

**Submission
No 86**

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

Organisation: NSW Young Lawyers

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Submission to the Joint Select Committee on the *Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020*

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1. We refer to the Select Committee's invitation dated 10 July 2020 to make a submission to the present inquiry into *Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 (the Bill)*. We welcome the opportunity to make a submission to this inquiry.

NSW Young Lawyers

2. NSW Young Lawyers is a division of The Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 15 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

The Human Rights Committee

3. The NSW Young Lawyers Human Rights Committee comprises a group of over 1,200 members interested in human rights law, drawn from lawyers working in academia, government, private and the NGO sectors and other areas of practice that intersect with human rights law, as well as barristers and law students. The objectives of the Human Rights Committee are to raise awareness about human rights issues and provide education to the legal profession and wider community about human rights and their application under both domestic and international law. Members of the Human Rights Committee share a commitment to effectively promoting and protecting human rights and to examining legal avenues for doing so. The Human Rights Committee takes a keen interest in providing comment and feedback on legal and policy issues that relate to human rights law and its development and support.

Summary of Recommendations

4. In summary, the Committee makes the following recommendations:
 - a) While people should be protected from religious discrimination, the Bill should not be passed in its current form.
 - b) The Committee recommends that religion should be a standalone protected attribute in the *Anti-Discrimination Act 1977 (NSW) (the Act)*.
 - c) The Committee recommends that religious vilification should be unlawful under the Act, in similar form to the protections against racial vilification in section 20C of the Act.

- d) The definition of “religious activities” in clause 22K should not extend to activities motivated by a religious belief. Additionally, “religious activities” should not include any activity that would constitute unlawful conduct under NSW or Commonwealth law, including conduct that is currently unlawful under the Act. Conduct that is already unlawful under the Act (such as vilification) should not be considered a protected activity.
- e) Sub-clauses 22N(3)-(5) should be removed. The committee supports protections against direct and indirect discrimination on the basis of religion, but does not support the extension of discrimination law to cover “protected activity” outside of work where such activity impinges upon the rights of others or causes detriment to the employer. The right to hold a religious belief should not be protected in employment beyond the level of protection afforded to other protected attributes under discrimination law.
- f) The proposed exception for religious ethos organisations in clause 22M should be removed. If there is to be an exception for religious ethos organisations it should be narrow and should allow for freedom of religion to be balanced against other rights. The definition of a “religious ethos organisation” should exclude faith-based health, welfare and care services, educational services, and exclude bodies engaging in commercial activities.
- g) The exemption in clause 22U from proposed religious discrimination obligations due to a genuine occupational qualification should be narrowed.

Freedom of religion under international human rights law

- 5. Australia has obligations under international law to prohibit discrimination on the ground of religion. For example, Australia is a party to the International Covenant on Civil and Political Rights (**ICCPR**).¹ Articles 2 and 26 of the ICCPR provide rights to equality and freedom from discrimination on the basis of religion. Article 18 of the ICCPR provides that everyone shall have the right to freedom of thought, conscience and religion. This right includes freedom to have or adopt a religion or belief, as well as the freedom to manifest one’s religion or belief in worship, observance, practice and teaching. While freedom of religion or belief is a non-derogable right, the freedom to manifest one’s religion may be subject to limits, where such limitations are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

¹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

NSW anti-discrimination law does not provide effective protection against discrimination on the ground of religion

6. Currently, the *Anti-Discrimination Act 1977* (NSW) does not make discrimination on the basis of religion unlawful.
7. Section 7 of the Act prohibits discrimination on the basis of race. Section 4 of the Act defines race to include “ethno-religious or national origin”. As such, people who are discriminated against on the basis of their ethno-religious origin may be able to make a claim for race discrimination under the Act. The concept of “ethno-religious origin” is broadly understood to require a clear association between a person’s nationality, ethnicity, or culture and his or her religious beliefs and practices,² but otherwise it is imprecisely defined³ and its lack of a clear ordinarily accepted meaning has not assisted the courts to construe its application.⁴ It falls significantly short of a protection against discrimination on the ground of religion. For example, in *Ekeremawi*, Muslim people were not considered to be an “ethno-religious group” and thus not protected against discrimination on the ground of being Muslim under the Act.⁵ This means that persons from recognised ethno-religious groups, such as from the Jewish or Sikh faith who have experienced religious vilification could bring a complaint of vilification under the racial vilification provisions of the Act (as race covers ethno-religious origin), while members of the Christian or Muslim faith which are not recognised as ethno-religious groups are unable to access this protection.

