

**Submission  
No 51**

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

**Organisation:** Equality Australia

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# RELIGIOUS DISCRIMINATION:

SUBMISSION TO THE NSW JOINT SELECT COMMITTEE ON  
THE ANTI-DISCRIMINATION AMENDMENT (RELIGIOUS  
FREEDOMS AND EQUALITY) BILL 2020



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## **ABOUT EQUALITY AUSTRALIA**

Equality Australia is a national LGBTIQ+ organisation dedicated to achieving equality for LGBTIQ+ people. Equality Australia has been built from the Equality Campaign, which ran the successful campaign for marriage equality, and was established with support from the Human Rights Law Centre.

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We acknowledge that our offices are on the land of the Kulin Nation and the land of the Eora Nation and we pay our respects to their traditional owners.

Equality Australia has no issues with making this submission public.

# EXECUTIVE SUMMARY

Equality Australia welcomes the invitation to make a submission to the Joint Select Committee on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 (NSW) (the **Bill**), introduced as a private members' bill by One Nation NSW leader, the Honourable Mark Latham MLC. The Bill proposes amendments to the *Anti-Discrimination Act 1977* (NSW) (the **ADA**).

**Our laws should protect all of us, equally. This Bill fails to do that. It privileges the interests of some people and institutions over the rights of others, including LGBTIQ+ people, women, people with disabilities and even people with different or no beliefs. For that reason, we oppose this Bill.**

The Commonwealth Government has itself been considering religious discrimination protections. Two exposure drafts have been released for consultation, neither of which has yet achieved community consensus. Critics of the proposals have included business, employee, faith-based, human rights, legal, medical professional, and many other groups.<sup>1</sup> This Bill is an inferior attempt to do the work the Commonwealth Government is still grappling to do.

As set out in this submission, the problems with this Bill include:

- **No consequences for conduct:** This Bill permits people to hide behind religion to hurt others by providing immunity to conduct which may breach laws and professional standards. It does that by imposing legal provisions with narrow and sometimes arbitrary considerations, such as whether conduct occurs on the footpath outside a workplace or school as opposed to inside the workplace or school. The no consequences for conduct provisions (proposed sections 22N(3)-(5), 22S(2)-(4) and 22V(3)-(5)) ignore real harm experienced by others, including co-workers, peers, customers or clients, that may justify employers, schools and professional bodies taking reasonable action in appropriate cases. In some cases, these provisions would even allow a business to go under before they can take action to stop the financial and reputational harm caused by unacceptable conduct, regardless of whether it is religiously motivated or not.
- **Entrenching double standards in the law:** This Bill contains broad exemptions allowing organisations (and possibly even commercial operations) that define themselves as religious to discriminate in employment, education, and service provision against others with different or no beliefs, even when religion has no relevance to the role or when services are taxpayer funded.
- **Religious bill of rights:** This Bill establishes a religious bill of rights which priorities religion above other human rights. It allows individuals and organisations that define themselves as religious to challenge NSW programs, policies, contracts and decisions which contradict their particular beliefs. For example, any legal entity which operates according to any religious belief will be able to challenge, as religious discrimination, government programs or decisions made under NSW laws, such as the COVID-19 public health orders limiting public gatherings. No other group protected under the ADA has this right,<sup>2</sup> and no Australian anti-discrimination law provides such a right to legal entities.

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<sup>1</sup> For example, see submissions of the Australian Industry Group, Australian Chamber of Commerce, Australian Council of Trade Unions, Australian Discrimination Law Experts Group, Australian Federation of AIDS Organisations (AFAO), Australian Human Rights Commission, Australian Medical Association, Australian Nursing and Midwifery Federation, Equal Voices, Intersex Human Rights Australia, Law Council of Australia, National Secular Lobby, Mental Health Australia, Public Interest Advocacy Centre, Rainbow Families, Royal Australian and New Zealand College of Psychiatrists and Uniting Church via the Attorney-General's consultation website: [www.ag.gov.au/Consultations/Pages/religious-freedom-bills.aspx](http://www.ag.gov.au/Consultations/Pages/religious-freedom-bills.aspx).

<sup>2</sup> A narrow provision currently exists only in the case of sexual harassment: *Anti-Discrimination Act 1977* (NSW) (**ADA**), s 22J.

The ADA is an old law which merits comprehensive review, including looking at the extension of ethno-religious discrimination and vilification protections to all people of faith. But this Bill does not solve this problem. It leaves the existing ethno-religious protections exactly as they are, meaning all religions (and people with no religion) are not protected in the same way, or even equally. This Bill also makes subtle yet alarming inroads towards banning certain forms of religious dress in the workplace.

As the Commonwealth Government has discovered, reform in this area is difficult. Religious beliefs are diverse, deeply personal, difficult to define, difficult to prove or disprove, and sometimes conflict with the beliefs of others who hold different or no beliefs. Any reform in this area must bring the community together, not divide it.

**No laws should privilege one group over another. Our laws should protect all of us, equally. Because this Bill fails to meet those principles, we oppose it.**

## LIST OF RECOMMENDATIONS

### RECOMMENDATION

**The Bill not be passed.**

### ALTERNATIVE RECOMMENDATIONS

If our principal recommendation that the Bill not be passed is not accepted by the Committee, we recommend the following changes:

1. Proposed subsections 22N(3)-(5), 22S(2)-(4) and 22V(3)-(5) should be removed.
2. Proposed section 22M should be removed.
3. Proposed subsections 22N(9), 22S(5) and 22V(6) should be removed.
4. Proposed subsection 22Z(2) should be removed.
5. Only natural persons should be protected under discrimination protections.
6. If subsections 22Z(1) and (3) are to be introduced, they should apply to all protected grounds under the ADA.
7. Section 3 should be removed.
8. 'Religious activity' should be defined to mean 'engaging in, not engaging in or refusing to engage in a *lawful* religious activity'.
9. Ensure no discrimination protections are extended to conduct which is contrary to the law or the limitation in article 18(3) of the International Civil and Political Rights on public safety, order, health, or morals or the fundamental rights and freedoms of others.
10. Review and reform the vilification protections in the ADA so that they can be extended properly to all grounds covered by the ADA.
11. Subsection 22N(6) should be removed.
12. Remove the amendment to section 126 from the Bill.

# KEY ISSUES WITH THE BILL

**As we set out below, this Bill fails to protect all of us, equally. It privileges the interests of some people and institutions over the rights of others, including LGBTIQ+ people, women, people with disabilities and even people with different or no beliefs.**

Given our view on the Bill, our principal position is that this Bill cannot be supported by this Committee. It has many technical problems which make it an inferior law for protecting both people of faith and those of no faith, and would only serve to add to the existing deficiencies of the ADA. Accordingly, our principal recommendation is that this Bill not be passed. Our preference is that any religious discrimination reform be considered as part of a comprehensive review of the ADA. We provide further reasons for this view in the following section, *Reviewing the ADA*.

