

**Submission  
No 74**

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

**Organisation:** Muslim Legal Network (NSW) Inc

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## Who we are

The Muslim Legal Network (NSW) (“**MLN(NSW)**”) is an Australian-based legal practitioner and law student association. It is a gateway for Australian Muslim law students and legal practitioners to both network with one another and engage with the wider legal community. We provide community legal education and participate in law reform and legal advocacy, as well as offering a Muslim perspective on civil liberties issues.

## Introduction

1. We welcome efforts to broaden the NSW anti-discrimination framework to include the protection of religious beliefs and activities and are grateful for the opportunity to submit on the *Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020* (the **Bill**).
2. The objectives of the Bill appear on its face to provide increased protections for religious minorities in the realm of employment as well as in the community and social services sector.
3. However, we have a number of reservations about how the Bill has been drafted and whether it meets the broader objectives of having anti-discrimination laws which create a more harmonious society.
4. In our view, the Bill does not address other pressing concerns of religious minorities, particularly protections against hate speech and the vilification of the tenets of a faith or religious belief. The Muslim community in Australia often bears the brunt of such attacks which erodes their confidence in the Australian justice system. Rising Islamophobia and the absence of significant resources to tackle this issue along with other hate crimes in New South Wales perpetuates this feeling of anguish.
5. While the Bill attempts to define religious beliefs and religious activities, longstanding judicial authority demonstrates the difficulty in defining what is meant by “religion” and determining what are the “genuine” tenets of a religion. We submit these questions can only be objectively answered by reference to expert practitioners of the particular religion and not the Courts or Legislature. From a policy perspective it is not the most desirable outcome to have a tribunal of fact determining individual references to religion or religiosity. The broad definitions in the Bill also leave open the possibility of abusing the right of freedom of religion by groups that are not considered “religious” by the community they might claim to be a part of.
6. Another important concern with the Bill is its potential inconsistency with Australia’s broader anti-discrimination regimes and the international human rights conventions they are based on. In an attempt to address a gap in the protection of religious rights and freedoms, there is a risk in the construction of this Bill that the rights of other vulnerable groups would be left unprotected from bigotry and discrimination where a “religious” right could be asserted.

7. This Bill, in addition to the *Anti-Discrimination Amendment (Complaint Handling) Bill 2020 (NSW)*, operates to weaken powers of the NSW Anti-Discrimination Board (ADB) and its ability to hear certain complaints. While acknowledging recent issues with some of the complaints raised in the ADB against organisations with a “religious ethos”, the way the Bill is framed is such that religious principles could be relied upon to discriminate against other groups. This could negatively impact social cohesion as the rights of different groups are pitted against each other with the Muslim community being an easy target for those seeking to inflame social tensions.
8. In the MLN(NSW)’s view, a better approach would be for NSW to follow its counterparts in Victoria and the ACT in adopting a human rights charter as a means of ensuring protections of various freedoms without impeding protections of marginalised groups.

### **Religious Belief and the test of “genuine belief”**

9. MLN(NSW) welcomes the right for religious ethos organisations to engage in conduct that accords with their religion. However, due to the broad definition of *religious belief* and *religious activity*, this Bill leaves open firstly, what are the doctrines, tenets, beliefs or teachings of a religion and secondly whether a religious belief is genuinely held (section 22K).
10. We submit these questions can only be objectively answered by reference to expert practitioners of the particular religion to which the “religious activity” belongs. Relying on the judiciary to determine religious beliefs or teachings can lead to unfair outcomes that do not properly reflect the true position of a religion.<sup>1</sup> It could inhibit the authentic practice of a faith or conversely, also result in an unnecessarily narrow or incorrect interpretation of the faith. In a pluralist jurisdiction like New South Wales, not striking this balance correctly would see minority groups, sects or unfamiliar religions or religious practices not fairly represented.
11. Deferring to experts also becomes crucial in the setting of textual interpretation. In the same way that a complex body of common law can only be reliably interpreted by lawyers in the field; religious doctrines and tenets can only be expounded on by specialists in the religion.
12. An additional risk remains that even where a theological arbiter or expert is produced, it is not in the public interest to have the doctrines, tenets, beliefs or teachings of any religion being scrutinised and determined at common law.
13. Without clear definitions, individuals and groups may attempt to prove that their beliefs or practices should be considered a religious belief or religious activity simply to seek protections under the Bill.