Recommendation b) The Committee recommends that religion should be a standalone protected attribute in the Act.

Recommendation c) The Committee recommends that religious vilification should be unlawful under the Act, in similar form to the protections against racial vilification in section 20C of the Act.

Current exceptions under the Act

8. Although the Act does not provide effective protection against discrimination on the ground of religion, it does provide exceptions from discrimination law for religious bodies. Section 56 of the Act provides that nothing in its provisions is to affect:
 - a. the ordination or appointment of priests, ministers of religion or members of any religious order;

² *Khan v Commissioner, Department of Corrective Services* [2002] NSWADT 131, [20].

³ *Jones and Harbour Radio Pty Ltd v Trad (No 2) (EOD)* [2011] NSWADTAP 62, [13].

⁴ *Ibid* [16].

⁵ *Ekeremawi v Nine Network Television Pty Ltd* [2010] NSWADT 145 (10 June 2010), [53].

- b. the training or education of persons seeking such ordination or appointment, as priests, ministers of religion or members of a religious order;
 - c. the appointment of any other person in any capacity by a body established to propagate religion; or
 - d. any other act or practice of a body established to propagate religion that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.⁶
9. The Committee recognises the need for religious exemptions in the areas of employment or education for religious bodies and for educational institutions established for religious purposes, such as where the inherent requirements of a position require adherence to the tenets of the religion. The existing exemptions under s 56(a)-(c) of the Act noted above should be maintained. However, the Committee has concerns over the wide exemption in s 56(d).

The definition of “religious activities” in the Bill

10. Clause 22K of the Bill introduces a definition for “religious activities”. The reference to “an activity motivated by a religious belief” in the definition of “religious activities” may encompass activities that are not religious in nature, at least beyond what is contemplated in international law. The term “motivated” is not defined in the Bill, but drawing on Article 18 of the ICCPR there are four general categories through which religious belief may manifest: worship, observance, teaching and practice. By defining “religious activities” to include acts beyond these categories, that is, acts motivated by religious belief, the Bill may unreasonably protect any activity for which a religious belief was a motivation, or even one of several motivating factors.
11. There is potential for inconsistency between proposed Part 2B of the Bill and other sections of the Act. In particular, proposed Part 2B may permit currently unlawful conduct where a “religious activity” constitutes discrimination but is protected. For example, “homosexual vilification” is unlawful under section 49ZT of the Act, but it is not an offence punishable by imprisonment if it falls short of inciting violence under s 93Z of the *Crimes Act 1900* (NSW). The proposed definition of “religious activity” would result in an anomalous consequence where an activity that is unlawful (though not punishable by imprisonment), or contravenes other sections of the Act would be a “protected activity” under clauses 22N(4), 22S(3) and 22V(4) of the Bill. The exclusion of all unlawful acts, even where those acts are not punishable by imprisonment, is therefore necessary in defining “religious activity” in clause 22K.

⁶ *Anti-Discrimination Act 1977* (NSW) s 56.

Recommendation d) The definition of “religious activities” in clause 22K should not extend to activities motivated by a religious belief. Additionally, “religious activities” should not include any activity that would constitute unlawful conduct under NSW or Commonwealth law, including conduct that is currently unlawful under the Act. Conduct that is already unlawful under the Act (such as vilification) should not be considered a protected activity.

The definition of “religious beliefs” in the Bill

12. Clause 22K of the Bill introduces a definition for “religious beliefs”. The definition provides that “not having any religious conviction, belief, opinion or affiliation” is covered. The Committee supports the inclusion in this definition of not having any religious belief.
13. We note that the United Nations Human Rights Committee has interpreted Article 18 of the ICCPR broadly to cover:

“protect[ing] theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms ‘belief’ and ‘religion’ are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions.”⁷

Protected activity in the area of employment

14. In the context of religious discrimination and employees, our Committee raises an issue with sub-clauses (3), (4), and (5) of clause 22N. Under the Bill, an employee, notwithstanding any detriment brought to an employer’s business, is protected from adverse action by an employer if that employee engaged in a “protected activity”. Under these provisions, an employee may be permitted to behave in a manner inconsistent with their employer’s interest.
15. The introduction of protections for a “protected activity” may elevate freedom of religion beyond the level of protection in employment afforded to other protected attributes under discrimination law, such as sex or race. Currently, the Act renders direct and indirect discrimination on the basis of various protected attributes in employment unlawful. These clauses extend discrimination law to protect employees who engage in “protected activity” outside the workplace, where this activity may cause harm to other employees of the organisation, or the employer’s business.
16. Whilst our Committee recognises the benefit of protecting employees from adverse action by employers in relation to the employee having a religious belief or practicing a genuine religious activity, the operation of clause 22N goes beyond this and does not strike the correct balance.

