

**Submission
No 126**

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

Organisation: Freedom for Faith

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Freedom for Faith Submission on the *Anti-Discrimination Amendment (Religious Freedoms and Equality Bill) 2020*

ABOUT FREEDOM FOR FAITH

Freedom for Faith is a Christian legal think tank that exists to see religious freedom protected and promoted in Australia and beyond.

It is led by people representing a range of institutions including the Australian Christian Churches, Baptist Church Ministries, the Presbyterian Church, the Seventh-Day Adventists, and the Anglican Archdiocese of Sydney. It has strong links with, and works co-operatively with, a range of other Churches and Christian organisations in Australia.

Context for the Bill

1. NSW is out of step with other states in regard to protections against religious discrimination. Only NSW and SA do not comprehensively protect their citizens from discrimination on the basis of religious belief. The NSW *Anti-Discrimination Act* (1977) prohibits discrimination on the basis of race, including ethno-religious origin, but this only protects the small subset of religious people whose religion is intrinsically connected to their race (e.g. Jews and Sikhs). It offers no protection against religious discrimination on the basis of religion more broadly.
2. The Ruddock Review recommended that State Governments should have regard to the Siracusa Principles when drafting laws that would limit the human right to freedom of religion (Recommendation 2), that State Governments should consider the use of objects or purposes clauses in anti-discrimination law to reflect the equal status of all human rights in international law, including freedom of religion (Recommendation 3), and that “NSW... should amend their anti-discrimination laws to render it unlawful to discriminate on the basis of a person’s ‘religious belief or activity’ including on the basis that a person does not hold any religious belief. In doing so, consideration should be given to providing for the appropriate exceptions and exemptions, including for religious bodies, religious schools and charities” (Recommendation 16). The bill seeks to implement these recommendations.

3. In response to the recommendations of the Ruddock Review, the Commonwealth Government has released and sought feedback on two exposure drafts of a *Religious Discrimination Bill*. It was intended that a final draft would be introduced to Parliament in the first half of 2020. However, the advent of the Coronavirus crisis rightly meant other matters had to be prioritised, and consequently it is unlikely the bill will be introduced this year. Even if it were introduced, given the mixed reaction to the two exposure drafts, there is no guarantee that the bill will pass in the Senate, where the government does not have a majority. The implementation of the Commonwealth bill is therefore unclear in the near future and may be delayed indefinitely.
4. The combination of factors 1-3 provides a persuasive basis for saying that now is the right time for NSW to enact legislation protecting people against religious discrimination. NSW has a clear gap in its anti-discrimination protections which was explicitly identified for remedy in the Ruddock Review, and federal protection for the people of NSW cannot be relied upon at this stage.

Substance of the Bill

5. The remainder of this submission will engage in a detailed analysis of specific sections of the bill in the context of the terms of reference.
6. Section 3 implements Recommendations 2 and 3 of the Ruddock Review and correctly emphasises the Siracusa principles, recognising that freedom of religion is a fundamental human right which can only be restricted where *necessary* to protect public safety, order, health, morals or the fundamental rights and freedoms of others (Article 18(3) *International Covenant on Civil and Political Rights*). Hence the bill does not give religion any special privilege, but makes religion equal to other protected attributes such as race, age and sex by providing protections against discrimination on the basis of religion or belief (*UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*). Section 3 recognises that freedom of religion is a fundamental human right which is equal with other rights such as equality, and provides a mechanism for balancing competing rights rather than privileging any one right.
7. Section 22K contains definitions relevant for the bill. It sensibly recognises that religion is not simply belief or opinion, but includes expression through ‘activity motivated by a religious belief’. As specified in the Explanatory Notes, these activities do not only protect so-called ‘sacred’ acts, but also operate to protect ‘secular’ actions motivated by religious belief, following the accepted position that religious convictions can influence beliefs and behaviour extending to the entirety of a person and everything they do. It also sensibly recognises a limit to permissible religious activity by excluding from the definition of that term activities that would constitute an offence punishable by imprisonment.

This does not necessarily mean that the bill permits activities which breach civil obligations. That a religious obligation may sometimes conflict with a civil law (private) obligation of some sort is a recognised feature of discrimination laws, and scope is given for the courts to determine how to balance these rights by considering whether imposition of the civil obligation is reasonable in all the circumstances. It is therefore not necessary to exclude any broader set of activities from the definition. The bill only makes unlawful that which is currently lawful under state law, namely discrimination on the basis of religious belief or activity.

Section 22K broadly and correctly defines religious beliefs as including convictions, beliefs, opinions or affiliation, or not having these.

It defines genuinely held religious belief as the holding of a belief in a way that is not fictitious, capricious or an artifice. This satisfies the well accepted position that a court should not unduly intrude into the question of whether a person actually holds a belief, but will instead accept testimony to that effect unless the holding of the belief falls into one of the exceptional categories (see for example the *Scientology* case).

Section 22K defines a religious ethos organisation as a private educational authority, charity or other body that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion. This is an improvement upon the Commonwealth *Religious Discrimination Bill*, which excludes some religious bodies such as particular charities which are deemed to engage in commercial activities. It also follows the recommendation of the Ruddock Panel that the religious nature of an organisation be defined in this way and that the definitional approach of the Victorian Act is a good model in this respect. The correct position is that engaging in commercial activities does not make a particular organisation less religious and therefore less entitled to the bill's protection.

