

**Submission
No 87**

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

Organisation: New South Wales Society of Labor Lawyers

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21 August 2020

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Chair, Religious Freedoms and Equality Inquiry
Parliament House
Macquarie Street
Sydney NSW 2000

By email: religiousfreedombill@parliament.nsw.gov.au

Dear Chair,

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

The New South Wales Society of Labor Lawyers ('the Society') welcomes the opportunity to make a submission to the Joint Select Committee ('the Committee') on the *Anti-Discrimination Amendment (Religious Freedom and Equality) Bill 2020* ('the Bill'). The Bill seeks the addition of a further protected attribute in the *Anti-Discrimination Act 1977* ('the ADA') and consequential amendments.

The Society, originally established in 1977, aims to promote changes in the substantive and procedural law, the administration of justice, the legal profession, legal services, legal aid and legal education to help bring about a more just and equitable society. The Society provides a meeting ground for people involved in the law who believe in Labor principles of fairness, social justice, equal opportunity, compassion and community. The Society's membership and supporters include barristers, solicitors and trade union industrial officers working across the legal sector. The Society's founder, Frank Walker QC, was Attorney-General responsible for the establishment of the anti-discrimination regime in New South Wales in the 1970's, a regime that to this day continues to protect some of the most vulnerable in our community.

Our Society generally supports the expansion of religious anti-discrimination laws in Australia. In New South Wales, the law presently lags behind its counterparts in offering protection against religious discrimination, with only a limited offering of protection to religious persons who might be captured under the category 'ethno-religious' in the ADA's definition of 'race'¹. In saying this, our Society recognises that expansion of religious discrimination laws is a complex area, fraught with difficulty due to the risk that any expansion of such laws infringes on other attributes protected by already existing discrimination laws in Australia. Our preference is also that any development in religious discrimination law occur at a federal level, acknowledging the advanced jurisdiction of the Australian Human Rights Commission and the preference for having a comprehensive suite of federal anti-discrimination laws.

We take the following approach to the development of religious discrimination law in this submission. Firstly, our view is that religious discrimination law should not displace other protected attributes. Secondly, we distinguish between laws which protect from discrimination on the basis of religion and laws which protect freedom of religion. Anti-discrimination legislation in Australia has generally been

¹ See ADA, s 4. For other religious discrimination protections see also the *Equal Opportunity Act 2010* (Vic), *Discrimination Act 1991* (ACT), and the *Anti-Discrimination Act 1991* (Qld).

confined to the former, with the latter being protected through, in some states and territories, human rights legislation. Thirdly, we consider that developments to religious discrimination law should occur in tandem with other protected attributes and that, where possible, new laws should not confer protections in excess of those that already apply to other protected attributes. In doing so, the ADA can continue to meet the equality purpose in Article 26 of the *International Covenant on Civil and Political Rights* which states that '[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law.' The purpose of any anti-discrimination reform is therefore preventative – to prevent persons from being treated unequally, rather than to confer rights to one group in excess of the rights available to another.

With these issues in mind, we make the following comments on the proposed Bill:

Principles of the Act [Proposed Section 3]

Recommendation: Amend

The Bill proposes a new s 3 prescribing 'Principles of the Act' which focuses on three international agreements, but which in s 3(2) expands only on those agreements with respect to religion. We query the intended purpose of this provision, which places fundamental importance on religious discrimination above other protected attributes in the ADA. We suggest that if such a provision were to be incorporated in the ADA it should be worded in attribute neutral terms, such as:

- (1) *In carrying out functions and making determinations under this Act, the Minister, Board, President, Tribunal and Courts shall have fundamental regard to the International Covenant on Civil and Political Rights.*
- (2) *So far as 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 the International Covenant on Civil and Political Rights.*

In those circumstances, the Society would support the inclusion of a general principles provision. In the absence of these changes, the Society proposes this section be removed from the draft, as the ADA has now effectively operated for over four decades without direct reference to international instruments.

Definition of 'religious belief' and 'religious activity' [Proposed 22K(1)]

Recommendation: Amend

The Bill proposes a new s 22K which defines terms including 'religious belief' and 'religious activity'. The current definitions in s 22L expand on definitions found in other anti-discrimination law, including the *Equal Opportunity Act 2010* (Vic) which defines 'religious belief or activity' as 'holding or not holding a lawful religious belief or view [or] engaging in, not engaging in or refusing to engage in a lawful religious activity'². This definition is similar to that adopted in the *Anti-Discrimination Act 1991* (Qld)³ and the second exposure draft of the Religious Discrimination Bill 2019 ('RDB')⁴.