⁷ United Nations Human Rights Committee, *General Comment 22: The Right to Freedom of Thought, Conscience and Religion (Art 18)*, [5], UN Doc CCPR/C/21/Rev.1/Add.4 (1993) (‘General Comment 22’) at [2].

17. For example, if an employee acted in a way outside of work hours which was offensive or discriminatory against others on the basis of their sex, and harmed the commercial or financial interests of their employer (such as by damaging the reputation of the employer if the employee's association is identified), the employer might have a legitimate interest in directing the employee to cease such conduct. We submit that employers should retain the ability to take appropriate steps to protect co-workers from discriminatory behaviour by an offending employee. The effect of sub-clauses (3), (4) and (5) of clause 22N combined with the wide definition of "religious activities" is that, if the employee can demonstrate a religious nexus to the behaviour, the employer will generally be unable to take appropriate action because the behaviour is a "protected activity".
18. Our Committee is also concerned with the reference to "direct and material financial detriment" in clauses 22N(4)(a)(ii), 22S(3)(a)(ii) and 22V(4)(a)(ii) of the Bill. The use of this phrase could potentially limit the ability of employers, qualifying bodies and educational authorities from taking the necessary action in circumstances where religious activities cause non-financial detriment to that employer, qualifying body or educational authority. For example, it may be appropriate for a qualifying body to place reasonable and proportionate restrictions on the right of a person subject to professional codes and regulations, to manifest his or her beliefs, if that manifestation interfered with the human rights of others.⁸ The current drafting would hinder the qualifying body's ability to take relevant disciplinary action if it cannot demonstrate that the person has caused "direct and material financial detriment" to that qualifying body. This is likely to have a negative impact on the ability of qualifying bodies to undertake appropriate regulation of their professions.

Recommendation e) Sub-clauses 22N(3)-(5) should be removed. The committee supports protections against direct and indirect discrimination on the basis of religion, but does not support the extension of discrimination law to cover "protected activity" outside of work where such activity impinges upon the rights of others or causes detriment to the employer. The right to hold a religious belief should not be protected in employment beyond the level of protection afforded to other protected attributes under discrimination law.

⁸ *Ngole v University of Sheffield* [2019] EWCA Civ 1127, [5](4).

Presumed and imputed discrimination

19. The Committee supports sub-clause 22L(3) which protects against discrimination on the basis of imputed religion.
20. The Committee notes clause 22KB in the Bill which addresses the issue of discrimination based on presumed religious belief or activity, including past and future presumed religious belief or activity. In relation to future religious activity, the Committee notes there may be ambiguity in assessing a religious belief that “a person will hold in the future or that it is thought a person will hold in the future”, or in a religious activity that “that a person will engage in in the future, or that it is thought a person will engage in in the future... or it is thought a person will not engage in or refuse to engage in in the future”. This ambiguity in the wide scope of the definition may affect the Bill’s operation. However, the Committee also acknowledges the benefit of protecting a person against discrimination for their presumed past or future religious belief or activity.

Religious ethos organisations

21. The broadness of the definition of “religious ethos organisations” in proposed clause 22K of the Bill is deeply concerning. The current drafting fails to establish the extent to which religion must be part of the conduct of an organisation in order for it to be considered as a “religious ethos organisation”. In its current form, this definition encompasses an excessively broad spectrum of organisations, from registered places of worship, to faith-based welfare service providers, and to faith-based restaurants, bakeries and butchers.
22. Additionally, our Committee is concerned that the exception for religious ethos organisations in clause 22M does not strike an appropriate balance between freedom of religion and freedom from discrimination, as it automatically privileges freedom of religion for religious ethos organisations over others’ rights to not be discriminated against.
23. While the Explanatory Note of the Bill contends that clause 22M is in line with international practice,⁹ our Committee submits otherwise. Clause 22M operates on a subjective test of whether the religious ethos organisation “genuinely believes” that the conduct is required because of the religious susceptibilities of the adherents of the religion, or is consistent with or aiding in compliance with the organisation’s affiliated religion. Conversely, General Comment 18 of the United Nations Human Rights Committee provides that differentiation of treatment may be acceptable if the criteria for such

⁹ *Anti-Discrimination Amendments (Religious Freedoms and Equality) Bill 2020 (NSW) Explanatory Note*, 3.

differentiation are reasonable and objective.¹⁰ The drafters recognised the importance of objectivity when they quoted the following section of General Comment 18 at page 3 of the Explanatory Note of the Bill:

“Not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate.”

