

**Submission
No 122**

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

Organisation: New South Wales Council for Civil Liberties (NSWCCL)

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New South Wales
Council for Civil Liberties

NSW COUNCIL FOR CIVIL LIBERTIES

submission to the

**Joint Select Committee Inquiry into
the Anti-Discrimination
Amendment Bill 2020**

22 August 2020

About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

NSWCCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

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Inquiry into the Anti-Discrimination Amendment Bill 2020

1 INTRODUCTORY COMMENTS

The NSW Council for Civil Liberties [NSWCCL] considers it is very important to respond in some detail to this Joint Select Committee's inquiry into the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 [the Bill].

The issues encompassed by this Bill – religious freedoms and protection from discrimination on the grounds of religion - are of great significance in a democracy such as ours. They are also extremely complex and potentially deeply contentious issues. Legislation on human rights must always be carefully considered and balanced, and this is especially so in relation to religious rights and protections. If all rights are not considered in a fair and balanced way the outcome is likely to be discriminatory and harmful to some groups and individuals and to over-privilege the rights of others.

i) Religious freedom and protection from discrimination on religious grounds

NSWCCL supports the right to religious freedom and considers this should be embodied in both an Australian Charter of Human Rights and a NSW Charter of Human Rights. We have for many years argued for the former and are currently active in advocating for NSW to follow in the footsteps of the Australian Capital Territory, Victoria and Queensland and implement a NSW Charter - which would encompass the right to freedom of religion.

NSWCCL also supports anti-discrimination laws to protect against discrimination on the grounds of religion with the caveat that such protections are carefully and fairly balanced with other rights and protections.

Currently the NSW Crimes Act provides protection against public incitement to violence on specified grounds - including religion – and section 7 of the NSW Anti-Discrimination Act provides limited protection against discrimination for religious groups identified with particular racial groupings under its racial discrimination provisions¹.

NSWCCL is of the view that protections against religious discrimination in NSW should be strengthened consistent with existing NSW anti-discrimination law - and we therefore support the Bill's statement of purpose:

*A Bill for: An Act to amend the Anti-Discrimination Act 1977 to make discrimination on the ground of a person's religious beliefs or activities unlawful;*²

And we support Mr Latham's second reading articulation of the purpose of his Bill:

¹ Crimes Act 1900, S93Z; Anti-Discrimination Act 1977, S7(2).

² Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020, p1.(There is a lengthy outline of the Object of the Bill in the [Explanatory Note](#).)

“The purpose of the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill can be stated in a single sentence: To extend protections against discrimination beyond existing categories of citizenship and identity in New South Wales to people of religious faith and non-faith.”³

NSWCCL would welcome a Bill which included provisions to achieve this outcome in a balanced fashion and which provided reasonable protection against religious discrimination while respecting reasonable protections against other forms of unlawful discrimination.

Mr Latham asserts a similar motivation:

The word “equality” is included in the title to reflect the equal standing to be given to matters of faith and spirituality in the coverage of the State’s anti-discrimination laws⁴.

ii) NSWCCL opposition to this Bill

Notwithstanding this assuring statement reference to ‘equal standing’, key provisions in this Bill fail to achieve this balance across all human rights and deviate from the existing national and state anti-discrimination legal frameworks in disturbing and, at times, seemingly provocative, ways.

In its totality this Bill over-privileges religious rights with the effect of seriously undermining other rights in ways which carry the potential for considerable harm to individuals and groups - as well as exacerbating, rather than diminishing, the potential for community dissension and conflict. This is particularly so in relation to its impact on GLBTIQ+ rights.

NSWCCL opposes this Bill and in this submission argues why it should not be progressed by Parliament.

iii) The origins of this Bill

Mr Latham offers a lengthy account of his motivations in bringing this Bill forward in his second reading speech.

He repeatedly emphasises the need for protection against religious discrimination to be legislated in NSW. We agree - and are not aware of any current, widespread opposition to this⁵. The live issues in NSW, and at the Commonwealth level, relate to timing, process and getting the balance right in relation to other, and sometimes competing, rights. And, possibly most importantly, managing the politics within and outside parliaments.