If the Committee were minded to support this Bill in some form, we have set out alternative recommendations seeking to improve the Bill to the extent possible within the existing framework of the ADA. These alternative recommendations would not address our broader and more fundamental concerns regarding the current deficiencies of the ADA. However, because the Committee has called only for submissions that address this Bill and not other parts of the ADA,<sup>3</sup> we have not set out those concerns in detail in this submission. We would be happy to provide the Committee with further information upon request.

This section otherwise sets out our key issues with the Bill.

## RECOMMENDATION

**The Bill not be passed.**

## 1. NO CONSEQUENCES FOR CONDUCT

**This Bill allows people to hide behind religion to harm others, and employers, educators and bodies conferring occupational and professional licences and qualifications will be powerless to stop it. Whether it's a doctor promoting conversion 'therapy' through a church youth group or a teacher posting slurs on a personal social media account, there are times where it is appropriate for an employer, school or qualifying body to set and enforce standards of conduct designed to protect others from harm or maintain trust in a profession or organisation. This Bill prevents that from occurring by shielding misconduct from consequences when it occurs outside traditional occupational and educational settings.**

### (a) The 'no consequences for conduct' provisions (ss 22N(3)-(5), 22S(2)-(4) and 22V(3)-(5))

It will be almost impossible for government and non-government employers, educators and professional and licencing bodies to foster inclusive cultures, or meet shareholder, customer or community expectations, when their employees or members use their religion privately to hurt others.

The no consequences for conduct provisions, proposed sections 22N(3)-(5), 22S(2)-(4) and 22V(3)-(5), prohibit employers, educational authorities, and qualifying bodies (such as organisations which confer qualifications or professional or trade licenses) from restricting or disciplining a person who engages in religious activities outside their normal hours or places of work or education, except where those activities directly criticise or attack their

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<sup>3</sup> See <https://www.parliament.nsw.gov.au/committees/listofcommittees/Pages/committee-details.aspx?pk=267#tab-resolution>.

organisations or cause them *'direct and material financial detriment'*.<sup>4</sup> However, that financial detriment cannot include any boycotts, or the withdrawal of sponsorships or 'other financial or corporate support' from the organisation resulting from that religious activity.<sup>5</sup> 'Religious activities' are broadly defined to include any activity, which is not an imprisonable offence, that is motivated by a religious belief.<sup>6</sup>

This means that all NSW government and non-government employers, educators and bodies conferring occupational and professional licences and qualifications will be unable to respond appropriately to religiously-motivated conduct which may breach civil obligations (such as breaches of contract, professional obligations, or civil vilification laws) or cause harm to others.

For example:

- the NSW Government, as an employer, may not be able to discipline a teacher who expresses offensive or outdated views based on their religious beliefs outside the classroom, notwithstanding the detriment such public statements could have to maintaining community confidence in their ability to perform their role impartially;
- a health disciplinary body may not be able to investigate a doctor or psychologist who promotes LGBT conversion 'therapies' through their church, notwithstanding that such opinions carry more weight because of their standing as health professionals;
- an employer would not be able to prevent a prominent employee and public figure from expressing offensive or outdated views based on their religious beliefs on the footpath outside their work or on a social media platform, even if it destroys their sponsorship revenue or customer base of the organisation.

## (b) Unworkable and inconsistent obligations for employers

The no consequences for conduct provisions could leave government employers and businesses with no recourse when an employee, motivated by their religious beliefs, destroys community confidence in the organisation or a business' reputation or goodwill. Comments made by an employee on the footpath outside their workplace (such as 'disability is caused by the devil', 'women must submit to their husbands', 'all [people of another faith] will go to hell' or 'homosexuality is a form of brokenness') will be immune from any consequences. This is because employers cannot rely on the loss of any 'financial and corporate support' in asking their employees to refrain from their damaging behaviour. Nor can employers interfere with conduct motivated by a religious belief which takes place *'at a place other than the employer's place of work'* or *'at a time other than when the employee is performing work'*.<sup>7</sup>

These provisions are inconsistent with existing legal obligations falling on employers that apply outside traditional workplace settings or after hours. For example, sexual harassment and workplace bullying laws can apply after hours or outside of workplaces if the conduct is connected to the employer's workplace and business, such as when it impacts on other co-workers.<sup>8</sup> Employers will find it impossible to comply with inconsistent obligations: one which requires them to stop conduct from occurring, and another which prohibits them from stopping that conduct. Employers, public and private alike, are being placed in an impossible position.

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<sup>4</sup> Bill, ss 22N(4)(a)(ii) and (b), 22S(3)(a)(ii) and (b), and 22V(4)(a)(ii).

<sup>5</sup> Bill, ss 22N(5), 22S(4) and 22V(5).

<sup>6</sup> Bill, s 22K(1) (definition of *religious activities*).

<sup>7</sup> Bill, ss 22N(4)(a)(i).

<sup>8</sup> See, for example, *O'Keefe v Williams Muir's Pty Limited T/A Troy Williams The Good Guys* [2011] FWC 5311 at [43].



### (c) Impacts on schools and students

The no consequences for conduct provisions could also leave schools and other educational institutions with no recourse when a student, motivated by their religious beliefs, engages in harmful conduct towards another student on the footpath outside their school, on the way to school, or during a school sporting match on the weekend. This is because schools and educational institutions also cannot interfere with conduct motivated by a religious belief which takes place *‘at a place other than the person’s place of education’* or *‘at a time other than when the employee is receiving education’*.<sup>9</sup>

This Bill would prohibit a school responding to a student who, motivated by their religious beliefs, tells another student on the way to school that:

- they are going to hell because they follow a different (or no) religion;
- their parents are going to hell for divorcing;
- their sibling’s disability is a punishment from God; or
- God hates gay, lesbian, bisexual, trans or queer people.

This is a law which makes it unlawful for schools to respond to cruelty in the name of religion when that occurs on the footpath outside a school, on the way to school, or online after school.

### (d) Professional misconduct

The no consequences for conduct provisions would also apply to bodies that accredit, licence and regulate professionals such as doctors, nurses, psychologists, lawyers and teachers. These qualifying bodies are responsible for protecting the public from conduct which falls below professional standards, or people who are not fit and proper to perform the roles entrusted to them.