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<sup>1</sup> For example *R v Bayda* ; *R v Namoa* (No 8) [2019] NSWSC 24; and “Transcript of the sentence hearing in the matter of *R v Alameddine* (No. 3) [2018] NSWSC 681

14. The judiciary attempted to develop a common law definition of religion in the context of taxation law in the case of *Church of the New Faith v. Commissioner of Payroll Tax* (1983) (“Scientology Case”) where Mason ACJ and Brennan J proposed that:

“... the criteria of religion are twofold: first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief, though canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion.<sup>2</sup>”

15. The term “genuine belief” is also broad and unprecedented in the field of anti-discrimination legislation. It inserts a subjective test which again forces the decision maker to decide what religious belief can be considered genuine.
16. This raises another important issue about the language and the definitions used in this Bill. The definitions are inconsistent with those used in other anti-discrimination legislation both federally and at the state level. For example, the *Religious Discrimination Bill 2019 (Cth)*, uses the term “reasonably consider” when defining a “statement of belief” and also at section 11(1) where a religious body’s conduct is not deemed discriminatory when it engages in conduct that “could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of that religion”.
17. Many regimes require a direct connection with the religious acts and beliefs. For example, at the Commonwealth level, the *Sex Discrimination Act 1984 (Cth)* defines acts or practices of religious bodies as those “that conform to the doctrines, tenets or beliefs” of the religion.
18. Though these differences between State and Federal anti-discrimination laws could seem to produce more semantic than substantive differences, the Bill adds another layer of complexity to this already fraught area of law. The Bill appears to simply add to and possibly override rights already enshrined in the Act it is attempting to amend, the *Anti-Discrimination Act 1977 (NSW)*. If not carefully considered with the rest of Australia’s anti-discrimination regime and obligations under international law, there exists a very real risk in embarrassing inconsistencies. This could invite the application of section 109 of the *Commonwealth of Australia Constitution Act* which provides that where Federal and State laws are inconsistent, then the Federal law prevails “to the extent of the inconsistency” leaving this section of the regime largely inoperable for what seems to be a very significant portion of its stated intent in protecting religious belief and the expression thereof.
19. The MLN(NSW)’s recommendation is for the Bill to be reconsidered by ensuring it is compatible with Australia’s current anti-discrimination regime. This would likely require a more comprehensive review of State and Federal laws to avoid inconsistencies and provide effective remedies for complainants. This would also ensure religious groups and minorities are not forced to clash with other interest

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<sup>2</sup> “Scientology Case”, (1983) 154 CLR 120 at 136

groups in society whose current rights could be adversely affected by the proposed Bill in its current form.

### **Lack of adequate frameworks to address vilification**

20. While the Bill provides important protections to members of some religious communities against discrimination, it falls short of addressing the increasing vilification against the followers of minority religions in Australia. This deficiency is serious because, currently, neither Federal nor State legislative frameworks provide adequate protections against hate speech and vilification of vulnerable religious groups like Muslims.

### **The prevalence of Islamophobia**

21. Across Australia, Muslims are increasingly becoming a target of hate crimes and vilification. A recent study, conducted by the Islamophobia Register in two years from 2016 to 2017, found 349 verified Islamophobic incidents that occurred either in an online space or a real-life scenario (offline).<sup>3</sup> This study revealed or cited some alarming statistics such as the following:

- The offline incidents were of interpersonal and generic nature involving physical attacks, verbal abuse/threats, non-verbal threats, written abuse, damage/graffiti, offensive media content and hate mail.
- 73% of victims of offline cases were women and 14% were children. Eleven percent (11%) of offline cases involved death threats.
- Muslims were the largest victims (constituting 73%) of all bias crimes reported to NSW Police between July 2013 - July 2016.
- According to research conducted by the Office of the eSafety Commissioner and the Department of Education and Training among 2,448 Australian children aged 12-17 by the, 53% of the surveyed children were targets or witnesses of anti-Muslim online hate.<sup>4</sup> Anti-Muslim hate was the most dominant hate type to be exposed online.

22. The MLN(NSW) have raised the issue of hate crime against the Australian Muslim population with various executive arms of Government and unfortunately this issue is falling on deaf ears.

### **Lack of legal protection**

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<sup>3</sup> Iner, Derya, ed. **Islamophobia in Australia** Report II. (2017-2018). Sydney: Charles Sturt University and ISRA, 2019 <[https://cdn.csu.edu.au/\\_data/assets/pdf\\_file/0008/3338081/Islamophobia-Report-2019-Low-RES24-November.pdf](https://cdn.csu.edu.au/_data/assets/pdf_file/0008/3338081/Islamophobia-Report-2019-Low-RES24-November.pdf)>.

<sup>4</sup> Office of the eSafety Commissioner and the Department of Education and Training, November to December 2016, <<https://www.esafety.gov.au/about-us/research/young-people-social-cohesion/online-hate-bullying-violence>>.

