

**Submission  
No 143**

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

**Organisation:** NSW Bar Association

**Date Received:** 10 September 2020



SUBMISSION NEW SOUTH WALES  
|  
**BAR ASSOCIATION**

Joint Select Committee Inquiry into the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 (NSW)

## **Promoting the administration of justice**

The NSW justice system is built on the principle that justice is best served when a fiercely independent Bar is available and accessible to everyone: to ensure all people can access independent advice and representation, and fearless specialist advocacy, regardless of popularity, belief, fear or favour.

NSW barristers owe their paramount duty to the administration of justice. Our members also owe duties to the courts, clients, and colleagues.

The Association serves our members and the public by advocating to government, the Courts, the media and community to develop laws and policies that promote the Rule of Law, the public good, the administration of and access to justice.

## **The New South Wales Bar Association**

The Association is a voluntary professional association comprised of more than 2,400 barristers who principally practice in NSW. We also include amongst our members judges, academics, and retired practitioners and judges.

Under our Constitution, the Association is committed to the administration of justice, making recommendations on legislation, law reform and the business and procedure of Courts, and ensuring the benefits of the administration of justice are reasonably and equally available to all members of the community.

This Submission is informed by the insight and expertise of the Association's Human Rights Committee. If you would like any further information regarding this submission, please contact the Association's Department of Policy and Public Affairs on 02 9232 4055.

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## A. Executive Summary

1. The New South Wales Bar Association (**the Association**) thanks the NSW Parliament's Joint Select Committee for the opportunity to make submissions regarding the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 (NSW) (**ADAB**).
2. While the Association supports in principle the enactment of laws to prevent discrimination on the grounds of religious belief and to protect the freedom of religion of individuals, the Association does not support the ADAB in its current form.
3. The Association is concerned that the ADAB would, if enacted:
  - a. expand the nature of religious belief or activity well beyond current legislated understanding of those terms;
  - b. have the potential to foster religious discrimination;
  - c. prioritise freedom of religious belief or activity over and above other similar human rights, particularly in the absence of a NSW Bill of Rights;
  - d. depart from established anti-discrimination legislative models;
  - e. potentially result in disharmonies between the protection of religious rights at a state and at a federal level, as there is a significant risk that the ADAB's provisions could be inconsistent with the Commonwealth Religious Freedom Bills.<sup>1</sup>

## B. Recommendations

4. Accordingly, the Association recommends that:
  - a. the ADAB as currently drafted should not be enacted;
  - b. the ADAB should not be further considered by the NSW Parliament until the Commonwealth Parliament has determined the terms of the Religious Discrimination Bill (Cth), which is yet to be introduced to Federal Parliament; and
  - c. a statutory Bill of Rights should be enacted in NSW to ensure the adequate protection of all human rights, including religious freedoms, in this State.

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<sup>1</sup> Exposures drafts of the Religious Discrimination Bill 2019 (Cth), Religious Discrimination (Consequential Amendments) Bill 2019 (Cth) and Human Rights Legislation Amendment (Freedom of Religious) Bill 2019 (Cth) (together, **the Commonwealth Religious Freedoms Bills**).

## C. Primary drafting concerns

### *The ADAB departs from well-established ways to prohibit discrimination*

5. A number of Australian States have already legislated to prohibit discrimination on religious related grounds. The *Equal Opportunity Act 2010* (Vic) prohibits discrimination on the ground of religious belief or activity;<sup>2</sup> South Australia prohibits discrimination on the grounds of religious appearance or dress;<sup>3</sup> a person may not discriminate on the grounds of religious conviction in Western Australia;<sup>4</sup> and, in Tasmania, a person may not discriminate on the ground of religious belief or affiliation.<sup>5</sup> Generally speaking, religious discrimination is prohibited in other States using the same model of direct and indirect discrimination found in the *Anti-Discrimination Act 1977* (NSW) (*ADA*).
6. The ADAB departs from that model by adopting a wide and subjective definition of “*religious belief*” to include having a “*religious conviction, belief, opinion or affiliation*” as long as it is *genuinely* believed.
7. The definition of “*religious activity*” then further expands the definition to include an act “*motivated by religious belief*”. In doing so the ADAB adopts a new approach to religious matters far wider than that found in other States. It is also wider than that currently provided by section 56(d) of the *ADA*, which protects an “*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*” even where that might be unlawful discrimination.
8. The effect of the new definitions is to remove the nexus with a belief or act which conforms to the doctrines of that religion and to replace it with a person’s subjective belief of what they think religion is. Further, religion is not limited to an orthodox or established religion such as Christianity, Islam or Buddhism.
9. Proposed section 22M permits a “*religious ethos organisation*”<sup>6</sup> to discriminate against another person where the discrimination would “*further or aid*” the organisation in acting in accordance with “*its doctrines, tenets, beliefs or teachings*”. As belief includes the right not to believe, this would allow any such organisation not to hire a gay cleaner, to refuse to enroll a Muslim child in a Christian school, to refuse to provide a wedding cake to a same sex couple or to supply accommodation to a Hindu family because they do not share the same beliefs as the religious organisation.

