

**Submission
No 63**

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

Organisation: Lebanese Muslim Association

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SUBMISSION

To the NSW Joint Select Committee on the Anti-Discrimination
Amendment (Religious Freedoms and Equality) Bill 2020

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Introduction

The Lebanese Muslim Association ('the LMA') commends the Joint Select Committee on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 ('the Committee') for conducting an inquiry into these pertinent issues.

The LMA welcomes the opportunity to make a submission to the Committee in relation to the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 ('the Bill').

About the Lebanese Muslim Association

Established in 1962, the LMA is one of Australia's largest Islamic organisations that offers social, religious and advocacy services to the Australian community. The LMA represents a diverse cohort of members and is a central provider in the South West Sydney Muslim community. The LMA drives projects which build on social capital, community resilience, cohesion, and support.

The LMA prides itself on the services it provides to the largely migrant community in the heartland of South West Sydney. It has been able to foster social participation, community networks, economic and personal wellbeing, and youth programs for over 60 years and continues to service communities from a wide variety of ethnic and religious backgrounds. Currently, the LMA works with government agencies, non-for-profit organisations, and corporate partners to provide much needed community support.

Need for Legislative Protections from Religious Discrimination

Through the adoption and ratification of various international treaties, particularly article 18 of the International Covenant on Civil and Political Rights and article 5 of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, Australia has committed to protect basic human rights, including religious freedom. This commitment is reflected in section 116 of the Australian Constitution.

All states and territories in Australia, except NSW and South Australia, offer legislative protections against discrimination on the grounds of a person's religious beliefs or activities.

In NSW, it is unlawful to discriminate on the basis of race, including colour, nationality, descent and ethnic, ethno-religious or national origin, sex, including pregnancy and breastfeeding, marital or domestic status, disability, homosexuality, age, transgender status, and carer's responsibilities (Anti-Discrimination Act 1977 (NSW)).

In its current form, the Anti-Discrimination Act 1977 (NSW) does not offer protections against discrimination on the ground of a person's religious beliefs or activities ('the Act'). The legal definition of "ethnic, ethno-religious or national origin" has been narrowly construed by the Courts and only protects faith groups with common ethnic or ethno-religious origin, such as Jews and Sikhs¹. Consequently, the Act does not offer Muslims or most other faith groups protection from discrimination. This inconsistency, and resulting inequality at law, is mirrored on the federal level in the Racial Discrimination Act 1975 (Cth).

Since 2014, NSW has consistently recorded more Islamophobic incidents than any other state or territory by some significant margin². The LMA is acutely aware of the painful impacts of anti-religious sentiment and incidents, particularly as it relates to Islamophobia in NSW. The aftershock and effects of a single Islamophobic incident

¹ Ekermawi v Nine Network Australia Pty Limited [2019] NSWCATAD 29 (15 February 2019).

² Islamophobia in Australia Report 2019, Islamophobia Register Australia, p. 74, <http://www.islamophobia.com.au/wp-content/uploads/2019/11/Islamophobia-Report-2019LOW-Res.pdf>. By way of background, Islamophobia Register Australia was established in 2014 to provide a platform for Islamophobia incidents to be reported, recorded, analysed, and reported in a yearly report ('the Register'). The Register is the trusted organisation in the Islamic community for receiving reports of Islamophobic incidents.

extends beyond the person targeted and quickly spreads across the Islamic community. As there are no laws in NSW to protect against discrimination on the ground of religion, Muslims who suffer from discrimination are left without legal recourse.

The LMA congratulates the Committee for providing NSW Muslims and other faith groups with hopes for equal legislated freedom of religion and protection from discrimination.

In the next section, this Submission will address specific aspects of the Bill then proceed to make recommendations which, if accepted, would ensure the Bill meets its objectives.

Comments

Section 22L

The LMA supports the introduction of behaviour that constitutes unlawful discrimination on the grounds of religious belief or activity in section 22L. This provision reflects the language used in existing anti-discrimination provisions on other grounds covered by the Act. The LMA welcomes the consistency this amendment brings to the Act.