The no consequences for conduct provisions are particularly ill-fitting for the functions performed by these qualifying bodies because:

- the Bill protects activities, motivated by religious beliefs, which breaches laws and professional obligations provided that they do not amount to imprisonable crimes.<sup>10</sup> Yet most breaches of professional standards do not amount to imprisonable crimes, and therefore could be protected by definitions in the Bill;
- the no consequences for conduct provisions are framed around the issues of financial harm to, or direct criticism of, the qualifying body. Yet, when qualifying bodies perform their investigative and disciplinary functions, they are not motivated by financial considerations or criticisms of their organisation. Rather, these bodies perform their functions to protect the public from conduct or potential future conduct which falls or may fall below professional standards. These bodies consider matters of character to assess whether someone is a ‘fit and proper’ person to perform the role entrusted to them, including by having regard to matters in someone’s personal life which impacts on their ability to perform that role (such as conduct which reveals dishonesty, lack of judgement, misconduct in Australia or overseas, lack of ability to adopt professional boundaries, or lack of capacity due to substance use, mental impairment or otherwise). The no consequences for conduct provisions stand in the way of a qualifying body considering relevant matters when they relate to a person’s religious beliefs or conduct that is motivated by those

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<sup>9</sup> Bill, s 22N(4)(a)(i).

<sup>10</sup> Bill, s 22K(1) (definition of *religious activities*).

beliefs. They are unlikely to allow a qualifying body to be able to investigate or discipline a professional who engages in private conduct, motivated by religious beliefs, which raises questions about the fitness of that person to perform the role entrusted to them.

There are numerous cases where qualifying bodies have cautioned or disciplined health professionals who have been unable to meet their professional standards in a manner influenced by their religious beliefs.

For example:

- in 2015, a psychiatrist and devout Catholic was deregistered for, among other things, making religious comments and gestures to 5 women, including:
  - a woman with depression who he told *‘should be looking forward to the Kingdom of Heaven’*; and
  - a sexual abuse survivor with depression, who had been discharged from an alcohol detoxification program, who he told that *‘Jesus drank, and you don’t need any medication’* and that if she didn’t *‘show Jesus that she loved him’*, she would *‘end up in hell’* with her former abuser;<sup>11</sup>
- in 2012, a doctor and member of the Exclusive Brethren had restrictions placed on his licence to practice after consulting with an 18-year-old man from his church in his home, and prescribing a medication that reduces testosterone and can be used to treat advanced prostate cancer or manage sexual deviation, because the man had been sent to him for a ‘cure’ for his homosexuality;<sup>12</sup>
- in 2010, a psychologist and charismatic Christian was deregistered for referring to religious material invoking Satanic abuse and supernatural events in his treatment of two women who each suffered from mental illness;<sup>13</sup>
- in 2007, a dentist and devout Christian was counselled for telling a patient that she was oppressed by *‘sprites of fear’* and that spiritual healing could heal her schizophrenia;<sup>14</sup>
- in 2005, a doctor and Born-Again Christian had restrictions placed on his licence to practice for requiring his patients to subscribe to ‘Biblical Meditation’ as a condition for treating their drug addictions and dependencies;<sup>15</sup>
- in 2005, a psychologist was found to have engaged in misconduct for, among other things, selling or loaning religious books to his patient, attending an interstate religious conference with his patient, and sending his patient (who ultimately committed suicide) to a priest when his patient became more aggressive and agitated and reported to the psychologist that he was ‘talking to saints’.<sup>16</sup>

Some of the misconduct highlighted above occurred outside traditional occupational settings, and a feature of some of these cases has been the inability of the professional involved to maintain professional boundaries, instead

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<sup>11</sup> *HCCC v Sarah* [2015] NSWCATOD 99.

<sup>12</sup> *Re Craddock* [2012] NSWMPSC 8.

<sup>13</sup> *HCCC v Tynan* [2010] NSWPSST 1.

<sup>14</sup> *Dr Paul Gardner* [2007] DPBV 1.

<sup>15</sup> *HCCC v Dr Kwan* [2005] NSWMT 23.

<sup>16</sup> *Case 7* [2005] SAPSB 1.

allowing their religious views to interfere in the care they provide to their patients. Any provision that would create barriers to qualifying bodies taking into account misconduct or the propensity for misconduct, whether motivated by religious belief or not, should be opposed.

### (e) The no consequences for conduct provisions are unnecessary

The no consequences for conduct provisions are simply unnecessary. Even without these provisions, employers, educational institutions and qualifying bodies would still be prevented from unreasonably limiting the religious expression of their employees, students and members, whether inside or outside workplace and educational settings. This is because the standard tests for religious discrimination would apply. These tests prohibit an employer, educational institution or qualifying body from discriminating against someone by imposing an unreasonable requirement which has the effect of disadvantaging persons of a particular faith. So, for example, an employer that sought to limit an employee expressing their religious views outside the workplace, particularly in circumstances where that expression did not harm others or the business, would likely be found to have unlawfully discriminated against that employee under standard discrimination protections.

#### ALTERNATIVE RECOMMENDATION

Proposed subsections 22N(3)-(5), 22S(2)-(4) and 22V(3)-(5) should be removed.

## 2. DOUBLE STANDARDS IN PROTECTION

**This Bill contains broad exemptions allowing organisations (and possibly even commercial operations) which define themselves as religious to discriminate in employment, education, and service provision against others with different or no beliefs. This Bill leaves people who are employed, interact with, or rely on such organisations with no protection, even when religion has no relevance to the role or the service is taxpayer-funded.**

### (a) ‘Religious ethos organisations’ allowed to discriminate (s 22M)

The Bill contains exemptions for ‘religious ethos organisations’ which leaves people with different or no beliefs vulnerable to discrimination whenever they are employed, interact with or rely on services provided by organisations that define themselves as religious, including those which receive taxpayer funding to deliver their services or where religion has no relevance to the role being performed.

Proposed section 22M provides a broad exemption to ‘religious ethos organisations’ allowing them to discriminate on the basis of a person’s religious beliefs or religious activities across all protected areas, including employment, education and in the provision of goods and services.

For example, it would never be religious discrimination under this Bill:

- for a school which defines itself as religious to require its students to remove any facial hair which contradicts religious dress requirements or to require students to participate in sporting activities on a religious holiday;
- for a charity which defines itself as religious to strongly encourage its homeless clients to attend religious activities in order to access their meals;
- for a hospital which defines itself as religious to refuse employment to a doctor, nurse or potential member of their administration with a different religion or no religion at all.