8. Section 22KA reflects the point above that a person holds a religious belief if they genuinely hold the belief i.e. if they testify that they hold that belief. This is an improvement on the Commonwealth *Religious Discrimination Bill*, which currently imposes a complex test based on what a hypothetical believer would reasonably consider is in accordance with the doctrines, tenets, beliefs, or teachings of the religion. That test is problematic because it puts a secular court into the position of determining whether a person genuinely holds a religious belief.
9. Section 22KB sensibly specifies that a religious belief or activity should be understood broadly as held or potentially held across time.
10. Section 22L adopts the usual language in anti-discrimination legislation to specify when discrimination occurs, correctly distinguishing between different kinds of religious belief and religious activity.

11. Section 22M provides that religious ethos organisations are taken not to discriminate in circumstances where they engage in conduct which they genuinely believe is necessary to maintain the religious ethos of the organisation.

Structurally this is a sensible way to protect the integrity of a religious ethos organisation entailed in the human right to freedom of religion, which includes the freedom to associate around a particular religious ethos. The ability to associate necessarily entails the ability to determine its criteria for membership in accordance with the principles of the association. This is a better approach than creating an ‘exemption’, which can give the impression that religion is receiving special treatment to engage in discriminatory acts. A positive right to engage in conduct integral to the association reflects the proper balance of the right to freedom of religion with the right to equality in international law.

12. Section 22N, in addition to creating general prohibitions against discrimination on the basis of religious belief, includes provisions which address the ‘Folau’ situation, where Israel Folau was dismissed from Rugby Australia after influence by Rugby Australia’s sponsors for publishing controversial content on a personal social media account outside of work hours.

Before considering these provisions, it is worth noting that there is a potential contradiction between 22N(1)-(2) and 22M. 22M provides that a religious ethos organisation does not discriminate by engaging in conduct that they genuinely believe will uphold the religious ethos of the organisation. 22N provides that it is unlawful for an employer to discriminate against an employee on the basis of religious belief or activities. If we imagine the employer is a religious ethos organisation, does 22M or 22N prevail? This hypothetical is not addressed in the explanatory notes. Unlike the equivalent s 11 of the Commonwealth *Religious Discrimination Bill*, 22M is not an overriding provision. 22N(9) provides that (4) and (5) do not apply to religious ethos organisations, but that does not address (1) and (2). It is arguable that the phrase ‘taken not to discriminate’ in 22M would operate to exclude ‘unlawful to discriminate’ in 22N, but this is not certain. 22U provides a general limitation on the application of the division by noting it does not apply where a person with a particular religious association is genuinely required for the occupation. Again, it is arguable this could protect religious ethos organisations but this is not certain. It seems clear from these individual points that the intention of the bill is that a religious ethos organisation does not engage in unlawful discrimination in an employment context where the conditions in 22M are met. This intention would be more clearly communicated by, for example, extending 22M(9) to 22M(1) and 22M(2) as well, or making 22M an overriding provision. For example, s 22M(1) might commence: “For the purposes of this Part, and notwithstanding any other provisions of this Part...” This same issue arises with respect to 22S and 22V and could be addressed in the same way.

In regard to the “Folau provisions”, 22N is an improvement upon the Commonwealth *Religious Discrimination Bill* in a number of ways. It specifies that it is unlawful for an employer to prevent an employee from engaging in a protected activity or sanction them for doing so, where a protected activity is defined as a religious activity that occurs outside of work and does not directly criticise or cause direct material financial detriment to the employer. It further specifies that direct financial material detriment does not include boycotts or sponsorship withdrawal. This is a sensible provision which would have protected Folau in those circumstances.

However, unlike the Commonwealth *Religious Discrimination Bill*, 22N does not explicitly recognise statements of belief as an aspect of religious activities, nor provide any explicit protection for such statements. In fact the NSW bill as a whole fails to do this. Given that it is statements of belief that have given rise to many of the scenarios which motivate this bill, it would make sense to insert explicit protection for statements of belief by making statements of belief a separate part of the definition of religious activities in 22K, following the model of the Commonwealth bill. 22N also sensibly provides explicit protection against discrimination on the basis of the wearing of religious symbols or clothing by an employee.

22N(9) disapplies some of these provisions in relation to religious organisations. It is unclear why only sub-sections (4) and (5) are disapplied- in fact these provisions are really only in the nature of definitions provisions and do not contain any direct obligations. It would seem to be more sensible to disapply all of sub-sections (1)-(6) from religious organisations.

13. Sections 22O to 22Z sensibly provide protections in a variety of contexts. Particularly important are protections for contract workers (22P), persons subject to qualifying bodies (22S) – as indicated in the explanatory notes, students (subject to the need for religious ethos organisations to engage in conduct designed to uphold their ethos) (22V), and protections against discrimination by state law programs (22Z) – as indicated in the explanatory notes.
14. As mentioned above, 22U provides an exception to Div 2 where there is a genuine occupational requirement. The issue of what constitutes a ‘genuine occupational requirement’ in the context of religious ethos associations has not been clearly understood by courts, and has often led to the problem of secular courts imposing a particular view of what is a genuine occupational requirement onto a religious ethos organisation (this problem was referenced earlier in relation to genuine religious belief). The potential of this problem occurring in this bill has been minimised through sensible and comprehensive delineation in the provision and examples in the explanatory notes. In this way there is no need for a decision-maker to themselves determine the content of a ‘genuine occupational requirement’.
15. In conclusion, this bill is necessary and with the minor amendments suggested it is an important contribution to protecting the citizens of New South Wales against discrimination.