Section 22P

The LMA supports the introduction of section 22P that shields contract workers from discrimination on the ground of their religious beliefs or activities. The inherent vulnerability faced by contract workers is well established and this provision legislates in support of them.

Section 22T

The LMA is pleased to see the same grounds are covered to make unlawful discrimination towards people who are provided, and who seek to be provided, the services of employment agencies under section 22T, to make unlawful discrimination towards people who are existing or prospective commission agents under section 22O, and to make unlawful discrimination towards people who are prospective or current members of industrial organisations under section 22R, as well as in other areas, namely educational authorities under section 22V, providers of goods or services under section 22W, providers of accommodation under section 22X, and registered clubs under section 22Y.

Recommendations

Section 22N

The LMA is concerned that employers pursuant to section 22N, educational institutions pursuant to section 22V and qualifying bodies pursuant to section 22S (which regulate professional, trade and occupational authorisations and qualifications) will risk violating these provisions if they seek to punish inappropriate, offensive or discriminatory conduct by their employees, students or members, when that conduct is motivated by religious beliefs and occurs outside of occupational and educational settings.

For example, under section 22N, an employee will be able to undertake 'religious activity' at a time other than when they are performing work and at a place other than their physical place of work, provided it does not directly criticise or attack their employer or cause 'material financial detriment' to their employer. 'Religious activity' is defined in section 22K (1) as engaging in an activity motivated by a religious belief, provided it does not constitute a punishable offence by imprisonment. A 'religious belief' includes a religious conviction, belief, opinion or affiliation as well as 'not having any religious conviction, belief, opinion or affiliation'. 'Material financial detriment' is defined broadly and does not include any boycott or secondary boycott of the employer by others because of the conduct of the employee or their associate. Nor does it include the withdrawal of sponsorship or financial or corporate support for the employer because of the conduct of the employee or their associate.

Under section 22N, it will be unlawful for the employer to discriminate against that employee in response to the aforementioned religious activity, in the terms or conditions of their employment contract; by denying or limiting them access to promotion, transfer or training; or to any other employment benefits; or by dismissing them or subjecting them to any other detriment. It will also be unlawful for the employer to restrict, limit, prohibit or prevent them from engaging in said 'religious activity', or punish or sanction them for doing so, or because an associate of theirs has done so.

In respect of section 22N, the Second Reading Speech by the Hon. Mark Latham states that "the principle is clear: Bosses do not own the private lives of staff, their beliefs, faith and religious activities". The LMA respectfully submits that the provisions strike a disproportionate balance in favour of freedom of speech at the expense of the need to maintain tolerance and diversity in Australian workplaces, in educational institutions and among the diverse members of qualifying bodies generally. The result will be that individuals who are subject to offensive and harmful statements or conduct based on religious beliefs, such as adherents of minority religions, people with disability or people who identify as LGBTI+, will be placed in a position of further vulnerability.

The LMA also recommends the removal of section 22N(6) from the Bill, which allows employers to prohibit the wearing of any religious symbol or any religious clothing during work hours where the wearing of such symbols or clothing is not reasonable having regard to the circumstances of the employment, including the workplace safety, productivity, communications and customer service requirements of that employment, and the industry standards of that employment. The LMA is concerned that Page 6 of the Explanatory Memorandum provides a situation in which this exception is adjudged by Parliament to be properly invoked, namely refusal of the employment application for the position of a bank teller by a Muslim woman who wears a full-face covering due to 'problems of customer service and communications' that the full-face covering would cause, as well as with reference to applicable industry standards and practices.

The LMA recommends the removal of the threshold contained in section 22N(7), which exempts discrimination relating to employment for the purposes of a private household or where the number of persons employed by the employer, disregarding any persons employed within the employer's private household, does not exceed 5. The LMA also recommends the removal of the threshold contained in section 22Q, which exempts discrimination relating to prospective and current partners of partnerships of 6 or less. The LMA questions whether these thresholds are necessary, as they do not protect workers employed in private settings or partners or prospective partners in small partnerships from further vulnerability and discrimination, particularly as these places of work are already closed from public attention and scrutiny.

