22M.

³⁷ ADA s 56.

³⁸ Private Member's Bill sch 1 item 1, proposed ss 22N(3), 22S(2), 22V(3).

³⁹ Private Member's Bill sch 1 item 1, proposed ss 22N(4), 22S(3), 22V(4).

⁴⁰ Private Member's Bill sch 1 item 2, proposed s 22N(9).

⁴¹ Private Member's Bill sch 1 item 2, proposed s 22U.

⁴² Private Member's Bill sch 1 item 3.

On 13 December 2018, the Commonwealth Government released the Report by an Expert Panel, chaired by the Hon Philip Ruddock, examining whether Australian law adequately protects the human right to freedom of religion (the **Religious Freedom Review**). The Religious Freedom Review concluded that there is an opportunity to further protect and better promote freedom of religion under Australian law and in the community.

In response to the Religious Freedom Review, the Commonwealth Government announced that it would amend Commonwealth legislation relating to freedom of religion, including amendments to marriage law, charities law and objects clauses in existing anti-discrimination legislation.

A package of legislation including the Commonwealth Bill responds to the recommendations of the Religious Freedom Review. A first exposure draft of this legislation was released for public consultation on 29 August 2019. A second exposure draft was released on 10 December 2019.

The first exposure draft received approximately 6,000 submissions and the second exposure draft received 6,972 submissions.⁴³

In February 2020, the Commonwealth Attorney-General, the Hon Christian Porter MP, announced that he will undertake another round of consultations with community and religious groups before introducing a third version of the Bill package into Parliament.⁴⁴

The Commonwealth Bill, among other things:

- Prohibits discrimination on the basis of religious belief or activity in key areas of public life including in relation to employment, education, access to premises, the provision of goods, services and facilities and accommodation;
- Defines religious belief or activity to include holding, or not holding, a religious belief and engaging in, not engaging in, or refusing to engage in, a lawful religious activity;
- Makes exemptions for conduct engaged in by religious bodies, such as religious educational institutions, charities, and registered public benevolent institutions in good faith that reasonably conforms to the doctrines, tenets, beliefs or teachings of their religion. This extends to reasonable conduct intended to meet a need arising from the religious belief or activity;
- Prevents a relevant employer from imposing conduct rules that would limit the ability of an employee to make a statement of belief other than in the course of employment, unless compliance with the rules by an employee is necessary to avoid unjustifiable hardship to the employer; and
- Provides that a 'statement of belief', in and of itself, does not constitute discrimination for the purposes of any Commonwealth, and state and territory anti-discrimination laws as defined by the *Fair Work Act 2009* (Cth).

6.2 The ALRC Review

In April 2019, the Commonwealth asked the ALRC to review the framework of religious exemptions in anti-discrimination legislation across Australia. As part of its terms of reference, the ALRC will have regard to the interaction between religious exemptions and grounds for religious belief or activity with a view towards national consistency.

The ALRC is to inquire into and report on what reforms relevant to anti-discrimination laws should be made in order to limit or remove altogether, if practicable, religious exemptions to prohibitions on discrimination, while also guaranteeing the right of religious institutions to reasonably conduct their affairs in a way consistent with their religious ethos.

⁴³ See <https://www.attorneygeneral.gov.au/media/media-releases/protecting-religious-freedom-remains-high-priority-government-10-december-2019>.

⁴⁴ Judith Ireland (February 2020), 'Flawed': Liberal senator wants religious discrimination bill scrapped, Sydney Morning Herald, available at: <https://www.smh.com.au/politics/federal/flawed-liberal-senator-wants-religious-discrimination-bill-scrapped-20200211-p53zqb.html>

The ALRC Review is primarily in response to recommendations 6 and 7 of the Religious Freedom Review, which recommended that Australian jurisdictions should abolish exceptions to anti-discrimination laws that provide for discrimination by religious schools in employment on the basis of disability, pregnancy or intersex status, or with respect to students on the basis of race, disability, pregnancy or intersex status.

The ALRC may make recommendations that are directed towards the existing religious exceptions in the ADA (discussed above).

The ALRC report is due to the Attorney-General 12 months from the date the Commonwealth Bill is passed by the Commonwealth Parliament.

7. Consistency between Commonwealth and state discrimination laws

Consistency in anti-discrimination legislation has been said to be desirable, on the basis that 'clearer and more consistent anti-discrimination legislation will make it easier for both individuals and business to understand rights and obligations under the legislation.'⁴⁵ In practice, Commonwealth, state and territory discrimination statutes operate as parallel schemes, and where the wording of the legislation is identical or nearly identical, effectively create the same rights and obligations.