There is however a widely held concern, that, if not fairly balanced, a religious discrimination bill will wind back hard-won protections under other discrimination laws - with very harmful consequences for relevant groups - and especially in relation to the GLBTQI community.

³ Latham Second Reading Speech; [NSW Hansard](#) 13th May 2020, p41

⁴ *ibid*

⁵ There are numbers of persons with expertise in the area who are also supporters of a strong human rights framework and other anti-discrimination laws – who do not think there is a need for a religious discrimination bill. Some also think it will be inevitably a retrograde step. Examples...

NSWCCL shares this general concern. The second draft of the Commonwealth Religious Discrimination Bill 2019 and this NSW Bill have understandably exacerbated these concerns.

iv) Optimal timing

Mr Latham argues this Bill is urgent. We don't particularly disagree with this. The NSW Parliament has been lagging in adopting a Human Rights Charter and in responding to the Ruddock Report recommendations on Religious Discrimination legislation. But we do think it is more appropriate and sensible to align any amendments on this issue with the national discussion that will occur when the Commonwealth Religious Discrimination Bill 2019 surfaces again.

Mr Latham rejects this and argues that as the Commonwealth Bill will not displace any state anti-discrimination provisions⁶ there is no need for NSW to await its appearance. This misses the point. The benefit of waiting arises from the opportunity to identify and address any significant divergences between provisions with the intention of achieving nationally consistent legislation on such an important and sensitive issue - in so far as is possible.

It would also make very good sense to await the directly relevant findings and recommendations of the *Australian Law Reform Commission's report on The Framework of Religious Exemptions in Anti-Discrimination Legislation*.

Its updated terms of reference specifically flag: *'the anticipated effect of .. [the Commonwealth Religious Discrimination Bill 2019] on the operation of Commonwealth, State and Territory anti-discrimination legislation'* and *'the interaction between Commonwealth, State and Territory anti-discrimination laws and the desirability of national consistency in religious exceptions in those laws.'*⁷

Furthermore, the ALRC is specifically directed to inquire into what reforms to relevant anti-discrimination laws and the Fair Work Act 2009 (Cth) should be made to:

*'limit or remove altogether (if practicable) religious exemptions to prohibitions on discrimination, while also guaranteeing the right of religious institutions to reasonably conduct their affairs in a way consistent with their religious ethos;'*⁸

The ALRC's reporting date is the 12th December 2020. It would be gratuitously counter-productive to introduce a NSW Bill Religious Discrimination Act before considering this directly relevant national report.

v) A war against Christianity

Mr Latham's argument for the need and urgency of this Bill relies on some dubious claims:

⁶He bases this on an assurance from the Federal Attorney General. In fact a note to s62(1) of the Commonwealth Bill which specifies the Bill's *Relationship with State and Territory Laws*, exempts Part 4 of the Bill, which is one of its most controversial provisions: *Statements of Belief do not constitute discrimination etc...* s42(1) and which would impinge on the current Tasmanian anti-discrimination law and potentially this NSW Bill

⁷ *Australian Law Reform Commission's Inquiry on The Framework of Religious Exemptions in Anti-Discrimination Legislation*. [Terms of reference amended March 2020](#).

⁸ Ibid

Yet now the fastest growing form of discrimination in our society is against people of religious faith, especially Christians. We have all seen the high-profile cases of Israel Folau and Margaret Court, outstanding Australians treated like second-class citizens because they take a literal interpretation of the Bible⁹

There is a long history of religious discrimination in Australia against minority religions notably Judaism and, particularly since 9/11, Islam.¹⁰ The claim that the fastest growing form of discrimination is on the grounds of religion seems dubious, but to assert that this discrimination is 'especially' directed at Christians is astonishing. Clearly the brunt of serious discrimination and intimidation on religious grounds in recent times has been experienced by Muslims.

To single out Israel Folau and Margaret Court as examples of attacks on Christianity or religion per se would seem to be a misleading interpretation and possibly a cynical use of high profile and widely publicized controversies to garner support for this Bill.

In the Folau case the debate was to a large extent between Christians with different perspectives and beliefs. It cannot be characterised as an attack on religion or on Christianity as such. Similarly, the opposition to the public honouring of Margaret Court no doubt included many Christians. In both cases, people who took stands against each of these high-profile individuals are likely to have done so because they perceived them as propagating hateful, and certainly harmful views, about others on the grounds of their sexuality.