## (b) A fatal flaw of the Bill

This exemption is much wider than comparable religious exemptions under other Australian anti-discrimination laws (including under the religious bodies exemption in section 56 of the ADA) for a number of reasons, including:

- it defines ‘religious ethos organisations’ broadly to include *‘any other body that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion’*.<sup>17</sup> This definition appears to allow any legal body, including a commercial entity (such as a baker, butcher or bookshop), to exempt itself from these anti-discrimination protections by simply defining itself as being conducted in accordance with a religion. For example, a ‘Christian catering company’ could refuse to cater for the wedding of a Muslim couple, and a ‘Muslim reception venue’ could refuse to hire out its venue to a couple that refused to observe halal dietary practices when catering for the reception;
- it allows an organisation to discriminate on the basis of religious belief or activity merely if it *‘furthers or aids the organisation in acting in accordance with the doctrines, tenets, beliefs or teachings of the religion of the organisation’*.<sup>18</sup> This circular provision means that any legal body can define itself as religious, adopt to its own doctrines, tenets, beliefs or teachings, and is then allowed to discriminate against others with different or no beliefs merely if it *‘furthers or aids’* the organisation’s self-defined religion. ‘Religious ethos organisations’ do not have to prove that their religious beliefs are accepted by anyone but themselves, as the Bill simply protects beliefs based on a ‘sincerity test’.<sup>19</sup>

This heavy-handed exemption is unnecessary and undermines the purported purpose of the Bill. It is in addition to, and separate from, a number of exemptions that facilitate religious discrimination in employment where it may be relevant to the job being performed, such as jobs requiring the observance of religious rituals and customs, artistic roles requiring authenticity in performances, roles requiring the observance of religious food and drink requirements, and roles facilitating the provision of welfare services by persons with a particular faith.<sup>20</sup>

This exemption is also in addition to the already broad exemption for religious bodies in section 56, which applies across the whole of the ADA.<sup>21</sup> That exemption has been used, for example, by a Christian charity to exclude same-sex couples from applying to become foster carers, even when that charity accepted unmarried (heterosexual) couples to do so and received taxpayer funding to provide foster care services.<sup>22</sup>

Proposed section 22M is a fatal flaw of this Bill. It provides a legal loophole that allows any legal body to define itself as religious, adopt its own beliefs (which, so long as they are genuinely held,<sup>23</sup> cannot be challenged), and then seek to conduct itself in furtherance or in aid of those beliefs. Accordingly, the protections afforded by this Bill for people of faith are ephemeral: they only apply to organisations that have decided for themselves that it would be wrong to discriminate against another person because they have different or no beliefs to their own.

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<sup>17</sup> Bill, s 22K(1) (definition of *religious ethos organisation*).

<sup>18</sup> Bill, s 22M(1)(c).

<sup>19</sup> Bill, ss 22K(1) (definition of *genuinely believes*) and 22KA; Explanatory Note to the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020, p. 2.

<sup>20</sup> Bill, s 22U.

<sup>21</sup> Bill, s 22M(3).

<sup>22</sup> *OW & OV v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293, following the appeal in *OV & OW v Members of the Board of the Wesley Council* [2010] NSWCA 155.

<sup>23</sup> Bill, s 22KA.

What this Bill gives to people of faith who experience discrimination with one hand, it allows to be taken away far too easily with another.

#### ALTERNATIVE RECOMMENDATION

Proposed section 22M should be removed.

#### (c) Only religious values matter (ss 22N(9), 22S(5) and 22V(6))

Tellingly, 'religious ethos organisations' are also exempt from the provisions which apply to prohibit other employers, educational institutions and qualifying bodies from enforcing their standards of conduct outside traditional occupational and educational settings (see section 1(a), *The 'no consequences for conduct' provisions* (ss 22N(3)-(5), 22S(2)-(4) and 22V(3)-(5)), above).<sup>24</sup> This is because proposed sections 22N(9), 22S(5) and 22V(6) of the Bill exempt 'religious ethos organisations' from having to comply with the no consequences for conduct provisions.

So while so-called 'religious ethos organisations' (particularly those who are also exempt under section 56 of the ADA) will be allowed to dictate to their employees every aspect of their private life, other private and public sector employers will not have the same latitude, even when the private conduct of their employees harms others, the reputation of their employer, or undermines public trust in their profession.

These exceptions to the no consequences for conduct provisions for 'religious ethos organisations' are an admission that, in certain circumstances, it is reasonable to expect employees to act consistently with the values of an organisation, even outside traditional workplace or educational settings. That only 'religious ethos organisations' have that ability, and not other private and public employers seeking to create inclusive cultures and environments for their employees, students and the public, is another example of the double standards in this Bill.

#### ALTERNATIVE RECOMMENDATION

Subsections 22N(9), 22S(5) and 22V(6) should be removed.

### 3. RELIGIOUS BILL OF RIGHTS

**This Bill establishes a religious bill of rights which priorities religion above other human rights. It does that by allowing individuals and organisations which define themselves as religious to challenge NSW programs, policies, contracts and decisions which contradict their particular religion. It does that by giving special consideration to the manifestation of religion when considering any discrimination complaint. It also does that by protecting activities, motivated by religious beliefs, that may breach the law or other obligations. Our laws should apply to us all, and protect all of us, equally.**

#### (a) Challenging state laws and programs (s 22Z)

'Religious ethos organisations' (that is, any legal entity which defines itself as religious: see section 2(b) above) will be able to challenge NSW government programs, policies, contracts and decisions which contradict their particular religion.

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<sup>24</sup> Bill, ss 22N(9), 22S(5) and 22V(6).



Proposed section 22Z would make it unlawful to discriminate against a person (including a 'religious ethos organisation') on the grounds of religious belief or activity when performing a function or administering a NSW law or program. For the following reasons, proposed section 22Z is a significant and unprecedented provision, akin to a 'bill of rights' provision for individuals and legal entities which define themselves as religious.

This type of provision is not currently applicable to any other protected attribute in the ADA apart from protections against sexual harassment.<sup>25</sup> Similar provisions in Commonwealth laws, however, have been used to challenge harassment which occurred in Commonwealth programs run by local councils,<sup>26</sup> regulations made under a Commonwealth law,<sup>27</sup> and decisions of Ministers and public agencies under Commonwealth laws.<sup>28</sup>

Proposed section 22Z means that any executive action taken under a NSW law, and any NSW government contract, decision or policy, could be challenged if it contradicts the religion of an organisation or the religion (or no religion) of a person. For example:

- an organisation which defines itself as religious could challenge a government contract requiring it to provide taxpayer-funded foster care services to everyone equally, on the basis that accepting unmarried heterosexual or same-sex couples as potential foster carers contradicts its religious beliefs;
- an organisation which defines itself as religious could challenge COVID-19 public health orders which restrict public gatherings, arguing that they impose an unreasonable restriction on their worship activities when major recreational facilities or corporate events are allowed congregations of a much greater number of people.<sup>29</sup> This is because the COVID-19 public health orders are merely orders made by the Health Minister under section 7 of the *Public Health Act 2010* (NSW), and thereby the Minister is performing a function under a State law in making them. On the other hand, an individual who holds no religious belief, could equally challenge a COVID-19 public health order which provided people of faith with *greater* latitude to gather for the purposes of religious worship,<sup>30</sup> arguing that such orders discriminate against gatherings between atheists or for secular, but otherwise other important and legitimate, public purposes such as attending protests;
- a parent could challenge a public school's decision to select a school chaplain instead of a secular youth worker on the grounds that their child should be provided with access to a student wellbeing support officer who does not contradict their atheist values.