24. Clause 22M fails to include any notion of reasonableness, necessity or proportionality. This could result in freedom of religion being unjustly privileged above other fundamental rights and freedoms, including the rights to equality¹¹ and non-discrimination.¹²
25. Our Committee’s concerns with the definition and exceptions afforded to religious ethos organisations under the Bill are highlighted in the context of medical service providers. Under Article 12 of the International Covenant on Economic, Social and Cultural Rights (**ICESCR**)¹³, to which Australia is a party, everyone has the right to the enjoyment of the highest attainable standard of physical and mental health.¹⁴
26. It is likely that the definition of “religious ethos organisations” in clause 22K would include faith-based hospitals and medical centres. Under clause 22M, a faith-based hospital or medical centre would be permitted to discriminate against diverse groups of people in a broad range of circumstances. Although the faith-based hospital or medical centre must genuinely believe that their conduct is consistent with, necessary for, or relevant to the doctrines, tenets, beliefs or teachings of their affiliated religion, this is unsatisfactory.
27. Clause 22M could restrict access to healthcare for the LGBTI community,¹⁵ women,¹⁶ including single mothers and pregnant women, and people with disability.¹⁷ In particular, the availability of

¹⁰ Human Rights Committee, *General Comment No. 18: Non-discrimination*, 37th session, 10 November 1989, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 146 (2003).

¹¹ *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 2.

¹² *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 26.

¹³ *International Convention on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 12.

¹⁴ *International Convention on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 12.

¹⁵ Judith Ireland, “This will drive people back into the closet”: LGBTIQ warning on religious discrimination bill”, Sydney Morning Herald (online, 10 September 2019) < <https://www.smh.com.au/politics/federal/this-will-drive-people-back-into-the-closet-lgbtqi-warning-on-religious-discrimination-bill-20190910-p52ppz.html>>.

¹⁶ Amy Remeikis, ‘Religious discrimination bill would create barriers to women’s healthcare, advocates warn’, The Guardian (online, 10 October 2019) < <https://www.theguardian.com/australia-news/2019/oct/10/religious-discrimination-bill-would-create-barriers-to-womens-healthcare-advocates-warn>>; Quincy Nguyen, ‘Four ways the Religious Discrimination Bill impacts on women’s reproductive rights’ (News, Australian Human Rights Institute, 13 April 2020) < <https://www.humanrights.unsw.edu.au/news/four-ways-religious-discrimination-bill-impacts-womens-reproductive-rights>>.

¹⁷ Equality Australia, ‘Religious Discrimination Bill 2019 – In Focus: Disability, Mental Health and Wellness’ (Factsheet, 14 January 2020) < <https://equalityaustralia.org.au/resources/disability-factsheet/>>.

reproductive health services such as abortion and contraception may be limited by faith-based medical services. This may be compounded in rural areas where non-faith based medical services may not be easily accessible. Clause 22M should not be allowed as a pathway to enable discrimination.

28. Many faith-based organisations receive public funding to perform essential services in areas including education, aged care, employment and adoption. Clause 22M would permit religious ethos organisations to discriminate against current and prospective employees and individuals accessing or attempting to access these services. These religious exemptions contain no provision for analysis of the reasonableness or proportionality of this exception, leading to a situation where the freedom to manifest one's religion is automatically privileged above others' fundamental rights, including health, equality and freedom from discrimination.
29. In addition to medical service providers, the combined operation of the definitions in clause 22K and the operation of clause 22M may result in entities engaged primarily or solely in commercial activities being permitted to discriminate in the provision of goods and services. When combined, the protection from discrimination in the provision of goods and services, at clause 22W, is effectively removed. In our view, allowing businesses, even if they are faith-based, to discriminate in the provision of goods and services is not necessary for the full and free enjoyment of religious freedom.