23. The above statistics show the heightened threat of harm faced by Muslims on a daily basis. Yet, the Commonwealth and State criminal and civil laws do not specifically address this threat.
24. The *Criminal Code 1995* (Cth) criminalises urging violence against groups, or members thereof, distinguished by religion.<sup>5</sup> However, it sets a high bar of prosecution on grounds which require threats to ‘peace, order and good governance of Commonwealth’ or an intention that ‘force or violence will occur’. In doing so, it fails to address common incidents of Islamophobia which, at times, include harassment or vilification without involving force or violence.
25. On the Federal civil laws level, *the Racial Discrimination Act 1975* (Cth) provides protection against hate speech and other offensive behaviour but does not extend it to the protection of religion.<sup>6</sup>
26. In New South Wales, no legal instrument addresses the contemporary experiences of religious vilification specifically. Although the recent addition of section 93Z to *Crimes Act 1900* (NSW) is a welcome step in this regard, it only addresses the more serious forms of vilification i.e. public threat or incitement of violence and hence fails to capture individual instances, such as death threats sent to individuals through mail. It should be noted, however that there have been no charges brought against any individual pursuant to s 93Z of the *Crimes Act 1900* and there has been a lack of community education on the availability of such mechanisms.<sup>7</sup>
27. In New South Wales, protection against public vilification under the *Anti-Discrimination Act 1977* (NSW) is afforded to ethno-religious groups like Jews and Sikhs, but Muslims, some of whom are readily identifiable due to their clothing or appearance (hijab, beard etc) or daily practices, such as praying, remain without protection.
28. In the recent case of *Ekerawali v Nine Network Australia Pty Limited* [2019] NSWCATAD 29 involving a renowned TV presenter, who had called for a ban on Muslim migration to Australia, the shortcomings of the NSW law became evidently clear. Despite the Tribunal’s finding that the respondents’ comments amounted to vilification, no appropriate remedy could be awarded due to Muslims not having the recognition of an ethno-religious group for the purposes of NSW law.
29. While the MLN(NSW) applauds attempts to provide protections against religious discrimination, we recommend any laws to protect religious freedoms must address hate crimes which have recently manifested themselves in significant forms of violence and harassment as a part of any proposed regime.

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<sup>5</sup> Section 80.2A and 80.2B *Criminal Code 1995* (Cth)

<sup>6</sup> Section 18C *Racial Discrimination Act 1975* (Cth)

<sup>7</sup> Portfolio Committee, Legislative Council, No.5 Legal Affairs, Friday 13 March 2020, pages 20-21; and Knaus, C. (4 June 2020). NSW race hate laws not used in two years since introduction, *The Guardian*, <<https://www.theguardian.com/australia-news/2020/jun/04/nsw-race-hate-laws-not-used-in-two-years-since-introduction>>

## Charter of Human Rights

30. Australian courts have stated that religious belief is a “fundamental right because our society tolerates pluralism and diversity and because of the value of religion to a person whose faith is a central tenet of their identity<sup>8</sup> and that freedom of religion is the “paradigm freedom of conscience” and “ the essence of a free society”.<sup>9</sup> In *Evans v New South Wales*,<sup>10</sup> religious belief and expression was described as an “important freedom generally accepted in society”.
31. The common law may provide indirect protection to the limited extent that it protects against encroachments on other freedoms, without which freedom of religion is not possible. In Australia, protections in the form of freedom of religion are often limited to or combined with situations where the expression of religious freedoms are attached to an exercise of freedom of speech or perhaps association.
32. It is perhaps in this incomplete frame and given the number of issues raised with the Bill, that the timing is quite apt for a call for a Charter of Rights, particularly in circumstances where Australia has in various jurisdictions, a suite of anti-discrimination regimes which could be easily adopted to form such a Charter of Rights.
33. Over the past decade, there have been a number of calls at both a State and Federal level for the strengthening of anti-discrimination legislation to include protections from discrimination for those who are a part of a religious group.
34. Anti-discrimination legislation is designed with the intent of protecting the vulnerable, often minority communities. Existing protections have been moderately sufficient at various levels, however, have failed to sufficiently grapple with the many issues including the various ways in which ethnicities intersect with religious identity and other forms of subtle or targeted discrimination.
35. The manner in which the Bill provides protection of an undefined act as a “religious activity”, could result in an act which is currently an offence under the existing anti-discrimination regime, be now protected under this Bill. Only this discrete example shows that the implications of amendments which when not properly thought out could impede the attempt to seek equity amongst discriminated communities.
36. The MLN(NSW) is of the view that one of the most fulsome ways of providing sufficient protections for religious or other minorities is by way of implementation of a Human Rights Charter.
37. The implementation of a Human Rights Charter has been called upon for many years as a means of ensuring protections of various freedoms without impeding protections of marginalised groups.

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<sup>8</sup> *Christian Youth Camps Limited v Cobaw Community Health Services Limited* (2014) 308 ALR 615, [560] (Redlich JA).

<sup>9</sup> “Scientology Case”, (1983) 154 CLR 120 at 136

<sup>10</sup> *Evans v New South Wales* (2008) 168 FCR 576, [79] (French, Branson and Stone JJ)



38. Australia is the only liberal democracy without a national Human Rights Charter, constitutionally enshrined or otherwise. The MLN(NSW) supports the call for a national Human Rights Charter that seeks to provide protections for all.

## **Conclusion**

39. The MLN(NSW) invites the Joint Select Committee to consider the significant technical issues raised in this submission as well as the policy related matters concerning the inadequacy of current pieces of legislation addressing hate speech and vilification. Specifically, we are concerned about the impacts of Islamophobia and how that might interact with the implied freedom of speech arising from the implementation of the Bill. Importantly, given New South Wales is one of the largest and most diverse jurisdictions in Australia, the adoption of a Charter of Human Rights, if properly implemented, would provide adequate protections for many persons who would otherwise be victims of discrimination.

Thank you for the opportunity to provide this submission.