The proposed s 22K goes further and extends to 'religious conviction, belief, opinion or affiliation'. We consider that the expansion of the definition is arbitrary, and the better approach is to bring the proposed definition in line with existing legislation and the draft RDB, which largely conform.

² *Equal Opportunity Act 2010* (Vic), s 4.

³ *Anti-Discrimination Act 1991* (Qld), Sch 1.

⁴ Religious Discrimination Bill 2019, s 5.

Consistent with our proposals later in this submission that s 22M and s 22Z(2) be removed, we also recommend the removal of the definition of ‘religious ethos organisation’.

Past, future, and presumed religious belief or activity [Proposed 22KB]

Recommendation: *Remove*

The Bill proposes a new s 22KB which expands the definition of ‘religious belief’ (found in proposed s 22K(1)) such that it includes religious beliefs that a person holds or is thought to hold, held in the past, or is thought to have held in the past, and will hold or is thought to will hold in the future. Subsection (2) extends this to ‘religious ethos organisations’. We consider this definition is imprecise, prone to statutory misinterpretation. The definition of ‘religious belief’ itself tends toward wide subjective interpretation⁵, as there are many manifestations of religious belief. Complicating this definition further by adding an element of temporality will magnify the indeterminate nature of this attribute.

Further, we see no basis for this provision given there is no equivalent for religious discrimination in other anti-discrimination statutes in Australia. Within the ADA, the equivalent provision on which proposed s 22KB is clearly modelled is s 49A, which in the case of disability provides protection against discrimination on the basis of presumed past or future disability. Similarly, s 4 of the *Equal Opportunity Act 2010* (Vic) extends the definition of disability to include disability that ‘may exist in the future’. These serve a tailored function for disability discrimination by preventing employers, or other organisations the subject of the statutes, from discriminating on the basis of past or present *medical history*. It is to avoid employers making predictions based on the medical history of a person concerned or their parents in some cases. It is difficult to see why a similar provision should be extended to religious discrimination when other protected attributes are not afforded the same open-ended protections.

Protection for religious ethos organisations [Proposed 22M]

Recommendation: *Remove*

The Bill proposes a new s 22M which exempts ‘religious ethos organisations’ from the new religious discrimination provisions if the organisation genuinely believes that the conduct they are engaging in is, amongst other things, ‘consistent with the doctrines, tenets, beliefs or teachings of the religion of the organisation’. We note there appears to be some uncertainty over whether s 22M is intended to exempt religious ethos organisations from discrimination on the ground of religious belief or activity, or discrimination generally. The Explanatory Notes state ‘[p]roposed section 22M provides that a religious ethos organisation is taken not to discriminate...’ [our emphasis] whereas the provision appears to be worded with particular reference to discrimination on the basis of religious belief or activity. For the purpose of these submissions, we consider the provision is only intended to operate with respect to discrimination on the basis of religious belief or activity.

Our primary concern with proposed s 22M stems from the operation of s 56 and the wide definition of ‘religious ethos organisation’. Section 56 already exempts particular kinds of conduct central to the practice of ‘religious bodies’ from the operation of the ADA, including the ordination of priests, the appointment of any person in any capacity by a body established to propagate religion, and, relevantly:

...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.

⁵ This point was acknowledged in the Second Reading Speech.

Section 56 is a necessary and proportionate measure to protect the central activities of religious bodies, and includes 'bodies established to propagate religion'. This section therefore already covers a range of situations to which the proposed s 22M is directed. Section 22M is worded in open-ended terms given the definition of 'religious ethos organisation' includes 'any other body that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion'. The key distinction between s 22M and the existing s 56 is while s 56 only captures bodies designed to 'propagate' religion, s 22M includes bodies which merely conduct activities in accordance with the doctrines, tenets, beliefs or teachings of a religion. This could include, for example, charities who have their basis in a particular religion (but do not 'propagate' that religion) that may receive significant government funding to conduct a particular public interest activity and, under the proposed s 22M, would be permitted to discriminate against people of other faith. In our view, given the existing protections in s 56 and uncertainty over the definition of 'religious ethos organisation', s 22M should be removed from the draft Bill.