Finally, this provision gives organisations that define themselves as religious the right to bring their own human rights complaints under laws which are intended to protect *humans* not organisations. Section 22Z(2) specifically does so by giving 'religious ethos organisations' standing to bring their own discrimination complaints. Further, given the breadth of the definition of a 'religious ethos organisation' (see section 2(b) above), this provision

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<sup>25</sup> ADA, s 22J.

<sup>26</sup> *Re Jacqueline Nora Hough v Council of the Shire of Caboolture* [1992] FCA 539.

<sup>27</sup> *Rohner & Tineo v Scanlan & Minister for Immigration and Multicultural Affairs* [1997] FCA 1202; affirmed on appeal in *Rohner & Tineo v Scanlan & Minister for Immigration and Multicultural Affairs* [1998] FCA 1006.

<sup>28</sup> *Carreon v Vanstone* [2005] FCA 865; *Webb v Child Support Agency* [2007] FMCA 1678.

<sup>29</sup> *Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 4) 2020* (NSW), cl 10 and 14A(2) v. cl 14A(4).

<sup>30</sup> For example, the *Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 4) 2020* (NSW) allows gatherings of up to 100 people for religious services.

protects religious schools, charities and ‘any other body’ conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion, meaning that even commercial operations could be protected.

This type of provision, which has been taken and extended to ‘religious ethos organisations’, highlights the critical importance of thinking carefully about how religious discrimination protections, if they are to be introduced in NSW, must be balanced with the rights of others and society at large. The ADA is not currently fit for this purpose.

Finally, if you are to provide people with a right to challenge government programs, policies, contracts and decisions which contradicts their religious beliefs, you must do that for everyone, equally, on all other grounds.

### **ALTERNATIVE RECOMMENDATION**

Proposed subsection 22Z(2) should be removed.

Only natural persons should be protected under discrimination protections.

If subsections 22Z(1) and (3) are to be introduced, they should apply to all protected grounds under the ADA.

### **(b) Privileging religion over other human rights (s 3)**

The Bill introduces an interpretative principle which gives special consideration to the manifestation of religion when carrying out any functions or making determinations under the ADA. This provision complicates the assessment of all discrimination complaints under the ADA and will lead to legal uncertainty and confusion in applying the ADA.

Proposed section 3 would require the Minister, Board, President, Tribunal and courts to have ‘fundamental regard’ to certain international instruments and documents when carrying out functions and making determinations under the ADA. Rather than listing all binding human rights treaties, such as conventions on economic, social and cultural rights,<sup>31</sup> racial discrimination,<sup>32</sup> sex discrimination<sup>33</sup> and people with disabilities,<sup>34</sup> the provision only lists one legally binding international covenant,<sup>35</sup> a non-binding declaration of the UN General Assembly,<sup>36</sup> and interpretative principles enunciated by the UN Economic and Social Council on the ICCPR.<sup>37</sup> Every function and determination under the ADA is then required to give ‘fundamental regard’ to this cherry-picked list of binding instruments and non-binding material.

While we support having regard to international human rights principles when construing domestic legislation, the common law already allows decision-makers to do this in appropriate circumstances,<sup>38</sup> and it does so in a way which does not pick-and-choose which international law should be had regard to. Accordingly, the purpose of this

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<sup>31</sup> *International Covenant on Economic, Social and Cultural Rights* 1966.

<sup>32</sup> *International Convention on the Elimination of All Forms of Racial Discrimination* 1965.

<sup>33</sup> *Convention on the Elimination of All Forms of Discrimination against Women* 1979.

<sup>34</sup> *Convention on the Rights of Persons with Disabilities* 2006.

<sup>35</sup> *International Covenant on Civil and Political Rights* 1966.

<sup>36</sup> *UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, proclaimed by the UN General Assembly on 25 November 1981.

<sup>37</sup> *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*.

<sup>38</sup> See, for example, *Minister for Foreign Affairs and Trade v Magno* [1992] FCA 864 at [12]-[20] per Gummow J; *Polites v The Commonwealth* (1945) 70 CLR 60 at 68-9, 77, 80-1.

provision appears to go well beyond what the common law allows, and towards changing outcomes in individual discrimination complaints when questions of religion arise.

In particular, proposed section 3(2) provides a list of factors to consider in ascertaining when it is necessary to place limitations upon a person's right to manifest their religion or belief. But it is not clear how these factors should, or can be, considered when interpreting and applying the ADA. This is because the words of the ADA (as determined by NSW Parliament), and not general propositions in international law, ultimately dictate how a decision-maker must carry out their functions or make determinations. The ADA uses legal concepts such as 'reasonableness',<sup>39</sup> 'unjustified hardship'<sup>40</sup> and 'religious susceptibilities'<sup>41</sup> which are foreign to, and in some cases contradict, international legal principles such as the proportionality doctrine which is being referred to in the proposed section 3(2). To say that you must make determinations having regard to international legal principles, some of which have not been adopted by the ADA, makes the ADA more legally complex and unpredictable than it already is. If you want the ADA to reflect international human rights law, you need to amend the language of the ADA itself, not merely have regard to these principles.

Take, for example, a discrimination complaint brought by a person with a guide dog who is denied access to a taxi by a driver that believes that dogs are unclean. Does the right of the taxi driver to manifest their religious beliefs override the right of the blind customer to non-discriminatory public transportation? Currently, the ADA has a framework for resolving that question. The decision-maker would look to the definition of discrimination and consider whether any exemptions applied. They would conduct any balancing of competing rights and interests (including impacts on the freedom of religion) through the lens of well-worn legal tests and defences, such as, the 'reasonableness' test under the definition of indirect discrimination and the 'unjustifiable hardship' defence.<sup>42</sup> Proposed subsection 3(2) would instead direct the decision-maker to consider the principle of proportionality which is foreign to the ADA, such as whether the means adopted 'are not more restrictive... than are required for the achievement of the purpose of the limitation'. This is a legal test that the NSW Parliament has rejected in adopting the language of 'reasonableness' and 'unjustifiable hardship'. Reintroducing concepts which the NSW Parliament has not adopted only serves to confuse the matter. Accordingly, the whole of proposed 3 is, at best, unnecessary, and at worst, legally uncertain and confusing.

#### **ALTERNATIVE RECOMMENDATION**

Section 3 should be removed.