However, where the language is different, there may be 'doubt about whether the rights and obligations are the same or materially different'.⁴⁶ This can create confusion about what jurisdiction to make a complaint in. Inconsistency between Commonwealth and state and territory discrimination laws may also raise constitutional questions. This section sets out these issues in more detail and identifies some differences between the Commonwealth Bill and the Private Member's Bill.

7.1 Interaction between NSW and Commonwealth complaints systems

As well as making a discrimination complaint pursuant to the ADA, a person may also have grounds to make a discrimination complaint to the Australian Human Rights Commission (**AHRC**) pursuant to Commonwealth legislation.

As set out above, s 108(2) of the ADA stipulates what remedies the Tribunal may order if a discrimination complaint is substantiated in whole or in part. Similarly, Commonwealth legislation sets out the remedies a court may order if satisfied that there has been unlawful discrimination.⁴⁷

The remedies available in each jurisdiction are different insofar as:

- damages payable in the Tribunal are capped at \$100,000, whereas damages for complaints made under Commonwealth legislation are uncapped;⁴⁸
- Commonwealth legislation enables a court to order a respondent to employ or re-employ an applicant, which is not specifically provided for by the ADA;⁴⁹ and
- the ADA provides that the Tribunal may order the publication of an apology or retraction, which is not specifically provided for in Commonwealth legislation.⁵⁰

Commonwealth discrimination legislation provides that where a person has made a complaint or initiated proceedings under a state or territory anti-discrimination law, that person is not entitled to

⁴⁵ Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper*, September 2011, p. 5, available at: <https://www.ag.gov.au/sites/default/files/2020-03/Consolidation%20of%20Commonwealth%20Anti-Discrimination%20Laws.pdf>.

⁴⁶ Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (3rd ed) Federation Press (2018) [21.14.14].

⁴⁷ *Australian Human Rights Commission Act* (Cth) s 46PO(4).

⁴⁸ See ADA, section 108(2)(a); *Australian Human Rights Commission Act* (Cth) s 46PO(4)(d).

⁴⁹ *Australian Human Rights Commission Act* (Cth) s 46PO(4)(c).

⁵⁰ ADA s 108(2)(d).

make a complaint or initiate proceedings under the Commonwealth scheme (in respect of the same act or omission).⁵¹

The effect of these provisions is twofold:

- a person loses the ability to make a complaint under Commonwealth anti-discrimination legislation in respect of an act or omission about which they have already made a complaint under the ADA; and
- even if the complaint made under the ADA is declined (for example, because the President determined that the conduct complained of could not amount to a contravention of the ADA),⁵² the complainant would be precluded from making a complaint to the AHRC.

The ADA does not contain an equivalent prohibition. As such, a person who has already made a complaint under Commonwealth anti-discrimination legislation is not barred from making a complaint under the ADA in relation to the same facts.

7.2 Inconsistency between state and Commonwealth laws

Under s 109 of the *Commonwealth of Australia Constitution Act 1901* (Cth) (the **Constitution**), where state and Commonwealth laws are inconsistent, the Commonwealth law prevails to the extent of any inconsistency, acting to invalidate part or all of the state law. Inconsistency under s 109 can occur where a Commonwealth law is intended to comprehensively regulate a particular area, where a state law removes a right conferred by a Commonwealth law, or where simultaneous compliance with a state law and a Commonwealth law is not possible.

Relevant Commonwealth anti-discrimination laws contain a provision stipulating that the Commonwealth law is not intended to exclude or limit the operation of a law of a state or territory that is capable of operating concurrently with the Commonwealth law.⁵³ This makes it clear that the Commonwealth law is not intended to comprehensively regulate the relevant area, so that s 109 inconsistency does not invalidate the whole of the relevant state or territory law. The Commonwealth Bill also contains such a provision.⁵⁴

While such provisions enable state and territory laws to operate concurrently with Commonwealth laws, they do not cure direct inconsistencies with Commonwealth law. As a result:

- If a state or territory law allows discriminatory conduct that a Commonwealth law does not allow, it may be inconsistent with the Commonwealth law. For example, where Commonwealth and state anti-discrimination laws protect the same or similar attributes, but the state law provides for wider or different exemptions, the state law arguably removes a right conferred by Commonwealth law.
- If a state or territory law prohibits discriminatory conduct that a Commonwealth law allows, it may be inconsistent with the Commonwealth law. This form of inconsistency may arise where a state or territory anti-discrimination law removes or diminishes an exemption contained in a Commonwealth law.