These two examples are better understood for their graphic illustration of the complexity, sensitivity and potential for divisive controversy that can emerge from competing rights – especially where they involve religion and sexuality. These examples should act as a caution against the drafting of religious (or other) discrimination laws without considered and informed assessment of their interactions with other rights and implications for other groups and individuals.¹¹

While Mr Latham does from time to time assert that all religious groups must be protected equally, his rhetoric is focussed on allegations of publicly authorised, widespread attacks on Christianity. The following is one example of an exaggerated and rather bizarre characterisation of a systemic anti-Christian culture across the NSW public service - which then elides without explanation into discrimination against heterosexuals:

I know of Christians working for the New South Wales Government who say they are scared to admit to their Christianity in the workplace, who feel there is an official policy of inclusion for every letter of the alphabet except C and H. Under this Government, selective diversity policies have been introduced in the public service to ensure certain groups are included. Every letter of the alphabet seemingly has a flag, a network, a special ceremony to affirm

⁹ Latham Second Reading Speech; [NSW Hansard](#) 13th May 2020 p41

¹⁰ Mark Latham acknowledges this elsewhere in the speech. Ibid. p43

¹¹ One Nation did [distribute an exhibition draft of this Bill in September 2019](#) calling for comment. Mr Latham says there were submissions - but they are not publicly available. A roundtable was held in October. NSWCCCL was not aware this distribution. We presume that this consultation may not have involved many individuals or groups with a direct interest in competing rights.

and celebrate its identity, except the letters C and H: Christians and heterosexuals. It is a perverse policy of so-called inclusion to exclude other groups but this is the new State-sponsored practice in New South Wales. It is a sad, ill-conceived soulmate to other forms of religious discrimination¹².

It is difficult to understand this characterisation of discrimination or the insistence that Christianity is under systemic attack in NSW when the reality of widespread, deeply harmful discrimination against so many others – eg. indigenous Australians, people of middle eastern and Muslim background, and transsexual or transgender persons - is so visible and incontestable in multiple contexts.

The unheralded reference to ‘heterosexuals’ in this paragraph does provide some indication of his target – the GLBTQI communities.

There are other similar kinds of statements, such as the following giving credence to an extreme view of a war against western civilisation, religion and Christianity:

Like me and others in this place, they resent the way in which activists are trying to undermine Western civilisation by undermining religion, by de-legitimising Christianity. Step by step, this campaign is trying to redefine the Bible as hate speech¹³.

It is difficult not to conclude that this line of argument is intentionally inflammatory. While there are parts of the speech which make reasonable points, the dominant message is angry and divisive. This is the worst possible perspective from which to approach this important, complex and potentially controversial legislation.

The NSW community deserves a more constructive approach. The drafting of a religious anti-discrimination bill for NSW would be more likely to achieve reasonable consensus and balance if it were to emerge from a more constructive and less angry context.

Recommendation 1

NSWCCL recommends the Committee or, failing that, the NSW Parliament, rejects the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020

Recommendation 2

NSWCCL recommends that:

- i) the NSW Parliament establishes a broadly consultative process to develop a balanced NSW Anti - Discrimination Bill to make discrimination on the ground of a person’s religious beliefs or activities unlawful;
- ii) the Bill be developed within an Australia-wide framework to gain maximum consistency of anti-discrimination provisions across states/territories and Commonwealth legislation and balanced consideration of all rights and impacts on persons and groups of exceptions/ exemptions provisions

¹² Latham Second Reading Speech; [NSW Hansard](#) 13th May 2020 p42

¹³ Ibid

- iii) this process should consider the findings and recommendations of the highly relevant Australian Law Reform Commission Report on The Framework of Religious Exemptions in Anti - Discrimination Legislation which is to report in December 2020;
- iv) strong consideration be given to extending this process to incorporate a review and update of all aspects of NSW anti- discrimination laws
- v) Ideally the national framework should include both an Australian and NSW charter of Human Rights.

2 DETAILED COMMENTS ON NSWCCCL CONCERNS

Our considered and strongly held position is set out in Recommendations 1 and 2.