Recommendation f) The proposed exception for religious ethos organisation in clause 22M should be removed as it is extremely broad. If there is to be an exception for religious ethos organisations it should be narrow, and should allow for freedom of religion to be balanced against other rights. The definition of a "religious ethos organisation" should exclude faith-based health, welfare and care services, educational services, and exclude bodies engaging in commercial activities.

Genuine occupational qualification exception

30. Clause 22U of the Bill exempts discriminatory conduct in respect of any work or employment if it was made within any one or more of four broadly described circumstances, three of which provide reasons of "authenticity, cultural sensitivity or other religious, ethical or moral requirements" as being acceptable exceptions.
31. For example, clause 22U of the Bill could enable religious organisations to specify personally holding a particular religious belief as an essential criteria for employment with them. Our Committee acknowledges that in certain circumstances, such as those contained in section 56(a)-(c) of the Act, religious exceptions are necessary in the areas of employment or education for religious bodies and for educational institutions established for religious purposes.
32. However, Clause 22U goes far beyond these exceptions. Whilst our Committee accepts there should be exemptions for religious training, the appointment or ordination of ministers of religion and

the selection or appointment of persons to perform religious rituals (including but not limited to chaplains), where reasonable in the circumstances and in good faith, the provision of religious exemptions in other areas where a religious connection to the occupation is less apparent, such as in the provision of goods and services, employment, or provision of welfare or care services, would be inappropriate.

Recommendation g) The exemption in clause 22U from proposed religious discrimination obligations due to a genuine occupational qualification should be narrowed.

Non application of provisions to religious ethos organisations and bodies established to propagate religion

33. We observe that sub-clauses 22N(9), 22S(5) and 22V(6) may contain clause referencing errors, as instead of applying to operative provisions, they apply to what might be called explanatory provisions. We also note that section 56 of the Act defines various activities that are not affected by the Act, and so it is not proper for sub-clauses 22N(9)(b), 22S(5)(b) and 22V(6)(b) to refer to “a body established ... under section 56”.
34. The Committee has outlined its concerns and recommendations regarding the exceptions proposed to be provided to religious ethos organisations above in this submission. If further exemptions are intended for religious ethos organisations in sub-clauses 22N(9)(a), 22S(5)(a) and 22V(6)(a), these further exceptions should be removed.

Human Rights Act for NSW

35. In the current bill, broad religious exemptions, as discussed above, preclude the balancing of rights in a principled way, which in some circumstances, may lead to one right being privileged disproportionately above another right.
36. A Human Rights Act for NSW would allow for the balancing of competing rights in a principled way. While the freedom to hold religious beliefs cannot be limited and is a non-derogable right, the freedom to manifest those religious beliefs may be subject to limits, where such limitations are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.¹⁸ The Committee observes that the most appropriate method of balancing the rights would be with a Human Rights Act for NSW. A submission by the Human Rights for NSW Alliance stated that “a Human Rights Act for NSW should provide guidance

¹⁸ *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18.

that when approaching balancing competing rights, the requirements of necessity and proportionality must be considered on a case by case basis.” This submission also analysed how existing “Australian Human Rights Acts also give guidance on the specific factors which need to be considered to determine if the limit of a human right is reasonable, being:

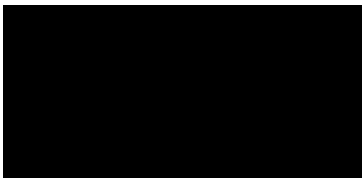
- The nature of the affected right;
- The purpose, nature and extent of the limitation;
- The relationship between the limitation and its purpose; and
- If there are any reasonable less restrictive means that would achieve the same purpose as the limitation.

A Human Rights Act for NSW should give similar guidance on how to balance rights and when limitations are reasonable.”¹⁹

Concluding Comments

37. The Committee submits that the while people should be protected from religious discrimination, the Bill should not be passed in its current form.
38. NSW Young Lawyers and the Human Rights Committee thank you for the opportunity to make this submission. If you have any queries or require further submissions, please contact the undersigned at your convenience.

Contact:



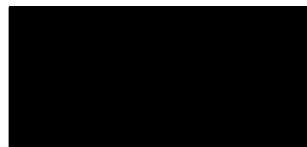
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¹⁹ Human Rights for NSW Alliance, ‘Submission to the Australian Human Rights Commission’s Free and Equal: An Australian Conversation on Human Rights Project’ (2019) <<http://static1.squarespace.com/static/58b61d71e4fcb5aa5a044522/t/5dd355948ca6f6715d3112d1/1574131116357/HR4SWNCF.pdf>>, 33, 34.