Submission No 119

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

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Secretariat
Joint Select Committee on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020
By Email: ReligiousFreedomsBill@parliament.nsw.gov.au

Dear Secretariat,

Freedom of Religion is Central to the Australian Way of Life

The Institute of Public Affairs ("the IPA") welcomes the Hon. Mark Latham MLC's landmark contribution to protecting freedom of religion in Australia.

Freedom of religion is an integral right and core mainstream Australian value. Every individual holds beliefs which inform their conscience, motivate their actions, and form their sense of individual identity. The freedom to hold, express, and act on religious belief is an inalienable requirement of the dignity of all humans.

Freedom of religion has also enriched Australian society as many of those that provide indispensable charity and material welfare to those that require it do so as a manifestation of their beliefs. Perhaps even more valuable are the non-material goods that flow from the protection of religious freedom such as ethics, meaning, and wisdom. Australian culture has typically been tolerant of religious difference out of an understanding that beliefs are important both to the individual that holds them, but also to society at large.

As Mr Latham astutely noted in the second reading of the *Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020* (the "Bill") introduced by Mr Latham into the New South Wales parliament:

> "We are a stronger society and a stronger community for respecting those [religious] beliefs and also acknowledging the incredible voluntary contribution of churches and temples in New South Wales in caring for the poor, the sick, the disabled and the needy over a long period. The origins of the Australian welfare State lie in the mutual help and care by religious associations. Religious rights are not a fringe issue. They are at the heart of our society's origins and values."

The toleration of religious difference and religious belief that was once unquestionably at the heart of the Australian way of life has, however, been threatened with a culture of censorship and growing intolerance. The aggressive secularisation of major governmental, civic, and economic institutions such as the media, universities, and corporate Australia has put pressure on Australians of faith to be silent and keep their beliefs out of the public square. The case of Israel Folau, who was dismissed by Rugby Australia, a professional sports administration body, in response to social media posts expressing traditional Biblical views, is perhaps the

well-known and highest profile instance of such censorship. This censorial and intolerant culture is at odds with mainstream Australian values and it patronises the Australian public by presuming it cannot tolerate differing (and even offensive) views.

The Bill introduced by Mr Latham is a significant improvement on the Commonwealth's proposed *Religious Discrimination Bill 2019 (Cth)* (the "Federal Bill"). In particular the Bill adopts the 'sincerity test' to determine what a religious belief is.[1] This reduces the scope for courts to determine whether something is a religious belief or activity or not by requiring the court to only consider whether the person genuinely believes they hold the belief.

Section 22Z is also improvement on the Federal Bill. Section 22Z is intended to make it unlawful for a government agency or statutory authority to discriminate against a person because of their religious beliefs or religious activities. This includes in employment, trade accreditation, grants and other funding programmes, and government contracts. There is no equivalent provision in the Federal Bill.

However, attempting to protect religious freedom through the use of anti-discrimination laws risks being counter-productive and subject to unintended consequences. It is often the case that anti-discrimination laws are used as a weapon by offended parties to settle their grievances in the court system.

This is what happened in 2019 when the New South Wales Civil and Administrative Tribunal heard a dispute between Ms Passas and Mr Comensoli. The dispute involved an altercation where Ms Passas asserted that the rainbow flag offended her religion whereas the Mr Comensoli was offended by her remarks regarding same sex marriage. The Tribunal found that Ms Passas must apologise to Mr Comensoli for engaging in vilification under the *Anti-Discrimination Act 1977*. Neither party in this case should be able to use the law to censor the other. Quarrels such as this should not be adjudicated by courts or tribunals, nor should one side of this dispute have a legal right to not be offended whilst the other does not.

In this way, anti-discrimination laws can become an instrument to propagate and embed a culture of censorship.

IPA research and analysis has identified three recommendations that could further improve the effectiveness of the provisions in the Bill in protecting freedom of religion.

1) The Bill should not conflate religious freedom, which as a natural, pre-political right, with a government granted legal action against discrimination.
2) Section 22M should be amended so that the burden of proof lies with a potential plaintiff in order to reduce the prospect of vexatious claims.
3) The wording that could require courts to interpret theological doctrine should be amended to reduce the role of the courts in defining what a religious belief means.

The IPA has an extensive body of research in regard to religious freedom, particularly as it relates to anti-discrimination law, which is is available on the IPA website. I have also enclosed for the Joint Committee's consideration the IPA's December 2019 letter to

[1] See Neil Foster, 'Submission of the Second Exposure Draft Religious Discrimination Bill', *Law and Religion Australia*, (pdf, accessed 20 August 2020) <https://lawandreligionaustralia.files.wordpress.com/2020/01/foster-submission-on-second-exposure-draft-religious-discrimination-bill.pdf>.

Commonwealth Attorney-General Christian Porter regarding the first exposure draft of the Religious Discrimination Bill, and the IPA's April 2018 submission to the Religious Freedom Review Expert Panel (known as the Ruddock Review).

The Bill should not conflate religious freedom, a natural right, with a government granted legal action against discrimination

Freedom of religion is a natural right in that it pre-exists government. No Act of Parliament is necessary to create the ability for a person to think, speak, or associate with others. The right to do these things bundled together and exercised for a religious purpose constitute freedom of religion and exist in the absence of government action rather than granted by legislation.