The following comments outline our major concerns underpinning those recommendations. We make further recommendations to address particular issues in the Bill for pragmatic reasons, but our view is that the most constructive way forward for NSW, is to abandon this Bill and address the important and complex issue of religious discrimination in a broader and more constructive context such as we have proposed.

i) Principles

The Bill inserts a set of Principles into the Anti-Discrimination Act.

These principles require that those carrying out functions and making determinations under the Anti-Discrimination Act *shall have fundamental regard to*: a) the International Covenant on Civil and Political Rights; b) the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief; c) the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights.¹⁴

It is also specified that to the extent it is possible to do so consistently with their purpose, all provisions of this Act must be interpreted in a way that is compatible with these three international instruments¹⁵.

Given these clear directions, NSWCCCL shares the concerns of others that the Bill fails to reference other important and relevant international instruments¹⁶ which would provide a less restricted perspective for valid interpretations of the NSW AD Act when carrying out its functions and making determinations. By comparison The Commonwealth Religious Discrimination Bill lists six international instruments as providing constitutional basis for its provisions.¹⁷

¹⁴ The Bill clause 3.

¹⁵ Ibid 3(3)

¹⁶ For example: *The Convention on the Rights of the Child; International Convention on the Elimination of All Forms of Racial Discrimination; Elimination of All Forms of Discrimination Against Women, ILO Convention No 111 – Discrimination (Employment and Occupation);*

¹⁷ Section 58

Mr Latham explains the thinking behind this amendment to the NSW AD Act:

In other countries and Australian States, religious anti-discrimination provisions are commonplace. They are supported by a series of international conventions. In New South Wales perhaps it was thought that these conventions would never be needed, that our easygoing lifestyle would supersede the possibility of sectarian conflict. But times have changed. This issue can no longer be avoided¹⁸.

NSWCCL agrees that this would be a positive addition to the NSW Act but only if there is a better representation of the key international conventions. The list must be extended to include a fuller listing of instruments relevant to provisions of the Act in line with the instruments cited in the Commonwealth Religious Discrimination Bill 2019. There is a clear risk that, without these other conventions in play, interpretations of the amended AD Act may be led to giving undue standing to religious rights.

If the list is not appropriately expanded, clause 3 should be removed from the Bill.

Recommendation 3

NSWCCL recommends that the list of instruments at 3(1) be significantly expanded to include additional international instruments relevant to all protected attributes covered by the Anti-Discrimination Act as well as religious rights. Alternatively, we recommend clause 3 be removed from the Bill.

ii) Definitions

As was the case with the Commonwealth's Religious Discrimination Bill 2019, NSWCCL has major concerns with key definitions in this Bill. Their cumulative impact is an important element in the over-privileging of religious rights and thereby weakening current protections against discrimination on other grounds that would result if this Bill becomes law.

a) Religious activities

The Bill addresses discrimination on the grounds of religious beliefs and religious activities. These are defined in section 22K.

Religious activities are defined as:

'religious activities includes engaging in religious activity, including an activity motivated by a religious belief, but does not include any activity that would constitute an offence punishable by imprisonment under the law of New South Wales or the Commonwealth.'¹⁹

NSWCCL's major concern with this definition is that unlawful activity is incorporated in the definition unless it constitutes an "offence **punishable by imprisonment under the law of New South Wales or the Commonwealth**".

¹⁸ Latham Second Reading Speech; [NSW Hansard](#) 13th May 2020. P43.

¹⁹ s22K(1)

This is not consistent with the tighter approach taken in the Commonwealth's Religious Discrimination Bill 2019 nor in the Queensland and Victorian legislation on religious discrimination. All of these exclude protection for all religious activities which are unlawful.²⁰

Allowing unlawful religious activities to be protected behaviours unless they attract a prison sentence will have very significant implications. It will protect a range of unlawful activities, including discriminatory behaviours which are currently unlawful, as long as they are motivated by a 'religious belief'.

Clearly, this constitutes an unacceptable privileging of religious rights over all others. It will significantly weaken current protections against discrimination on all other grounds covered by the NSW AD Act. It seems to imply that a person could lawfully engage in currently unlawful discrimination under any of the other grounds covered by the AD Act if their actions were religious or religiously motivated.

