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The Hon Gabrielle Upton MP

Chair,

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

Dear Ms Upton,

Thank you for your invitation to Women's Electoral Lobby NSW to make a submission to the Committee's inquiry on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020. Our submission follows.

Yours sincerely

Philippa Hall

Convenor

Women's Electoral Lobby NSW

About Women's Electoral Lobby

Women's Electoral Lobby, established in 1972, is an independent, non-party political lobby group dedicated to creating a society where women's participation and their ability to fulfil their potential are unrestricted, acknowledged and respected and where women and men share equally in society's responsibilities and rewards.

WEL applies a feminist approach to all its work, from policy analysis and development to campaigning. WEL has developed a Feminist Policy Framework, which sets out the values which we use to measure fairness for women and fairness for society. WEL believes that good policies should address these indicators and work with governments at all levels to achieve better and fairer policy outcomes.

WEL believes that fair policies are those that:

1. Ensure the benefits and outcomes are fairly distributed between women and men, as well as between different groups of women,
2. Value and reward fairly people's different skills, experiences and contributions,
3. Recognise the value of caring and supporting roles, whether paid or unpaid,
4. Recognise and rectify past and current inequalities between men and women, and
5. Enhance opportunities for both women and men to take on equal rights and responsibilities in all aspects of society: politics, community, employment and social life.

Summary of WEL's concerns and recommendations

WEL supports the right to freedom of thought, conscience and religion, fairly balanced with other human rights. Any limitation on human rights must be proportionate so that the rights of others are as far as possible protected. We oppose the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 as we believe that it has the potential to remove or severely compromise protection from discrimination for various groups covered by the NSW Anti-Discrimination Act (1977), where this discrimination is exercised on the basis of religious belief.

WEL's primary consideration is the potential impact of the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 on the NSW Anti-Discrimination Act as an instrument for advancing women's equality.

The NSW Anti-Discrimination Act 1977 (NSW) covers sex discrimination and other areas of discrimination such as race, age, disability, harassment, sexual harassment, marital status, carers, homosexuality and transgender, all of which include women from an intersectional perspective.

This Bill would allow individuals and organisations who claim the ground of religious belief to override the protections the Act provides for women and almost all the other categories and areas of discrimination it includes.

In this regard WEL agrees with the analysis in the expert legal submissions from the Australian Discrimination Law Experts Group, Equality Australia and the Women's Legal Service NSW. It seems barely tenable for the Joint Select Committee to adopt an Amendment which these expert submissions show would nullify the Act's protections of others who might be subject to discriminatory actions and expressions by people claiming religious belief.

Should the Bill be adopted, the amended NSW Anti-Discrimination Act would also allow discrimination by 'religious ethos organisations' (as defined in the Bill) against people of different religious beliefs. In the name of religious freedom and equality, the Amendment would undermine the Anti-Discrimination Act from within.

Need to review the NSW Anti-Discrimination Act

WEL shares the concern in other submissions, such as those from the Women's Legal Service NSW, Equality Australia and the Australian Discrimination Law Experts Group that the NSW Anti-Discrimination Act 1977 (NSW) does not reflect contemporary developments in Human Rights and Anti-Discrimination legislation, both in Australia and internationally.

We acknowledge that inclusion of discrimination based on religious belief and activity in a revised Anti-Discrimination Act is desirable and could contribute to women's equality. As a first step however the Act itself needs to be comprehensively reviewed.

WEL's position is that anti-discrimination laws should promote substantive equality and that the NSW Act falls short in this respect. We note that the full title of the NSW Anti-Discrimination Act is: 'An Act to render unlawful racial, sex and other types of discrimination in certain circumstances and *to promote equality of opportunity between all persons*' (our emphasis).

Currently the NSW Anti-Discrimination Board has very limited capacity to take a proactive and shaping role in deepening community understanding of anti-discrimination and to promote equality of opportunity between all persons.

The complaints procedures place the onus on the individual complainant. Marginalised and vulnerable individuals suffering discrimination can find the complaint process daunting and the legal requirements where a case goes to the Tribunal or courts even more so. This is likely to be the case for many women, especially where they are victimized on several grounds of discrimination, such as race, disability, gender or marital status.

In many cases where wealthy and powerful organisations are respondents there is likely to be a significant gap in the resources and knowledge available to the respondent and the complainant.