### **(c) Protecting unlawful and unprofessional conduct (definitions of 'religious activities' and 'religious beliefs')**

This Bill affords discrimination protection to people who breach laws and professional obligations if those breaches are 'motivated' by a religious belief and do not amount to imprisonable crimes.<sup>43</sup>

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<sup>39</sup> For example, see ADA, s 49B(1)(B).

<sup>40</sup> ADA, s 49C.

<sup>41</sup> ADA, s 56(d).

<sup>42</sup> ADA, ss 49B(1)(B), 49C and 49M(2).

<sup>43</sup> Bill, ss 22K(1) (definition of *religious activities*) and 22L(2).

The definition of ‘religious activity’ in the Bill has the effect of protecting a broad range of potential misconduct, such as:

- breaches of civil and professional obligations (such as those regulating the conduct of health professionals, lawyers and other professions);
- equitable and tortious obligations (such as the law of negligence or obligations of confidence);
- anti-vilification and anti-discrimination obligations; and
- certain criminal offences which do not impose potential penalties of imprisonment.

For example, most professional standards applying to health professionals operate by way of codes of conduct. Breaches of these codes may give rise to disciplinary actions, such as the ability to caution or reprimand the practitioner, impose conditions on the practitioner’s registration, or order that the practitioner seek and undergo counselling.<sup>44</sup> Rarely, if ever, do they amount to imprisonable crimes, meaning that a doctor could be protected from consequences if they breach these professional standards because of a religious belief.

As an example, the Medical Board of Australia has developed the *Good Medical Practice: A Code of Conduct for Doctors in Australia*. It provides standards regulating the conduct of doctors, such as:

- provisions on culturally safe and sensitive practice, which include ‘*understanding that your own culture and beliefs influence your interactions with patients and ensuring that this does not unduly influence your decision-making*’;<sup>45</sup>
- conditions on the ability to conscientiously object to direct participation in treatments, including ‘*informing your patients and, if relevant, colleagues, of your objection, and not using your objection to impede access to treatments that are legal*’;<sup>46</sup>
- not allowing moral or religious views to deny patients access to medical care.<sup>47</sup>

A doctor who refused to provide a patient with information about contraception, abortion or the availability of emerging stem cell based treatments due to their religious views could claim religious discrimination if they were disciplined for breaching professional standards requiring them to not allow their religious views to deny patients access to medical care, even if they are not willing to provide that care treatment themselves. This Bill therefore appears to allow individuals to challenge professional standards that regulate conscientious objection and requirements to provide referrals or information to patients when a conscientious objection is raised.

For the separate protections based on a person’s religious belief, there also appear to be no limitations set as to whether that belief, or characteristics appertaining or imputed to that belief, can include ‘actions, refusals, omissions or expressions’ which are otherwise unlawful.<sup>48</sup> It is unclear whether beliefs which advocate for breaches of the law could be protected, and whether it may be unlawful for an employer, school or qualifying body to prevent or deter a person who encouraged or excused breaches of the law based on their religious beliefs. There is, for example, no exemptions under this Bill removing protection from beliefs, or characteristics appertaining to those

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<sup>44</sup> Health Practitioner Regulations National Law (NSW), s 146B.

<sup>45</sup> Medical Board of Australia, *Good Medical Practice: A Code of Conduct for Doctors in Australia*, cl 3.7.3.

<sup>46</sup> *Id.*, cl 2.4.6.

<sup>47</sup> *Id.*, cl 2.4.7.

<sup>48</sup> Bill, ss 22K(1) (definition of **religious beliefs**), 22KA (which appears to extend the notion of a religious belief to include the person’s beliefs as to the actions, refusals, omissions or expressions that are motivated or required by, conflict with, accord or are consistent with, that belief), 22L(1) and 22L(3)(b)-(c) (which appears to extend the protection on a person’s religious beliefs also to characteristics that appertain generally, or are generally imputed to, a person with those beliefs).

beliefs, which are contrary to public safety, order, health, or morals or the fundamental rights and freedoms of others, nor exemptions for those who encourage or excuse serious offences based on their religious beliefs (such as the exemption contained in the second exposure draft of the federal Religious Discrimination Bill).<sup>49</sup> When coupled with the observations made by the Australian Discrimination Law Experts Group submission regarding the entirely subjective definition of a religious belief under this Bill,<sup>50</sup> it means protection is being provided to a wide range of beliefs which may be antithetical to liberal democratic societies built on mutual recognition for everyone's fundamental rights and freedoms.

#### ALTERNATIVE RECOMMENDATION

'Religious activity' should be defined to mean 'engaging in, not engaging in or refusing to engage in a *lawful* religious activity'.

Ensure no discrimination protections are extended to conduct which is contrary to the law or the limitation in article 18(3) of the International Civil and Political Rights on public safety, order, health, or morals or the fundamental rights and freedoms of others.

## 4. UNEQUAL PROTECTIONS FOR PEOPLE OF FAITH

**This Bill even fails to protect people of faith equally. It departs from existing discrimination and vilification protections, leaving some people of faith less protected than others.**

### (a) Vilification protections

NSW currently prohibits publicly threatening or inciting violence towards others based on their religious belief or affiliation. This crime, punishable by fines and/or up to 3 years' imprisonment, covers all religions equally.<sup>51</sup>

NSW also prohibits vilification (meaning, inciting hatred towards, serious contempt for, or severe ridicule of others) based on ethno-religious origin.<sup>52</sup> These protections are civil protections, allowing victims to bring their complaints to Anti-Discrimination NSW rather than relying on police enforcement.<sup>53</sup> These civil vilification protections currently likely cover some religious groups (such as Jewish people and Sikhs) but not others (such as Muslims and Christians).<sup>54</sup> They also do not extend to vilification of people with no religion.

The Bill includes no amendments to extend the existing ethno-religious vilification protections to people of all religions (or none), meaning that some people who are vilified on the grounds of religious belief or activity will have no means by which to seek a civil remedy.

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<sup>49</sup> Second exposure draft of the Religious Discrimination Bill 2019 (Cth), s 28.

<sup>50</sup> 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 dated 20 August 2020 at section 5.1.

<sup>51</sup> *Crimes Act 1900* (NSW), s 93Z.

<sup>52</sup> ADA, s 20C.

<sup>53</sup> ADA, s 87A(1).

<sup>54</sup> 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.



## ALTERNATIVE RECOMMENDATION

Review and reform the vilification protections in the ADA so that they can be extended properly to all grounds covered by the ADA.

### (b) ‘Banning the burqa?’ (s 22N(6))

The Bill draws inspiration from overseas attempts to ban full-face coverings in its provisions on religious dress in the workplace.<sup>55</sup> These provisions will likely disadvantage people who adopt religious dress that does not meet existing (and potentially discriminatory) standards of workplace attire.