NSWCCL consider this to be totally unacceptable in principle and because it would significantly diverge from existing approaches to religious discrimination law and privileges religion over all other rights.

Recommendation 4

NSWCCL recommends that the definition of 'religious activities' in s22K is amended to '*engaging in lawful religious activity, including a lawful activity motivated by a religious belief.*'

b) Religious beliefs

The definition of 'religious belief' is:

- (a) *having a religious conviction, belief, opinion or affiliation,*
- (b) *not having a religious conviction, belief, opinion or affiliation.*²¹

NSWCCL has for over 50 years argued for the fundamental right to freedom of 'thought, conscience and religion' for all persons- including for atheists and agnostics as well as religious believers. We are therefore fully supportive of the inclusion of both religious belief and the absence of same, as protected attributes in this Bill. We do however have a concern both with the Bill's definition of religious belief and the proposed validation test as to the genuineness of this belief.

As a definition it is circular, nebulous and open-ended. It makes no pretence at defining the meaning of 'religion' or 'religious'. This imprecision and expansive ambit do not pose a problem in relation to religions with known bodies of belief but the definition does leave it open for a person (or group) to assert that any belief/opinion they hold is religious. A person could have a totally unique religious belief or opinion which is genuinely held.

The Explanatory Note elaborates on the Bill's intended expansiveness in the definitions of religious beliefs and religiously motivated activity:

²⁰ s22K(1)(a) and(b)

²¹ Ibid

The examples make clear that the proposed Part does not intend to protect solely 'sacred acts' or acts in the performance of a 'religious ritual'. It is necessary to clarify in anti-discrimination law that, for many religious believers, religious convictions that impact on or motivate behaviour can extend to the whole of their personal values and lived experience.²²

This seems to mean that for 'many religious believers' all of their values (and opinions?) and all of their actions could be religiously motivated for the purpose of this Bill and therefore protected.

Section 22KA states that a person will be determined to hold a religious belief 'if the person genuinely believes the belief'. As a test this is totally subjective and circular. The Explanatory Note offers an explanation for this approach:

The 'sincerity test' (genuinely believes) gives effect to the approach consistently adopted by the highest courts in Australia (specifically in Church of the New Faith v Commissioner for Payroll Tax (Vic)), the United Kingdom, United States and Canada as a means to avoid courts determining matters of religious doctrine or disputation.²³

These weak definitions are illustrative of the inherent difficulty of defining 'religious' belief and activity which has long been a stumbling block in legislating against religious discrimination.

Mr Latham is clearly well aware of the problem and offers this accurate description of the approach taken in the Bill:

Given there is no one clear definition of "religion" under Australian law, right through to the High Court, at section 22K, the bill takes a minimalist approach.²⁴

The approach may be minimalist from one perspective (ie that it does not try for precise definitions) but it has very significant and disturbing implications for the ongoing fairness of the AD Act.

This is especially so as this Bill will introduce significant additional exceptions for protected religious beliefs and activities.

These core definitional problems accentuate the imperative of a wider discussion in a national context, informed by the findings of the pending ALRC Report on Religious Exemptions, before further progressing this Bill.

Recommendation 5

NSWCCL recommends that section 22K be withdrawn and that the definitions of religious belief be subject to wider, informed consideration to address the problems with the current formulation.

(This should be a key aspect of the wider consideration of religious discrimination and anti-discrimination legislation proposed in Recommendation 2.)

iii) Discrimination in work

²² Explanatory Note Anti-Discrimination Amendment (Religious Freedoms and Equality Bill 2020. [Ex Note Religious Discrimination] p 2

²³ *ibid*

²⁴ *Ibid* p4

Section 22N sets out the provisions constituting unlawful discrimination against applicants and employees. Sub-sections (1) and (2) are consistent with the approach for other protected attributes in the existing Act and with approaches for religious discrimination in other jurisdictions.

NSWCCL supports these provisions.

Our concerns relate to additional provisions in this section relating to ‘protected activity’.

