

**Submission
No 50**

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

Organisation: Community Legal Centres NSW

Date Received: 21 August 2020

21 August 2020

NSW Parliament
Joint Select Committee on the *Anti-Discrimination
Amendment (Religious Freedoms and Equality) Bill 2020*
By email: religiousfreedomsbill@parliament.nsw.gov.au

Dear Committee Members,

Re: Submission on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020

Thank you for the opportunity to provide comment to this Parliamentary Inquiry. Community Legal Centres NSW endorses the comprehensive submissions made by our member centres Kingsford Legal Centre (KLC) and the Public Interest Advocacy Centre (PIAC).

This short submission sets out our serious concerns about the Bill and recommends Parliament should not pass it. Rather than pursuing piecemeal reforms to an Act that is no longer fit-for-purpose, we argue that the best course of action is for the NSW Government to refer the *Anti-Discrimination Act 1977* (NSW) (the Act) for comprehensive, independent review, with genuine community consultation. If, instead, Parliament chooses to pass this Bill, we conclude with a number of recommended amendments that would lessen some of its most harmful aspects.

ABOUT COMMUNITY LEGAL CENTRES NSW

Community Legal Centres NSW is the peak representative body for 39 community legal centres in NSW. Our team supports, represents and advocates for our members, and the legal assistance sector more broadly, with the aim of increasing access to justice for people in NSW. Community legal centres are independent non-government organisations that provide free legal help to people and communities at times when that help is needed most, particularly to people facing economic hardship, disadvantage or discrimination.

Community Legal Centres NSW is advised on matters relating to discrimination law by our Employment and Discrimination Law Network, and by our member centres that specialise in discrimination law, including KLC and PIAC.

THE BILL IS FLAWED AND SHOULD NOT PASS

Community Legal Centres NSW recognises there are gaps in legislative protections against discrimination on the basis of religious belief and activity in both NSW and Commonwealth jurisdictions. In principle, we agree that people of faith, and people of no faith, deserve access to anti-discrimination protections consistent with and equivalent to protections for other protected attributes such as race, sex, disability, age, sexual orientation and gender identity.

However, it is our strong view that the *Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020* (the Bill) does not address current gaps in the *Anti-Discrimination Act 1977*

(NSW) (the Act). Instead, it undermines the worthy goal of providing adequate anti-discrimination protections for all people. The Bill does not create or strengthen protections in the Act for many people, particularly those from minority religions. Rather, it increases protections for religious individuals and institutions discriminating against people of other faiths, or on the basis of other attributes such as race, sexuality and gender identity.

On this basis, Community Legal Centres NSW does not support the passage of the *Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020*.

Recommendation:

1. The NSW Parliament should not pass the *Discrimination Amendment (Religious Freedoms and Equality) Bill 2020*.

GOVERNMENT SHOULD REFER THE ACT FOR INDEPENDENT, COMPREHENSIVE REVIEW

There are key gaps in the Act that should be rectified so that it effectively protects all people from discrimination, including on the basis of religious belief or activity. However, piecemeal reform like that proposed by this Bill is unlikely to achieve this goal. The Act is now over 40 years old and has not been comprehensively reviewed in more than two decades. Once a leader amongst Australian anti-discrimination laws, the Act is now full of inconsistencies and falls well below best practice. Compared to other jurisdictions, the Act provides limited protections to LGBTI+ people, does not sufficiently empower Anti-Discrimination NSW to conduct own-motion investigations and already grants unacceptably wide exceptions to religious organisations.

On these grounds, Community Legal Centres NSW endorses PIAC's recommendation for a comprehensive, independent review of the Act, based on proper community consultation.

Recommendation:

2. The NSW Government should immediately refer the *Anti-Discrimination Act 1977* for independent review, with genuine community consultation.

AMENDMENTS TO LESSEN THE BILL'S MOST HARMFUL IMPACTS

If Parliament chooses to pass the Bill, we recommend the following critical amendments to lessen its most harmful impacts.

Limit the definition of 'religious ethos organisations' in section 22K

The proposed definition for 'religious ethos organisations' in section 22K is extremely broad and would significantly expand the range of organisations exempted from the Act's provisions. In particular, the inclusion of charities in subsection (b) and 'any other body' in subsection (c) means that a large number of not-for-profit social service providers (like homelessness, aged care and domestic violence services) and even commercial businesses could qualify for protection under the Act.

This change is inconsistent with the existing approach to religious organisations set out in section 56 of the Act. It is also inconsistent with the approach of most other Australian jurisdictions, which define religious organisations as bodies established for religious purposes.

In our view, the proposed definition of ‘religious ethos organisation’ in section 22K should be removed. If it is retained, it should be replaced with a standard definition of religious organisations as bodies ‘established to propagate religion’, consistent with section 56 of the current Act.

Recommendation:

3. Replace the proposed definition of ‘religious ethos organisation’ in s22K with a standard definition, which covers ‘bodies established to propagate religion’.