Sanctioning of religious activity outside of work [Proposed 22N(3)-(5); 22S(2)-(4); 22V(3)-(5)]

Recommendation: *Remove*

The Bill proposes a new s 22N(3)-(5) which protects any employee who engages in 'protected activity' from sanction by their employer. 'Protected activity' is defined in subsection (4) as a religious activity at a time and place outside of work that does not include a direct criticism of, or attack on, or cause 'direct and material financial detriment' to the employer. In our view, such a provision undermines decades of established employment law, and creates new workplace rights for some, but not all, employees, at their own (perhaps *post facto*) declaration and without any employer recourse. This cuts across both the Federal jurisdiction of the *Fair Work Act 2009* (Cth) ('FW Act') and the NSW workers' compensation and work health and safety statutes, and may leave employers in breach of their duties under these statutes in reducing their ability to manage the conduct of their employees. Furthermore, it undermines the right of an employer, and other employees, to establish workplace policies and protocols particular to their workplace that protect the employer's reputation, financial and customer interests, and the wellbeing of employees.

The type of actions the subject of these draft subsections are also, to a large extent, already covered by provisions in existing legislation, and in other proposed provisions in this draft Bill. For example, if proposed subsections 22N(1)-(2) are adopted, these provisions in effect protect an employee, or prospective employee, from an employer or prospective employer refusing an offer of employment, or adjusting terms of their employment, on the basis of their religious belief or activity. Similarly, the FW Act contains existing provisions protecting against discrimination at work on the basis of religion. Section 351 provides that an employer cannot take 'adverse action'⁶, and s 772 provides that an employee cannot be terminated, on the basis of religion (not defined in the FW Act and therefore subject to broad interpretation). These provisions confer rights which arguably traverse the areas proposed by the new s 22N(3)-(5).

For the above reasons, we recommend the removal of proposed subsections 22N(3)-(5). Subsections 22S(2)-(4) and 22V(3)-(5), which are worded in similar terms, should also be removed.

Wearing or religious symbols and clothing [Proposed Section 22N(6)]

Recommendation: *Amend*

The proposed s 22N(6) provides that it is unlawful to discriminate by refusing an employee permission to wear 'any religious symbol or any religious clothing during work hours'. However, s 22N(6)(b) requires that the wearing of the religious symbol or clothing be 'reasonable having regard to the

⁶ Adverse action includes dismissal, injury in employment, prejudicially altering the position of an employee and discriminating between the employee and other employees: see s 342, FW Act.

circumstances of the employment'. Those circumstances include the workplace safety, productivity, communications, customer service requirements and industry standards of that employment. We consider that s 22N(6)(b) is unnecessarily vague and therefore prone to wide interpretation. We suggest this subsection be removed and replaced with a higher threshold test, for example, that the wearing of the religious symbol or clothing not conflict with the 'inherent requirement' of the role. This is a commonly accepted test in a range of anti-discrimination statutes⁷ which would, in our view, provide additional protection to those wearing religious symbols or clothing.

Application to State Laws and Programs [Proposed Section 22Z]

Recommendation: Amend

The Bill proposes a new s 22Z which prevents religious discrimination in the course of performing functions, or carrying out responsibilities, under or in the administration of a State law or program. This provision is broadly consistent with interstate and federal equivalents for other protected attributes⁸. The Society supports the inclusion of this provision in the ADA subject to the following. Firstly, the amendments proposed in the Bill to s 126 of the ADA should be removed (discussed in the following section) so that state laws and programs may be exempted, in certain scenarios and on public interest grounds, by the President of the Board, from the application of this (and other) provisions. Secondly, the draft Bill should extend these provisions to other protected attributes under the ADA so that attributes are equally protected in the application of State laws and programs. Thirdly, consistent with our approach taken to s 22M above, we consider that s 22Z(2) should be removed. Without these amendments, the Society does not support this draft provision.

Powers of the President to provide exemptions from the Act [Proposed Section 126]

Recommendation: Remove

The proposed amendment to s 126 inserts the words 'Other than for Part 2B, the President' at the commencement of the current provision. The effect of this change will be that the President of the Anti-Discrimination Board is unable to grant an exemption to the religious discrimination provisions in the ADA or its Regulations. We have two concerns with this proposal. Firstly, the intent of s 126 is to remedy unforeseen consequences of the ADA's operation and so organisations who are otherwise conducting public interest activities may be comfortable that their activities are lawful. For example, historically the provision has been used by indigenous organisations such as the Aboriginal Legal Service to hire indigenous-only solicitors for cultural reasons and client-facing roles, or by organisations to offer women-only scholarships to advance the status of women in their industries⁹. Similarly to other protected attributes, unforeseen consequences can be expected in the operation of the proposed religious discrimination provisions and the operation of s 126 would allow the President to in certain circumstances grant an exemption. Historically, this exemption power has been conservatively used (for example, as at the date of this submission ~150 exemptions operate in the whole of NSW). Secondly, this exemption from the operation of s 126 is not granted to any other protected attributes under the ADA. In order for the ADA to be structurally consistent, we suggest removal of this amendment.