- (3) Without limiting subsection (1) and (2), it is unlawful for an employer to—*
- (a) restrict, limit, prohibit or otherwise prevent an employee from engaging in a protected activity, or*
 - (b) punish or sanction an employee:*
 - (i) for engaging in a protected activity, or*
 - (ii) because an associate of the employee engaged in a protected activity.*

- (4) In subsection (3), **protected activity** means—*
- (a) a religious activity performed by the employee that:*
 - (i) occurs at a time other than when the employee is performing work and at a place other than the employer’s place of work, and*
 - (ii) does not include any direct criticism of, or attack on, or does not cause any direct and material financial detriment to, the employer.*
 - (b) a religious activity performed by an associate of the employee that does not include any direct criticism of, or attack on, or does not cause any direct and material financial detriment to, the employer.*

A protected religious activity by an employee is one that occurs out of the workplace and work hours, does not include any direct criticism or attack on the employer and does not cause direct and material financial detriment to the employer.

As the definition of religious activity is expansive and includes unlawful activity that does not attract a prison sentence, this definition of ‘protected activity’ will still encompass a very wide range of activities that an employer cannot attempt to regulate - including ones that would be unlawful under the NSW AD Act and other laws.

It will have significant and potentially harmful implications for individuals and groups likely to be affected by these ‘protected activities’ and for employers wishing to preserve their product/service reputation and for workplace harmony.

This is especially so given the Bill specifically excludes ‘any boycott or secondary boycott’ and ‘the withdrawal of sponsorship or other financial or corporate support’ from constituting ‘direct and material financial detriment to an employer’²⁵. These are the increasingly powerful ways in which the community can bring pressure to bear on major companies and, in recent times, their superannuation funds. These interventions give a voice to many individuals and groups otherwise lacking influence over corporations.

²⁵ ss (5)

There are important and complex ethical, social and political issues involved, and any decision to limit this kind of group advocacy/intervention requires careful consideration and strong justification which are both absent in this context.

In so far as it is likely that this provision arises from the Folau controversy, we note it is usually unwise to legislate on the basis of one high profile incident- especially in relation to one on which the range of public opinion was so divided.

NSWCCL has reservations about the ambit of some employer conduct codes restricting employees' lawful expressions of opinion and activities outside the workplace - including the increasingly extreme restrictions by governments on public servants. However, that is not an issue to be resolved in the context of an amendment relating to one attribute of the NSW AD Act.

A similar category of 'protected activity' does not apply for employees' out-of-work activities that are not religiously motivated. This provision would therefore create unfair and irrational inequalities in the rights of employees. Moreover, 'religious ethos organisations' are not constrained by these provisions creating another anomaly.

These provisions are not necessary and not appropriate. They should be deleted from the Bill.

Recommendation 6

NSWCCL recommends that sub sections 22N (3)-(5) which would make it unlawful for an employer to restrict, *limit, prohibit or otherwise prevent an employee from engaging in a protected activity*' or *'punish or sanction an employee for engaging in a protected activity'* be deleted from the Bill.

iv) Protected activity: qualifying bodies (22s) and 22v education

Similar protected religious activity provisions apply in relation to discrimination by qualifying bodies and educational authorities.²⁶ NSWCCL considers these to be inappropriate and unfair for the same broad reasons as argued above.

Recommendation 7

NSWCCL recommends that sub sections 22S (2)-(4) and 22V (3)-(5) which would make it unlawful for a qualifying body or an educational institution to *restrict , limit, prohibit or otherwise prevent a person or a student from engaging in a protected activity*' or *'punish or sanction a person or a student for engaging in a protected activity* be deleted from the Bill.

v) Religious ethos organisations and exceptions

²⁶ Ibid S 22S(2)-(4) and S22V(3)-(5)

The Bill inserts a new category of religious organisations: **religious ethos organisations**:

- (a) a private educational authority that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion, or*
- (b) a charity registered with the Australian Charities and Not-for-profits Commission under the Australian Charities and Not-for-profits Commission Act 2012 of the Commonwealth that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion, or*
- (c) any other body that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion.²⁷*

Religious bodies in this new category will be given broad exceptions for otherwise discriminatory actions on the grounds of religion on certain conditions.