The proposed Amendment to the Anti –Discrimination Act could well work in the same way. Some of the organisations seeking religious belief protection for their activities under this Bill are amongst the most wealthy and powerful in Australia, delivering a wide range of public services on behalf of government and with public funding, including aged-care, education, adoption services, employment assistance and child welfare.

We note that the NSW Law Reform Commission last reviewed the NSW Anti-Discrimination Act in 1999 and that several recommendations addressed many of these issues in detail – including the addition of religious discrimination, complaint procedures and the role of the Board. These recommendations were not implemented.

Impacts of the Bill on women from diverse religious and cultural backgrounds

WEL believes that the proposed Amendment as it stands, would not in fact assist a significant number of individuals seeking protection from religious discrimination, especially if they are victims of discrimination from others who themselves claim religious belief.

For example subsection 6 under Section 22N ‘Discrimination against applicants and employees’ states that *‘it is unlawful for an employer to discriminate against a person on the ground of religious beliefs or religious activities by refusing the employee permission to wear any religious symbol or any religious clothing during work hours.* The subsection then proceeds to constrain this provision to circumstances where the ‘symbol or dress is recognised as desirable or necessary by persons in the workplace of the same religious belief’ and where considerations of customer service, communications and productivity make it ‘reasonable’.

These constraints would enable employers to ban the wearing of scarves, robes, veils and other specific forms of dress sometimes adopted by women of Islamic faith as well as by people in other minority faith traditions in NSW.

Muslim women are amongst the most exposed to abuse and exclusion, based on dress and assumptions about Islam and women. Charles Sturt University's *Islamophobia in Australia* report, released last November, cites 349 incidents of Islamophobia over 2016 and 2017 involving ‘the perpetration of verbal and physical anti-Muslim abuse together with denigration of Muslim identity’.

Almost three-quarters of the incidents were carried out against women, with 96 per cent of non-online female victims wearing a hijab at the time.

Muslim women also have a much lower employment rate than other Australian women, which must partly be attributed to discrimination and its effects.

In these respects, the Bill is especially cruel. It promises protections to the religious women currently most susceptible to discrimination with one hand, then takes these away with the other.

Impact of the Bill on women's workplaces

Clauses in the draft Bill which privilege religious belief, actions and organisations over all other protections would set back women's progress in achieving equality in the workplace. Women in their places of employment would be more vulnerable to misogynist and demeaning stereotyping and denigration characteristic of some (but certainly not all) religious interpretations, sects, cults and traditions. Reproductive health, domestic violence services, education provision, employment security and conditions and many other services could be compromised.

Impact of the Bill on access to reproductive health services

Adoption of the Bill could further limit and constrain reproductive health services- especially in rural and regional NSW where access to services is already limited. For example health practitioners with a conscientious objection based on religious belief who break the law and infringe codes of professional conduct by refusing to refer women requesting a termination to non-objecting practitioners—either directly or via the information provided by the NSW Department of Health – could do so knowing they had the protection of religious belief and would face no threat from disciplinary procedures.

There is also the disturbing possibility that the Bill could allow an extension of conscientious objection on the basis of religious belief to people who, while not being medical or health practitioners, are able to make 'complicity claims' for exercising a conscientious objection. This would mean that individuals associated with the administration of medical or health procedures including clerical and other support staff could refuse on the basis of a religiously motivated conscientious objection. The Bill could also extend the scope for conscientious objection to organisations such as the proposed religious ethos organisations. We discuss this in more detail later in the submission.

Impact of the Bill on women's employment.

Under clause 22M of the Bill, organisations in the health, community services, education and care industries, which are some of the largest employers of women, could more easily adopt exclusionary and discriminatory recruitment and employment practices involving their whole workforce.

In deploying deliberately discriminatory policies or procedures, 'religious ethos organisations' would simply have to *believe* that their conduct is consistent with religious beliefs, doctrine or teachings, rather than having to make a case to justify such conduct. No other organisations – such as cooperatives or volunteer and pro-bono organisations which take secular ethical beliefs as their basis- are able to act with such impunity.

Impact of the Bill on government laws, decisions and other measures supporting women.

Section 22Z of the Bill has alarming implications for women's health, status and safety. We understand it is unprecedented in anti-discrimination law to give 'standing' to an organisation. The NSW Anti-Discrimination Act currently allows only natural persons to bring a claim of discrimination. These proposed clauses would enable 'religious ethos organisations' to pursue discrimination claims against other religious organisations and against state laws, rules, determinations and programs.