The Department of Communities and Justice is not aware of a situation where either of these potential situations of inconsistency has been tested in the courts.⁵⁵

⁵¹ See, for example, *Disability Discrimination Act 1992* (Cth) s 13(4); *Racial Discrimination Act 1975* (Cth) s 6A(2).

⁵² Grounds on which the President may decline complaints to the Board are set out in s 89B(2) of the ADA.

⁵³ See, for example, *Age Discrimination Act 2004* (Cth) s 12.

⁵⁴ See cl 62 of the Religious Discrimination Bill 2019 (Cth).

⁵⁵ See Neil Rees, Simon Rice and Dominique Allen, *Australian Anti-Discrimination and Equal Opportunity Law* (3rd ed) Federation Press (2018) [2.14.23] to [2.14.25].

7.3 Differences between the Private Member's Bill and the Commonwealth Bill

The Private Member's Bill and the second exposure draft of the Commonwealth Bill are both intended to prohibit discrimination on the basis of religious belief or activity in key areas of public life. However, the Bills differ in several key respects, which it may be helpful to outline. Some of these differences are described (non-exhaustively) below. In describing these differences, it is acknowledged that the Commonwealth is yet to settle its final proposal. No position is taken on the advantages or disadvantages of either position.

7.3.1 Definition of religious activity

The Private Member's Bill defines religious activities to including an activity motivated by a religious belief, but not including activities that would be an offence punishable by imprisonment under the law of NSW or the Commonwealth.⁵⁶ As a result, religious activities may include activities that would be a contravention of civil and criminal laws which are not punishable by imprisonment.

The Commonwealth Bill defines religious activity as engaging or not engaging in lawful religious activity.⁵⁷

7.3.2 Conduct of religious ethos organisations

The Private Member's Bill provides that religious ethos organisations are taken not to discriminate on the ground of another person's religious beliefs or activities in circumstances where they genuinely believe that their conduct is consistent with the doctrines, tenets, beliefs or teachings of their religion.⁵⁸

The Commonwealth Bill imposes a reasonableness standard for conduct by religious bodies that is taken not to be discrimination, providing that 'a religious body does not discriminate... if it engages in good faith in conduct that a person of the same religion... could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of that religion'.⁵⁹

7.3.3 Conduct in connection with religious belief occurring outside of work

The Private Member's Bill and the Commonwealth Bill differ in their treatment of conduct in connection with religious belief that occurs outside of work.

The Commonwealth Bill provides that an employer conduct rule or qualifying conduct rule that restricts a person from making a statement of religious belief, other than in the course of the person's employment or in the course of practicing a relevant trade, is not reasonable unless compliance with the rule is necessary to avoid unjustifiable financial hardship to the employer or qualifying body. A statement of belief is defined in the Commonwealth Bill as a statement of religious belief, made in good faith, which a person of the same religion could reasonably consider to be in accordance with the doctrines of the religion.

The Private Member's Bill prohibits the punishment or sanction by employers and qualifying bodies, of any religious activity that occurs at a time other than when the person is performing work and at a place other than the person's place of work, which does not directly criticise or attack, or cause direct and material financial detriment to, the employer or qualifying body.

⁵⁶ Private Member's Bill sch 1 item 2, proposed s 22K(1)

⁵⁷ Religious Discrimination Bill 2019 (Cth) cl 5.

⁵⁸ Private Member's Bill sch 1 item 2, proposed s 22M.

⁵⁹ Religious Discrimination Bill 2019 (Cth) cl s 11.

The differences between these provisions are that:

- the Private Member's Bill covers 'religious activities' rather than 'statements of belief', which suggests that the Private Member's Bill may protect a broader range of conduct than the Commonwealth Bill; and
- the Commonwealth Bill limits protection to statements 'which a person of the same religion could reasonably consider to be in accordance with the doctrines of the religion.' The Private Member's Bill does not impose such a requirement on religious activities.

7.3.4 Conduct in connection with religious belief occurring outside of education

The Private Member's Bill prohibits the punishment or sanction by educational authorities of any religious activity that occurs at a time other than when the person is receiving education and at a place other than the person's place of education, which does not directly criticise or attack, or cause direct and material financial detriment to, the educational authority. The Commonwealth Bill does not contain equivalent protection for conduct that occurs at a time other than when the person is receiving education and at a place other than the person's place of education.