The first problem is the number and kind of religious organisations that could be covered by this definition of religious ethos bodies. The definition is far more expansive than the definition of religious bodies eligible for general exceptions for discrimination on religious grounds in the current Act at Section 56:

Religious bodies

Nothing in this Act affects:

- (a) the ordination or appointment of priests, ministers of religion or members of any religious order,*
- (b) the training or education of persons seeking 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.*

Section 56 (c) and (d) appropriately confine the exception provision to religious bodies established to 'propagate religion'. The proposed definition of **religious ethos bodies** in the Bill is far wider. It includes registered charities which may not have as their aim the propagation of their religion and may be significantly involved in commercial activity. The reference in c) relating to any other body 'conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion' is potentially inclusive of many kinds of religious organisations with core objectives other than propagation of their religion – eg charities such as St Vincent de Paul, health and housing providers, sporting bodies.

Exceptions for religious ethos organisations

²⁷ Definitions 22K

Section 22M of this Bill provides a general exception from unlawful discrimination on religious grounds on certain conditions:

(1) For the purposes of this Part, a 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.²⁸

The test for compliance with the conditions is that the 'organisation genuinely believes' its conduct meets the three criteria set out in (a)-(c). As discussed in 2(ii) above, the definitions of religious beliefs and religious activities are circular and open-ended and the sincerity test (genuinely believes) is weak and subjective. In this section that problem is further complicated by the onus being on an organisation rather than a person to establish the genuine belief.

In summary, the Bill proposes a new and very loosely defined category of *religious ethos organisations* to be given exception from discriminatory conduct on religious grounds if the organisation genuinely believes their conduct abides by the broad conditions. The cumulative effect of these interlocking provisions would be an extraordinary and unbalanced over-privileging of religious organisation and religious rights to discriminate against others with impunity. It would create the conditions for a great deal of harmful discrimination against other groups and individuals.

It is an unbalanced and unfair proposal. It is not consistent with any of the other existing religious anti-discrimination laws.

In our view, the current provision at Section 56 provides appropriately broad exception criteria for an appropriately and reasonably defined category of religious bodies to be protected from what would otherwise be unlawful discrimination by them on religious grounds. Given this, neither of the proposed new provisions in the Bill are necessary or justified.

Recommendation 8

NSWCCL recommends that proposed sections 22K defining a '*religious ethos organisation*' and section 22M '*Religious ethos organisations taken not to discriminate in certain circumstances*' be deleted from The Bill.

Recommendation 9

²⁸ S22M(1)

NSWCCL recommends that the existing General Exceptions provision relating to religious bodies at section 56 in the Anti-Discrimination Act 1977(NSW) be maintained as an appropriate, adequate and balanced provision for exceptions against discrimination on religious grounds for religious bodies.

vi) The argument for S22M

NSWCCL objected strongly to a similar set of provisions in the exposure drafts of the Commonwealth Religious Discrimination Bill – which also created disturbing double-standards and over-privileging of religious rights. These exemption provisions were central to the broad opposition to those Bills.

As the exception provisions at 22M in conjunction with the wide range of organisations defined as eligible for access to them at 22K, clearly over-privilege religious organisations and religious rights and, if implemented, will result in unfair and unwarranted discrimination against others - it could be expected that there were clear reasons for such unbalanced provisions being deemed appropriate for an anti-discrimination Bill.

The Explanatory Note emphasises that this provision is *‘importantly.... an exception not an exemption.’*²⁹ It further says that this provision brings NSW into line with international practice citing General Comment 18 of the United Nations Human Rights Committee:

“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” under the International Convention on Civil and Political Rights³⁰

No argument is made to demonstrate how or why it can be presumed that the provisions in this Bill can ensure the required ‘reasonable and objective’ differentiation.

Mr Latham also gave significant emphasis to the ‘exception’ rather than ‘exemption’ status of religious ethos organisations in his second reading speech. Although the distinction it is not the important issue, it is worth considering some of his comments on the matter to better understand the reasons for inserting these provisions in the Bill.