Proposed subsection 22N(6) allows employers to prohibit the wearing of religious symbols and clothing during work hours where this is reasonable, having regard to ‘workplace safety’, ‘productivity’, ‘communications and customer service requirements’, and ‘industry standards’. As an example, the explanatory note to the Bill says that there would be no discrimination if a Muslim woman who wore a full-face covering were refused a job as a bank teller.<sup>56</sup>

This would be the first anti-discrimination law in Australia which requires decision-makers to have regard to ‘communications and customer service requirements’ and ‘industry standards’ to define what may be reasonable when it comes to religious dress in the workplace. These mandatory legal considerations are circular: prohibitions on religious dress become reinforced by reference to industry standards and current styles of communication, which merely reflect custom and tradition. But mere custom and tradition, rebadged as ‘communications and customer service requirements’ and ‘industry standards’, rarely provide legitimate reasons for maintaining policies and practices which disadvantage and discriminate against others. If mere custom or tradition were an appropriate legal justification for discrimination, women would still not be allowed to vote and there would still be steps at the entrance to every significant public building or monument preventing access to people in wheelchairs. This provision thereby has the effect of reinforcing existing standards and ways of doing things, which may themselves be discriminatory. It allows an employer to justify prohibitions on religious dress in the workplace simply by reference to – *‘that’s just the way we do things around here’* – and a decision-maker would have to take into account that reason as a legitimate factor in determining whether the ban on religious dress is reasonable.

This provision is also unique in that – through the words ‘only if’ at the end of subsection 22N(6) – it appears to be exhaustive of the circumstances in which prohibiting religious dress in the workplace will be unlawful. Applying the legal principle that a specific provision takes precedence over a general one,<sup>57</sup> this means that the general open-ended prohibition on workplace discrimination in subsection 22N(1) would not apply where the matter concerns the prohibition of religious symbols or clothing in the workplace. Accordingly, such discrimination would always need to be determined through the lens of subsection 22N(6) with its apparent bias against any religious dress which contradicts existing standards.

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<sup>55</sup> Explanatory Note to the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020, p. 6; *Case of S.A.S. v France* (2014) Application no 43835/11, European Court of Human Rights (particularly at [122]).

<sup>56</sup> Explanatory Note to the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020, p. 6.

<sup>57</sup> *Anthony Hordern and Sons Ltd v The Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7 per Duffy CJ and Dixon J.

### ALTERNATIVE RECOMMENDATION

Subsection 22N(6) should be removed.

#### (c) Banning temporary exemptions (s 126)

The Bill prohibits the President of Anti-Discrimination NSW from allowing temporary exemptions to redress historical disadvantage experienced by people from minority faiths.

Section 126 of the ADA allows the President of Anti-Discrimination NSW to grant temporary exemptions from any ground of discrimination.<sup>58</sup> This section is used to allow what may otherwise amount to discrimination under the ADA to redress historical disadvantage through special measures.<sup>59</sup> This Bill prohibits section 126 from applying to Part 2B, being the new part introduced by the Bill which prohibits discrimination on the grounds of religious belief or activity.

This has the effect of prohibiting employers, educators and service providers from seeking temporary exemptions to redress historical disadvantage, for example:

- allowing the NSW Police to advertise a community liaison position specifically for a person of a particular faith, in order to improve community relations between a minority faith community and NSW Police;
- allowing a NSW university from offering a scholarship to students from a particular faith, in order to redress the historic underrepresentation of students from particular faith backgrounds in an area of study.

### ALTERNATIVE RECOMMENDATION

Remove the amendment to section 126 from the Bill.

## 5. OTHER ISSUES

We concur with the submission made the Australian Discrimination Law Experts Group as to several other technical issues with the Bill, including:

- the asymmetrical definition of 'religious belief' which appears to exclude or reduce protections afforded to people who are agnostic;
- the entirely subjective standard for determining the existence of a religious belief which, coupled with the issues we highlight in sections 3(c) above, appears to give protection to any belief that a defined group of adherents choose to call a religion;
- the complex extension of protections to people who may be imputed to hold religious beliefs in the future.<sup>60</sup> This requires employers, schools, service providers and qualifying bodies to consider an impossibly large range of potential beliefs, which are unknown and unknowable, and

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<sup>58</sup> ADA, s 126(1).

<sup>59</sup> For a list of current exemptions, see: [https://www.antidiscrimination.justice.nsw.gov.au/Pages/adb1\\_antidiscriminationlaw/adb1\\_exemptions/exemptions\\_126.aspx](https://www.antidiscrimination.justice.nsw.gov.au/Pages/adb1_antidiscriminationlaw/adb1_exemptions/exemptions_126.aspx).

<sup>60</sup> Bill, s 22KB(1)(d).

which a person may adopt in the future. Businesses, service providers and others are simply being required to engage in a degree of clairvoyance.

We accordingly support recommendations 3-8, and the reasons given for those recommendations, in the Australian Discrimination Law Experts Group's submission.

## REVIEWING THE ADA

This Bill only serves to highlight and add to existing problems with the ADA, which needs comprehensive review. Careful thought needs to be given to how discrimination laws should protect people with different religious beliefs before reform is attempted, particularly while federal religious discrimination protections remain under consideration.

### 6. OTHER PROBLEMS WITH THE ADA

The fact that this Bill introduces an exemption for ‘religious ethos organisations’ alongside section 56,<sup>61</sup> itself a broad exemption for religious bodies, demonstrates just how incoherent the ADA has become. The Act is replete with inconsistencies, gaps and omissions. Passing this Bill would simply add to them.

Some of the issues we see with the ADA include:

- an archaic approach of separate parts for each protected attribute, each with slight differences and most numbered a variation on ‘section 49xxx’. It is difficult for anyone confronting the ADA to know which grounds are covered, and what defences and exemptions apply, without a review of the whole Act;
- protected attributes with outdated definitions, such as sexual orientation protections which only cover gay men and lesbians;<sup>62</sup> and
- broad and unjustifiable exemptions, such as those allowing discrimination in sport on a person’s nationality and place of birth,<sup>63</sup> allowing private schools to discriminate against students on the grounds of sex, transgender status, marital or domestic status, disability, homosexuality or age,<sup>64</sup> or allowing aged care homes to discriminate on the basis of race.<sup>65</sup>

The ADA needs a comprehensive review if significant religious discrimination reform is to be attempted. This Bill leaves in place the existing ethno-religious discrimination and vilification protections, meaning all religions (and people with no religion) are not protected equally, or in the same way, under the ADA.

### 7. RELIGIOUS DISCRIMINATION PROTECTIONS NEED CAREFUL THOUGHT

As we submitted to the Commonwealth Attorney-General’s consultation on the second exposure draft of the federal Religious Discrimination Bill, regulation relating to religious belief and activity is a complex area for public policy.<sup>66</sup> Our laws must recognise and address these complexities, if we are to provide effective protection against discrimination on these protected attributes, without diminishing the rights of others.