Limit the scope of exceptions for ‘religious ethos organisations’ in section 22M

We are particularly concerned about proposed section 22M, which significantly widens the range of circumstances in which a religious ethos organisation is taken not to discriminate against another person. If legislated, the section would provide exemptions to organisations that genuinely believe that otherwise discriminatory conduct furthers its efforts to act in accordance with its religious doctrines, tenets or beliefs, as well as to organisations that give preference to people who share their religious beliefs. As with the definition of ‘religious ethos organisation’ in section 22K, the proposed approach is unorthodox and inconsistent with anti-discrimination laws in all other jurisdictions.

Taken together, the definition of ‘religious ethos organisation’ in section 22M and the wide scope of exceptions provided in section 22K are extremely concerning. In effect, they will enable a very broad range of organisations to discriminate against people of different faiths (or of no faith) with impunity. For example, a homelessness service operated by a charity that falls within the definition of ‘religious ethos organisation’ could lawfully decide to provide services only to people who share, or profess to share, its religious beliefs.

Together, proposed sections 22K and 22M will also enable a much broader range of organisations to rely on the standard exception for conduct that is consistent with the doctrines, tenets, beliefs or teachings of a particular faith, and therefore to lawfully discriminate against people based on their race, marital status, domestic status, sexuality or transgender status. In our view, this goes against the ethos of anti-discrimination protections to provide equal protection to all people.

Recommendation:

4. Limit the scope of section 22M so that it is consistent with current exceptions in section 56(d) of the Act, which protects actions that ‘conform to the doctrines of the religion or are necessary to avoid injury to the religious susceptibilities of adherents of that religion’.

Limit the proposed definitions of ‘religious beliefs’ and ‘religious activities’

Proposed definitions for the newly established protected attributes of ‘religious beliefs’ and ‘religious activities’ in section 22K are also problematic.

Proposed section 22K defines ‘religious beliefs’ to include:

- a) *having a religious conviction, belief, opinion or affiliation,*

b) *not having any religious conviction, belief, opinion or affiliation.*

Proposed section 22KA further provides that, in determining when a belief is held:

*For the purposes of this Act, a person holds a religious belief ... if the person **genuinely believes** the belief.*

This definition is very broad and, again, is inconsistent with definitions used in other jurisdictions that protect religious belief. In particular, the insertion of ‘genuinely believes’ into section 22KA introduces an inappropriate degree of subjectivity to the test for religious belief. We note that Australian Courts have rejected an entirely subjective approach to determining religious belief.¹ We are deeply concerned that enacting the proposed definition would grant ‘religious belief’ protections that exceed those afforded to some other protected attributes, including race, sex, sexuality, transgender status and marital and domestic status.

Proposed section 22K(1) defines ‘religious activities’ to include:

[E]ngaging in religious activity, including an activity motivated by a religious belief, but does not include any activity that would constitute an offence punishable by imprisonment under the law of New South Wales or the Commonwealth.

This definition is particularly problematic because it explicitly protects religious activities that are unlawful so long as they are not punishable by a term of imprisonment under NSW or Commonwealth laws. Examples of activities that are unlawful, but are not punishable by imprisonment include harassment, neglect, bullying and breaches of contract, consumer and corporations’ laws. These behaviours should not be protected on any grounds.

Granting protections to people who engage in activities that are unlawful and harmful because they are motivated by religious belief is inappropriate and out of step with community standards. It is also out of step with anti-discrimination protections in other jurisdictions, which generally exclude unlawful acts from protection regardless of the maximum penalties that can be imposed.

Recommendations:

5. The definition of religious belief should be limited to ‘holding or not holding a religious belief’, and the reference to ‘genuinely believes’ should be removed entirely.
6. Consistent with community standards and anti-discrimination laws in other jurisdictions, all unlawful acts should be excluded from protection regardless of the maximum penalties that can be imposed.

OTHER MATTERS

Funding for community legal centres that specialise in discrimination law

Several community legal centres in NSW specialise in discrimination law. These services are already underfunded to meet need for assistance in this area of law.

If the Bill passes, there is a real risk that instances of discrimination will increase. The complexity and lack of clarity the proposed amendments would introduce to the Act will likely result in an increase in legal action, particularly in relation to the subjective test for religious belief. It will also lead to an increase in the number of people who need professional legal assistance to address instances of discrimination through the legal system. Together, these

¹ See for example *Church of New Faith v Commissioner for Payroll Tax (Vic)* (1983) 154 CLR 120

impacts will reduce access to justice for people who experience discrimination through increased legal costs and increased pressure on an already stretched court system.

If this Bill passes, the NSW Government should significantly increase funding to community legal centres that specialise in discrimination law in order to meet additional legal need.

Recommendation:

7. If the Bill passes, the NSW Government should adequately fund community legal centres that specialise in discrimination law to meet additional demand for legal assistance proposed amendments will generate.

MORE INFORMATION

Thank you for taking the time to consider our submission.

The goal of reducing discrimination on the basis of irrelevant characteristics is a worthy one. But the people of New South Wales deserve better than this inadequate attempt. Community Legal Centres NSW believes that this Bill will achieve the opposite of its intent by authorising (and arguably encouraging) discriminatory practices that would cause harm to people who may be experiencing discrimination and heightened vulnerability already. Surely, this cannot be in the intention of the NSW Parliament.

If you have any questions or require further input, please contact Emily Hamilton via

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Yours sincerely,

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Tim Leach

Executive Director

Community Legal Centres NSW