He correctly points out the significance of Section 22M:

*The provision at section 22M says that when a religious institution acts in accordance with its beliefs, this is not discrimination, as technically described at law. **This is a foundational underpinning of my bill**, consistent with international law such as General Comment 18 of the United Nations Human Rights Committee³¹.*

He conflates the significant distinction between the very many organisations acting ‘in accordance’ with religious beliefs and those which have as their mission the ‘propagation’ of their religion:

Importantly, at section 22M it offers an exception for religious ethos organisations, including private educational authorities, registered charities and other bodies conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion—that is,

²⁹ NSWCCL emphasis. [Ex Note Religious Discrimination] p3

³⁰ Ibid

³¹ Latham Second Reading Speech; [NSW Hansard](#) 13th May 2020. p44

*organisations where religion is integral to their existence should not be expected to abandon their beliefs to accommodate the rights of other religions or non-believers.*³²

He misrepresents 'exemptions':

*Currently, under anti-discrimination law religious bodies are granted exemptions in their employment and other administrative practices, as if they have done something wrong to minority groups in society. It is as if religious rights are thought to automatically clash with broader notions of equality of access and opportunity.*³³

He exaggerates and misrepresents the treatment of religious schools and charities -under the current Act presumably:

*Religious schools and charities, in effect, have been treated as egregious, second-class citizens. My bill corrects this imbalance. It treats religion as an equality right no less deserving, no less legitimate, no less equal than any other human right. The bill has exceptions to discrimination law, not exemptions*³⁴

These comments are more a call to arms than a considered and balanced analysis of the best approach to the drafting of the sensitive and complex legislation on religious discrimination. Mr Latham says his Bill corrects imbalance and treats religion '*as an equality right no less deserving, no less legitimate and no less equal than any other human right.*' Unfortunately, despite any good intentions of its drafters to achieve this necessary balance and equality between the statutory rights, Section 22M significantly undermines both these necessary criteria.

While there were major problems with the second draft of the Commonwealth Religious Discrimination Bill 2019, it did incorporate a wise instruction in the Section on Objects of the Act:

In giving effect to the objects of this Act, regard is to be had to:

(a) the indivisibility and universality of human rights, and their equal status in international law; and

(b) the principle that every person is free and equal in dignity and rights.

We commend this provision and its effective implementation in the recommended redrafting of this Bill to the NSW Parliament.

Recommendation 10

The NSWCCCL recommends that that an explicit commitment to *the indivisibility and universality of human rights, and their equal status in international law* is embedded in a redrafted Bill and that it is an overriding criterion for achieving appropriate balance between rights in all relevant provisions.

vii) Lack of protection against discrimination for lgbtqi+ students

³² Ibid p43

³³ *ibid* p44.

³⁴ *ibid*

One of the disappointments of the Commonwealth Religious Discrimination Bill 2019, was that it did not deliver on the Prime Minister's promise to legislate protections from discrimination of LGBTQI+ students in religious and private schools³⁵. Instead the issue was referred to the Australian Law reform Commission Inquiry into the Framework of Religious Exemptions in Anti-Discrimination Legislation.³⁶

As currently drafted, this Bill does not provide adequate protection for LGBTQI+ students against harmful discrimination on religious grounds in religious and private schools - notwithstanding the provisions protecting against discrimination of students on religious grounds in educational institutions at 22V. This over-ridden by the exception provisions in the Bill.

The definition of religious ethos organisations includes '*a private educational authority that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion*'³⁷ and so the 22M exception provisions will apply thus exposing all students in a private educational authority to discrimination on religious ground at point of application and throughout their schooling.

This is not consistent with current anti-discrimination provisions in other state/territory legislation in Tasmania, Queensland, the Northern Territory and the ACT. These provisions do not allow exceptions to operate in relation to admitted students.

Our recommendation for the removal of section 22M will resolve this problem. Failing this the application of the exception provisions in 22M should be amended to apply to students only at the point of application – consistent with existing provisions in other jurisdictions.

Recommendation 11

NSWCCL recommends that if recommendation 8 on the deletion of section 22M from the Bill is not implemented, that the exception provisions in section 22M be amended so they do not apply to the provisions in section 22V(2) relating to religious discrimination against students in an educational authority.

CONCLUDING REMARKS

The comments provided above do not cover all of our concerns with the Bill but do address the major problems that must be addressed. NSWCCL hopes the submission is of assistance to the Committee. NSWCCL is willing to provide further comment or answer questions if the Committee so wishes.

³⁵ Prime Minister media release 13 October 2018

³⁶ <https://www.alrc.gov.au/inquiry/review-into-the-framework-of-religious-exemptions-in-anti-discrimination-legislation/altered-terms-of-reference-29-august-2019/>

³⁷ S22K