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<sup>2</sup> Section 6.

<sup>3</sup> *Equal Opportunity Act 1984* (SA) s 85T(1)(f).

<sup>4</sup> *Equal Opportunity Act 1984* (WA) s 53.

<sup>5</sup> *Anti-Discrimination Act 1998* (Tas) s 16(o).

<sup>6</sup> A religious ethos organisation includes a private education authority or registered charity or “any other body” that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion”.

10. In effect this provision permits active discrimination on grounds which may be much wider than that currently permitted under section 56 (that is, more than an act which conforms with the doctrines, tenets, beliefs or teachings of the relevant religion).

***The Bill promotes religious rights over other human rights***

11. The freedom of individuals to hold and to manifest religious beliefs as part of a comprehensive system of rights protections has only been accepted in those states which have adopted a charter of rights, being the Australian Capital Territory (ACT) in 2004, Victoria in 2006 and, most recently, Queensland in 2019.<sup>7</sup> Freedom of religion is similarly enshrined in the human rights legislation of New Zealand, Canada and the United Kingdom.<sup>8</sup> Such laws, if appropriately drafted, acknowledge obligations under international law to protect, along with other human rights, the freedom of individuals to practise their faiths and to be free from discrimination for doing so.<sup>9</sup>
12. It is, however, a well-established principle that human rights listed within conventions, charters and bills of rights are to be seen as universal, interdependent, indivisible and equal. Consequently, no one human right can be said to achieve paramountcy over all others. Religious beliefs do not, therefore, stand alone as an exceptional or uniquely protected area of public and private life. While guaranteed under international human rights treaties and under bills of rights in comparator common-law jurisdictions, the right to observe one's faith must be set alongside, and balanced against, all of the other rights considered fundamental in a democratic society.
13. The ADA protects the right to equality which is a foundation provision of the *International Covenant on Civil and Political Rights*. However it does not, nor was it intended to, protect the majority of other human rights (with very limited exceptions).<sup>10</sup>
14. The Association considers that the ADAB seeks to protect freedom of religion over and above other human rights in a way that would impinge unnecessarily on those other rights and freedoms. The ADAB does so in the following ways:

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<sup>7</sup> *Human Rights Act 2004* (ACT) s14; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 14; *Human Rights Act 2019* (Qld) s 20.

<sup>8</sup> *New Zealand Bill of Rights Act 1990* (NZ) ss 13, 15; *Canadian Charter of Rights and Freedoms* (1982) s 2(a); *Human Rights Act 1998* (UK) s 1(1)(a) and pt 1 of sch 1. Rights to religious beliefs are also recognised in the First Amendment to the Constitution of the United States of America and in regional human rights documents: see, for instance, art 9 of the *European Convention on Human Rights* (1950).

<sup>9</sup> See, eg, art 2, 18, 24, 26, 27 of the *International Covenant on Civil and Political Rights* (1966), which together protect individuals from discrimination on the basis of religious belief and protect freedom of religion for persons generally and specifically for minority ethnic, religious and linguistic groups; art 13 of the *International Covenant on Economic, Social and Cultural Rights* (1966), which complements article 18(4) of the ICCPR by providing a similar protection in relation to freedom of religion protections to education; arts 13 and 30 of the *Convention on the Rights of the Child* (1989), which protect the religious freedoms of children and children of minority groups, respectively; art 5(d) of the *International Labour Organisation Convention concerning Termination of Employment at the Initiative of the Employer* (1982), which preserves the right to freedom of religion and belief in employment by ensuring that religion cannot be a valid reason for termination.

<sup>10</sup> The *Anti-Discrimination Act 1977* (NSW) prohibits racial (s 20C), homosexual (s 49ZT), transgender (s 38S) and HIV vilification (s 49ZXB).