Anti-discrimination law on the other hand does not create a human right so much as an entitlement to legal action. They operate by granting to a member of a prescribed identity group a right of action against another person while carving out exemptions for some but not others. As IPA Director of Research Daniel Wild noted in *The Australian* on 15 October 2019 with respect to Section 18C of the *Racial Discrimination Act 1975*, the effect of these kinds of laws is to take away a natural right or freedom and then give it back in in a limited form as defined in legislation:

> [For example] Section 18C reframes freedom of speech from a natural right, which all Australians possess as citizens of a free nation, to a positive right bestowed by government in certain circumstances. That is, Section 18C takes away freedom, and Section 18D gives it back in a qualified, truncated and demented fashion that depends on the good grace of government and the Australian Human Rights Commission.

It is understandable why defenders of religious freedom have argued that Australians of faith should be protected by anti-discrimination laws. Currently in New South Wales, special rights are granted to those who possess some "protected" attributes, such as race or gender, but have not been extended to people of religion. However, passing additional anti-discrimination laws in order to protect religious freedom risks being counter-productive. Creating a legal action for religious people against discrimination may not address the legal threat to religious freedom that is currently expressed in legislation.

Defining religious freedom as the absence of being discriminated against defines it too narrowly. Freedom of religion must mean the right to express and manifest all beliefs, and should not be circumscribed by subjective emotional responses such as regarding offense. Anti-discrimination laws are limitations on these freedoms so are conceptually incompatible with freedom of religion. Because of this any amendments to the *Anti-Discrimination Act 1977* (NSW) to restore freedom of religion should repeal the provisions which impede freedom of speech, freedom of conscience and the freedom of religious organisations and New South Welshman to associate with others as a part of a religious community.

Amend Section 22M so that the burden of proof lies with a potential plaintiff in order to reduce the likelihood of vexatious claims

Section 22M provides that a "religious ethos organisation" (REO) is taken not to discriminate if the organisation "genuinely believes" its actions are "consistent with the doctrine, tenets, beliefs or teachings of the religion of the organisation." However the present drafting

provides that a REO responding to a discrimination complaint bears the burden of proving that it is a REO. Specifically, section 22M(1) states that:

> Religious ethos organisation is taken not to discriminate against another person on the ground of the person's religious beliefs or religious activities by engaging in conduct if the organisation genuinely believes the conduct—
> (a) is consistent with the doctrines, tenets, beliefs or teachings of the religion of the organisation, or
> (b) is required because of the religious susceptibilities of the adherents of the religion of the organisation, or
> (c) furthers or aids the organisation in acting in accordance with the doctrines, tenets, beliefs or teachings of the religion of the organisation.

The effect of this drafting is described in the Explanatory Note accompanying the legislation, which provides that "The onus is on the organisation to prove its REO status."

According to the ordinary principles of statutory interpretation the burden to prove an exception to discrimination will rest on the defendant unless expressly stated otherwise.[2] Placing the burden on a party bringing an action to the courts to prove the elements of its complaint is a legal tradition that dates back at least as far as the Roman Empire and is at the heart of the rule of law and a just legal system. It is also a barrier to frivolous and vexatious litigation if a plaintiff can not rely on presumptions in its favour.

In order to limit the potential for vexatious claims to be lodged, the section should be rephrased so that the burden of proof lies with plaintiff. Specifically, Section 22M should replace the words "if the organisation genuinely believes" with "unless the organisation does not genuinely believe."

The wording that could require courts to interpret theological doctrine should be amended to reduce the role of the courts in defining what a religious belief means.

Section 22M is designed to protect freedom of association by ensuring religious organisations can conduct their activities in accordance with their religious ethos. Section 22M(1) provides that an REO is taken not to discriminate if it "genuinely believes" its actions are "consistent with the doctrine, tenets, beliefs or teachings of the religion of the organisation."

This is an improvement on the Federal Bill as well as provisions in current state anti-discrimination law. The reference to "genuinely believes" invites a less subjective consideration of the activity than would be required under the Federal Bill, which defined a statement of faith as an expression or belief which may be "reasonably regarded" as being in accordance with the doctrines, tenets, beliefs teachings of the religion.

Nonetheless the reference to doctrine, tenets, beliefs or teachings of a religion in legislation can be a dangerous blurring of the separation of church and state. References to religious doctrine in legislation would prove difficult to interpret in a court without reference to theology and other questions of faith. The IPA's 2018 submission to the Ruddock Review that provisions which use similar language can confer on the courts "the inappropriate role of

[2] CR Williams, 'Burdens and Standards in Civil Litigation' (2003) 25(2) *Sydney Law Review* 165.

defining religion and determining which religious practices or beliefs are legitimate. This is an inevitable consequence of the secular law intruding into the religious sphere"

In order to minimise further the opportunity for a court to make inappropriate determinations about religious doctrine, a subsection should be added between section 22M(1) and 22M(2) to clarify that an organisation can be a religious ethos organisation if it meets objective criteria such as through registration with the Australian Charities and Not-for-profit Commission or similar legal status under state association laws:

> "(1A) Religious ethos organisation is taken not to discriminate against another person on the ground of the person's religious beliefs or religious activities by engaging in conduct if the organisation is a religious body that is registered or could be registered as a religious purpose charity with the ACNC."

The IPA thanks the Joint Committee for the opportunity to submit our research findings on this important topic and look forward to participating in any future discussions.

Yours sincerely,

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