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<sup>61</sup> Bill, s 22M(3).

<sup>62</sup> ADA, s 4(1) (definition of *homosexual*).

<sup>63</sup> ADA, s 22.

<sup>64</sup> ADA, ss 25(3)(c), 31A(3)(a), 38C(3)(c), 38K(3), 40(3)(c), 46A(3), 49D(3), 49L(3)(a), 49ZH(3)(c), 49ZO(3) and 49ZYL(3)(b).

<sup>65</sup> ADA, s 59.

<sup>66</sup> See Equality Australia (2019), *Submission on the Second Exposure Draft of the Religious Discrimination Bill 2019*, available at: <https://equalityaustralia.org.au/easubmission2/>.

While religious belief and activity shares some similarities with other protected attributes such as race, sex, disability or age, they also differ from other protected attributes. Legislation prohibiting discrimination on the grounds of religious belief or activity needs to contend with these key policy considerations.

These policy considerations include:

1. **Everyone has the religious belief or activity attribute**, either because they have particular religious beliefs or engage in particular religious activities, or they do not. These laws attempt to extend protections to everyone, which ultimately means protecting a religious belief held by one person, that may conflict with a different belief or the absence of a belief in a different person. Take for example, the story of the couple carrying the Christmas ham who were allegedly refused a ride by their Muslim Uber driver.<sup>67</sup> Under this Bill, the couple refused service would be protected because they do *not* engage in the religious activity of observing halal dietary requirements.<sup>68</sup> Meanwhile, the Muslim driver would be protected if Uber required him, as a condition of using its platform, to carry the couple's ham contrary to his religious observance of halal dietary requirements.<sup>69</sup> Protecting people against discrimination on the grounds of race, sex, or age rarely collides with the races, sexes or ages of others in this way. The Bill does not adequately address what happens when beliefs collide in areas of public life.
2. **Religious belief, and its expression, is limitless and diverse.** Religious diversity means that the Bill provides obligations in respect of a very large, disparate and heterogenous group. The differences within this group are often larger than their similarities. For example, some feel compelled to cover their heads, while others are compelled to remove head coverings in sacred places. Some are required to refrain from pork, while others are forbidden from eating beef. Some believe polygamy is permitted, while others believe polygamy is forbidden. Some believe women have an equal place in society, while others believe that place is equal but separate. Some believe laws of the land must be followed, while others are called to break laws they consider unjust. Not all believe that violence is never justified, nor do they all agree on what constitutes violence. Yet, employers, educational institutions and qualifying bodies are called to respond to conduct expressing these limitless and diverse beliefs by reference to legal straightjackets.<sup>70</sup> Employers, educators, service providers and others are called to make requirements which reasonably accommodate religious beliefs in all its forms so as not to indirectly discriminate.<sup>71</sup>
3. **Some religions are dominant while others are not.** There are different challenges for different faith groups in Australia, based on their collective size and the degree of historical and current discrimination they face. For example, Muslim Australians have experienced markedly high levels of harassment and abuse, particularly since September 11.<sup>72</sup> Many Jewish Australians live with the continued impacts of anti-Semitism in their lives.<sup>73</sup> While some faiths in Australia command a large following and can assert a degree of social, financial and political dominance and/or acceptance, others do not. The purpose of anti-discrimination laws has always been about the alleviation of barriers to participation in areas of public life,

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<sup>67</sup> ['We were furious': Uber driver rejects couple because of their Christmas Ham](#), 3AW 693 News Talk, 19 December 2019.

<sup>68</sup> Bill, s 22W, together with s 22L(2).

<sup>69</sup> Bill, ss 22N(1)(c), 22P(a) or 22W(b).

<sup>70</sup> Bill, ss 22N(3)-(5), 22S(2)-(4) and 22V(3)-(5).

<sup>71</sup> Bill, ss 22L(1)(b) and (2)(b), together with Div 2 and 3.

<sup>72</sup> Human Rights and Equality Opportunity Commission (HREOC) (2004) [Islamophobia – Listen: National consultations on eliminating prejudice against Arab and Muslim Australians](#), Sydney: HREOC; Derya Iner (2019) [Islamophobia in Australia Report II \(2017-2018\)](#), Sydney: Charles Sturt University and ISRA.

<sup>73</sup> Julie Nathan (2019) [Report on Antisemitism in Australia 2019](#), Sydney: Executive Council of Australian Jewry.



such as employment and education. But when those areas of public life also happen to be delivered by dominant faiths, there can be few barriers to the participation of those faiths. Instead there is a risk that their dominance overbears the wills of those who are less dominant, such as people from minority faiths who work or interact with these organisations. Considering those differences in power and resources, there is a materially different impact in giving all faith-based organisations exemptions under discrimination laws, when it also includes dominant faith-based organisations. Indeed, faith-based organisations, including large, well-established and sophisticated organisations, employ, educate and provide goods and services to millions of Australians.<sup>74</sup> Many of these organisations and services are taxpayer funded or provide services in areas which the public sector has vacated.<sup>75</sup> This Bill contains broad exemptions for faith-based organisations<sup>76</sup> which fails to grapple with the diversity of this sector and the responsibility it has, and will have for the foreseeable future, in employing, educating and delivering essential services to millions of Australians of differing or no religious belief.

4. **Religious beliefs, doctrines, tenets and teachings evolve.** Religions have changed their views as their holy texts are reevaluated and reinterpreted. Accordingly, doctrines, tenets, beliefs and teachings change. So, when drafting a law that will protect against religious discrimination in the enduring way that anti-discrimination statutes come to be held, it is important to get the settings right from the start. Laws require language imbued with flexibility, which work to keep the statute contemporary. The test of ‘reasonableness’ in anti-discrimination laws, as do other balancing provisions, do that work. On the other hand, the ‘no consequences for conduct’ provisions displace that flexibility, preventing all relevant circumstances from being taken into account. Given the evolution of beliefs and values, it is an error to draw on isolated cases today and convert them into inflexible principles, which will apply to everyone, tomorrow.

Any legislation proposing to enter the field of religious discrimination needs to confront and accommodate these policy considerations. Through its provisions and exceptions, this Bill has not done this effectively. Accordingly, we do not support it.

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<sup>74</sup> Penny Knight and David Gilchrist (2015) [Faith-Based Charities in Australia](#), March 2015, Australian Charities and Not-for-profits Commission, at 7, 12 and 17.

<sup>75</sup> Ibid, at 17.

<sup>76</sup> Faith-based organisations are likely to have the protection of both ADA, s 56, and Bill, s 22M.