- a. at the threshold of the ADAB it is proposed in the new section 3 that interpretative reliance be placed on the United Nations' *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, while omitting other major human rights treaties which protect other human rights;<sup>11</sup>
- b. it requires the interpretive provisions to be heeded by the Anti-Discrimination Board, its President, NCAT and "the Courts" even when those bodies are not considering matters of religious discrimination;
- c. section 22M permits a "*religious ethos organisation*" to discriminate unencumbered by the religious discrimination provisions;
- d. sections 22N, 22S and 22V prohibit employers, qualifying bodies and educational authorities from preventing or prohibiting certain activities which may be aimed at protecting another's human rights but also prevent an employee, applicant or student from practising their religious beliefs;
- e. the power of the President of the Anti-Discrimination Board to grant exemptions is only removed with respect to the newly inserted Part 2B of the *ADA* (religious discrimination) and would still apply to other rights to not be discriminated against.

### ***The need for a comprehensive Bill of Rights***

15. The Association believes that human rights should be protected within an overarching legal framework that ensures that fundamental rights and freedoms can be properly contextualised and balanced against one another. The ADAB does not take this approach.
16. The Association strongly recommends that NSW follow the ACT, Victoria and Queensland to become the fourth Australian jurisdiction to enact a human rights Act. Any further changes to, or consolidation of, the state's anti-discrimination legislations should occur concurrently with, or as a consequence of, the enactment of a human rights act/bill of rights for NSW. This has been the Association's position since 2007.<sup>12</sup>

### ***The risk of inconsistency between NSW and Commonwealth law***

17. The Association is also concerned that the introduction of the ADAB is premature, given that the Commonwealth Government's own package of religious freedom laws is currently in its second exposure draft form, has yet to be introduced to the Parliament and has been subject of criticism from a number of organisations including the Law Council of Australia, of which the Association is a constituent body. The final form that the Commonwealth Religious

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<sup>11</sup> Such as the *International Convention on the Elimination of all forms of Racial Discrimination*, the *Convention on the Elimination of all forms of Discrimination against Women*, the *Convention on the Rights of People with Disabilities*, and the *United Nations Declaration on the Rights of Indigenous Peoples*.

<sup>12</sup> The effectiveness of Bills of Rights to adjudicate between the rights of those who hold traditional religious beliefs to express their views freely and modern liberal values was recently demonstrated under the *Human Rights Act 1998* (UK) in *R (on the application of Ngole) v University of Sheffield* [2019] EWCA Civ 1127, where the English and Welsh Court of Appeal, Civil Division, overturned the dismissal of a Christian student's judicial review of his removal from a social work course for placing a Facebook post disapproving of homosexuality.



Freedoms Bills will take is unknown and it is not possible to analyse with any degree of certainty whether the ADAB will be consistent with the proposed Commonwealth provisions at this point.

18. There is a significant risk that the ADAB's provisions could be inconsistent with the Commonwealth Religious Freedom Bills. This would result in disharmonies between the protection of religious rights at a state and at a federal level where uniformity of approach is to be preferred.
19. The danger of inconsistencies between State and Federal approaches to a like issue have been demonstrated recently by the *Modern Slavery Act 2018* (NSW). The NSW legislation was enacted before the *Modern Slavery Act 2018* (Cth) but is still yet to commence and has been the subject of a parliamentary inquiry due to substantial inconsistencies between the statutes.
20. The importance of uniformity in the area of anti-discrimination law in particular is illustrated by *Viskauskas v Niland*,<sup>13</sup> where the High Court held that provisions of Part II of the *ADA* were inconsistent with the *Racial Discrimination Act 1975* (Cth) and consequently the Federal law prevailed over the State's legislation.<sup>14</sup> The result was a constitutional entanglement that rendered the NSW laws between 1978 and 1981 invalid.<sup>15</sup> The uncertainty previously generated by inconsistencies between state and federal anti-discrimination laws should not be repeated.
21. The avoidance of inconsistency between state, territorial and federal law is also central to the Australian Law Reform Commission's (ALRC's) ongoing review into the framework of religious exemptions in anti-discrimination legislation. The Commonwealth Attorney-General's reference of the issue of religion and anti-discrimination laws to the ALRC was based on the "*anticipated effect of [the Religious Discrimination Bill 2019 (Cth)] 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***" (emphasis added).<sup>16</sup>
22. The ALRC is due to report on 12 December 2020. The Expert Panel found in 2018 that "*Australians enjoy a high degree of religious freedom, and that basic protections are in place in Australian law*"<sup>17</sup> and that religious freedom cannot be said to be "*in imminent peril*" in this country.<sup>18</sup> There does not appear to be any pressing need that would justify legislating in haste to protect religious freedoms alone in NSW before the ALRC reports.
23. The Association therefore counsels caution in this contentious area of reform.