Section 22M

The LMA is also concerned with the exemption that will be enjoyed by religious ethos bodies pursuant to section 22M, which includes registered charities; private educational authorities that are conducted in accordance with the doctrines, tenets, beliefs or teachings of a religion; and other bodies conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion. The Second Reading Speech by the Hon. Mark Latham states that "organisations where religious is integral to their existence should not be expected to abandon their beliefs to accommodate the rights of other religious or non-believers... religious organisations must be allowed to remain religious in their guiding principles and practices". In practice, pursuant to section 22M, these organisations will be able to discriminate on the grounds of a person's religion if this is consistent with its religious doctrines, beliefs or teachings; or because it is required due to the religious susceptibilities of its adherents; or because it furthers or aids the organisation in acting in accordance with its religious doctrines, tenets, beliefs or teachings.

The LMA recommends the removal of section 22M from the Bill. The LMA questions whether the provision is necessary and is concerned that under section 22M, people of faith will be unprotected when they are employed by, transact with, or rely on services provided by these organisations with different religious beliefs to their own. The LMA is concerned that the following forms of discrimination will not be unlawful under section 22M: A Catholic private school that makes redundant a teacher who has converted to Islam; or a Baptist charity that refuses to hire Muslims or provide them with its services.

Employees of religious ethos organisations are at risk of abuse under section 22M, as opposed to employees of employers that are not religious ethos organisations.

Section 22Z

The LMA is concerned with section 22Z, which prohibits discrimination against another person on the ground of religious beliefs or activities, but not other groups, 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. The LMA believes this provision may elevate religious rights substantially over other protections. For example, Christian foster care agencies may be allowed to place children primarily with Christian families in the course of conduct of a State program and overlook Aboriginal kinship principle to place Aboriginal children with Aboriginal families in its placements.

The LMA is concerned that subsection 3 is an unnecessary provision. It is implied in discrimination law that all human rights are considered and balanced against each other.

Section 22C

The LMA is also concerned that the Bill does not extend existing anti-vilification legislation that protects certain groups, such as Jews and Sikhs, to all religions. For example, a Muslim person cannot bring a vilification complaint if a person, by their conduct in public or online, incites hatred towards, serious contempt for, or severe ridicule of Muslims. In light of this, the LMA recommends a provision that extends the existing provisions contained in section 20C of the Act to religious vilification. The LMA suggests that the terms of such a provision may appear as follows:

Religious Vilification Unlawful

- (1) It is unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the religion of the person or members of the group.

The LMA also recommends a provision that allows for an exemption to the general provision, which may be in the following terms:

- (2) Nothing in this section renders unlawful a person's conduct that was engaged in reasonably and in good faith —
 - (a) In the performance, exhibition or distribution of an artistic work; or
 - (b) In the course of any statement, publication, discussion or debate made or held, or any other conduct engaged in, for any genuine academic, artistic, religious or scientific purpose; or
 - (c) In making or publishing a fair and accurate report of any event or matter of public interest.
- (3) A person does not contravene sub-section (1) if the person establishes that the person engaged in the conduct in circumstances that may reasonably be taken to indicate that the parties to the conduct desire it to be heard or seen only by themselves.
 - (a) Subsection 3 does not apply in relation to conduct in any circumstances in which the parties to the conduct ought reasonably to expect that it may be heard or seen by someone else.

Concluding Remarks

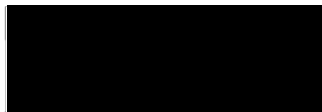
The LMA commends the Committee for conducting inquiries into these important issues. The need to address legislative inconsistencies in NSW has become a significant priority given the rise in Islamophobic sentiment and discrimination. The LMA encourages the NSW Government to address the absence of legislative protections from religious discrimination by meeting, if not surpassing, the precedents set by its counterparts and continuing to adapt to contemporary research and needs.

This Submission represents the preliminary views of the LMA. Subject to the foregoing comments and recommendations, the LMA supports the Bill.

The LMA would appreciate the opportunity for continued engagement with the Committee on this Bill and welcomes any requests for clarification or further information.

This Submission was prepared by Samier Dandan on behalf of the Lebanese Muslim Association. We hope it is of assistance to the Committee.

Yours sincerely,



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