Additional protections against vilification

The Bill currently does not afford the same protection against vilification to persons raising a complaint on the grounds of religious discrimination. The Explanatory Notes to the Bill are silent on this, but the

⁷ This is a well-adapted test found in Federal anti-discrimination legislation: see for example s 18, *Age Discrimination Act 2004* (Cth) and s 21A, *Disability Discrimination Act 1992* (Cth).

⁸ See, for example, s 101 of the *Anti-Discrimination Act 1991* (Qld) which extends the protection to 'religious belief or activity'; see also s 26 of the *Sex Discrimination Act 1984* (Cth), s 31 of the *Age Discrimination Act 2004* (Cth) and s 29 of the *Disability Discrimination Act 1992* (Cth) which extend the protection to the protected attributes under each statute.

⁹ Anti-Discrimination NSW Website, 'Current exemptions' (accessed 13 August 2020).

Second Reading Speech in the Legislative Council¹⁰ indicates a vilification provision was omitted because of the recent passage of the *Crimes Amendment (Publicly Threatening an Inciting Violence) Bill 2018* (NSW), which created a new s 93Z in the *Crimes Act 1900* (NSW) allowing for prosecution of persons who by a public act 'threatens or incites violence towards another person or a group of persons' on the grounds of, amongst other things, religious belief or affiliation¹¹. We consider that any new religious discrimination provisions in the ADA should be afforded the same vilification provisions as other protected attributes, so that individuals alleging conduct that 'incite[s] hatred towards, serious contempt for, or severe ridicule' on the basis of religious belief or activity can bring their complaint through the Anti-Discrimination Board under the mechanism in s 87A. This mechanism serves a separate purpose to criminal offence provisions: it allows aggrieved individuals to raise a complaint by identifying potentially harmful conduct directed toward a protected attribute. Such conduct is not considered of sufficient seriousness to warrant a criminal offence but is conduct which, through the operation of the complaints mechanism in the ADA, can be progressively minimised in society. This addition would also bring any proposed religious discrimination provisions into line with other protected attributes¹² thereby achieving structural consistency in the ADA.

Our approach to freedom of religion

With respect to the broader issue of freedom of religion, our Society continues¹³ to maintain the view that the best means of promoting these freedoms in Australia and in our state is through the adoption of charters of human rights consistent with charters adopted in Victoria, Queensland and the Australian Capital Territory. Adopting such a charter would, to the extent possible consistent with the purpose of statutes in New South Wales, allow courts to interpret statutory provisions in a way that is compatible with human rights and freedom of religion.

We otherwise support the introduction of religious discrimination provisions into the ADA, and encourage the Committee to give proposer consideration to enacting religious discrimination laws in New South Wales. Please contact the undersigned at info@nswlaborlawyers.com if the Committee requires any further submissions.

Yours faithfully,



NSW Society of Labor Lawyers

President: Lewis Hamilton **Vice President:** Blake Osmond **Treasurer:** Claire Pullen **Secretary:** David Pink **Ordinary Committee Members:** Kirk McKenzie, Tom Kelly, Jamila Gherjestani, Joe Blackshield, Janai Tabbernor, Nikhil Mishra and Ellyse Harding.

The Society is not affiliated to the Australian Labor Party (NSW Branch). The views expressed in this submission are not those of the Australian Labor Party (NSW Branch), its members, or the State Parliamentary Labor Party.

¹⁰ New South Wales, *Parliamentary Debates*, NSW Legislative Council, 13 May 2020 (Hon Mark Latham MLC).

¹¹ *Crimes Act 1900* (NSW), s 93Z.

¹² See racial vilification provisions, Div 3A; transgender vilification provisions, Div 5; homosexual vilification provisions, Div 4; and HIV/AIDS vilification provisions, Part 4F.

¹³ We have previously provided submissions to the Legislation Review Committee's review of the operation of the *Legislation Review Act 1987* (NSW) in support of a charter of human rights: Evidence to Legislation Review Committee, NSW Legislative Council, Sydney, NSW, 21 May 2018, at p 31 (Mr Lewis Hamilton and Mr Kirk McKenzie).