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<sup>13</sup> (1983) 57 ALJR 414.

<sup>14</sup> See s 109 of the Commonwealth Constitution. See also *University of Wollongong v Metawally* (1984) 59 ALJR 48 (*Metawally*).

<sup>15</sup> *Metawally*, 49 (Gibbs J).

<sup>16</sup> Terms of Reference, as amended on 2 March 2020 (see <https://www.alrc.gov.au/inquiry/review-into-the-framework-of-religious-exemptions-in-anti-discrimination-legislation/terms-of-reference/>).

<sup>17</sup> *Religious Freedom Review – Report of the Expert Panel*, 18 May 2018, [1.419].

<sup>18</sup> *Ibid*, [1.6].

### *Specific concerns with drafting*

24. In addition to the concerns outlined above, the following provisions within the ADAB are of particular concern to the Association.
25. First, the proposed interpretative provisions (“*Principles of the Act*”) to be inserted as sections 3(1)(b) and 3(2) into the *ADA* are not supported because they promote religious freedom over other rights.
26. Second, the proposed section 22M should be omitted entirely because a relevant exception is already provided by section 56 of the *ADA* and the proposed exception in section 22M is not in keeping with anti-discrimination statutes nationwide. The definitions of “*religious belief*” and “*religious activity*” proposed in the ADAB should be adopted for the following reasons:
  - a. The broad definitions potentially allow for subjective determination of what is religious belief and subjective motivation for a religious activity;
  - b. the effect of the proposed definitions is that the exception in proposed section 22M is far broader than that contained in any comparable legislation;
  - c. the definitions fail to balance the freedom of religion and the right to freedom from discrimination on religious grounds, and, for example, permit people to be discriminated against on the basis of incorrect assumptions about their past, present and future religious beliefs and activities;
  - d. the way in which the definitions operate when incorporated into section 22M does not comply with art 18(3) of the *International Covenant on Civil and Political Rights* (1966) and the *Siracusa Principles* because:
    - i. they are not necessary to protect fundamental rights and freedoms;
    - ii. they do not respond to a pressing public or social need;
    - iii. they do not pursue a legitimate aim and are not proportionate; and,
    - iv. do not apply no more restrictive means than are required for achievement of a legitimate purpose.
27. Fourth, a “*genuinely believes*” test for religious belief should not be adopted in the exception for the following reasons:
  - a. it reflects an incorrect interpretation of the decision of the High Court in *Church of the New Faith v Commissioner of Payroll Tax (Vic)*;<sup>19</sup>
  - b. the test is inconsistent with the way in which analogous exceptions to anti-discrimination regimes are cast, including section 56(d) of the *ADA*;

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<sup>19</sup> (1983) 154 CLR 120.

- c. a “*genuinely believes*” test does not comply with Australia’s international law obligations in that:
    - i. it is not necessary to protect fundamental rights and freedoms;
    - ii. does not respond to a pressing public or social need;
    - iii. does not appear to pursue a legitimate aim and is not proportionate; and,
    - iv. does not apply no more restrictive means than are required for achievement of the purpose;
28. The term “*consistent with*” in proposed section 22M (1) (as opposed to the term “*conforms to*” or “*conforms with*”) should not be incorporated into the anti-discrimination exception regime for the following reasons:
- a. the exception in section 22M is far broader than that contained in any comparable legislation including section 56(d);
  - b. the term permits the religious organisations to discriminate against people on the basis of their (presumed) religious activities and beliefs in extremely broad circumstances – including in the context of commercial or secular operations;
  - c. the exception in section 56 of the *ADA* is sufficient.
29. It is preferable for the Tribunal to determine the reasonableness of a requirement or condition whereas subsections 22N (3) to (5) and (9) propose a blanket rule which is inappropriate. The Association considers that the provisions concerning qualifying bodies in the proposed section 22S and educational authorities in section 22V should similarly be rejected.
30. The proposed subsection 22Z (2) should not be enacted because it would potentially lead to services, including fundamental services to which all NSW residents should be entitled, being provided on an unequal basis.

*Conclusion*

31. Thank you again for the opportunity to make a submission to the Joint Select Committee. If you would like any further information, our contact at first instance is the Association’s Department of Policy and Public Affairs at [REDACTED]

**10 September 2020**