Under section 22Z 'religious ethos organisations' such as churches, charities, religiously controlled health, community services and education providers will be able to challenge an extensive range of government measures and decisions, many of which contribute to the equal status of women and encourage safe and diverse, healthy and inclusive communities and workplaces..

Such government initiatives include: guidelines and programs to raise awareness of domestic violence and protocols in dealing with domestic violence; health guidelines and policies; occupational health and safety procedures; workplace diversity and inclusion strategies; government strategies to improve the position of women; codes of conduct and non-sexist policies in government agencies.

Procedures to support children against abuse, public health programs and policies, community services policies and programs plus school curriculum directives and syllabuses could also be challenged. It is possible that criteria for and decisions on government contracts and services could also be claimed as religious discrimination.

In privileging religious belief and activity protections, along with self-declared 'religious ethos organisations', WEL believes that the Amendment would serve to make this new section of the Act a regressive agent, undermining the Act's overall objective, expressed in its title, to achieve equality between all persons, including equality between people of faith.

Recommendations

WEL endorses the recommendations in submissions to the Committee from Women's Legal Service NSW, the Australian Discrimination Law Experts Group, Family Planning NSW, Domestic Violence NSW and Equality Australia.

1. WEL recommends that the Committee not endorse the Bill, given its underlying flaws and potential for undermining the fundamental rights and freedoms of others.
2. WEL recommends that the Committee propose to the Government a wider, expert review of the Anti-Discrimination Act 1977 (NSW), such as by the Law Reform Commission, which includes consideration of how religious belief and activity should be added and constructed as protected attributes equal in status to the other attributes protected.
3. In the event that the Committee resolves to recommend a revised version of the Bill, we support the detailed amendments, including deletions, as specified in the submission from the Australian Discrimination Law Experts Group.

4. Definitions of religious belief and activity should be clarified to allow the genuineness of the belief to be assessed independently during a complaints process and in a manner appropriate to the weight of the protections religious belief confers in the Act.
5. In particular WEL recommends deletion of Section 22M 'Religious Ethos Organisations taken not to discriminate in certain circumstances'; Section 22N Discrimination Against Applicants and Employees -subsections 3, 4, 5 & 6 and subsection 9; Section 22 S Qualifying Bodies- subsections 2-5; Section 22V Education - subsections 3-6; Section 22Z State Laws and Programs, subsections 2-3 and section 126 Granting of exemptions by President.

Specific comments supporting WEL recommendations

Principles of the Act

The proposed principles reference a limited range of international covenants and declarations and omit some of the most critical human rights and anti-discrimination agreements.

We note the absence of the 'Convention on the Elimination of All Forms of Discrimination Against Women', to which Australia is a signatory.

In our submission we outline the ways the Bill could restrict access to reproductive healthcare, especially in rural and regional NSW.

The United Nations Committee on the Elimination of All Forms of Discrimination states:

'...access to healthcare, including reproductive health care is a basic right under the Convention of the Elimination of All Forms of Discrimination Against Women.... it is discrimination for a State Party to refuse to provide legally for the performance of certain reproductive health services for women. For instance if health service providers refuse to perform such services based on conscientious objection, measures should be introduced to ensure that women are referred to alternative serious providers'.¹

In this regard WEL commends the observation in the report from the Religious Freedom Review's chapter on Manifestation and Religious Belief that:

'...the right to freedom of religion or belief cannot be used to justify violations of the rights of women and girls. The Special Rapporteur's most recent report to the Human Rights Council notes: [T]he jurisprudence of the Human Rights Committee and the regional human rights courts uphold that it is not permissible for individuals or groups to invoke "religious liberty" to perpetuate discrimination against groups in vulnerable situations, including lesbian, gay, bisexual, transgender and intersex persons, when it comes to the provision of goods or services in the public sphere'.²

¹ United Nations Committee on the Elimination of all Forms of Discrimination Against Women General Recommendation No 24 Women and Health(1999)

² *Religious Freedom Review* Report of the Expert Panel :30, 1.62

<https://www.ag.gov.au/sites/default/files/2020-03/religious-freedom-review-expert-panel-report-2018.pdf>

Definitions of religious belief, activity and religious ethos organisations

The Bill provides exceptionally broad definitions of religious belief and activity (and non belief). The provision in the definition of religious activity that permits inclusion of any activity 'other than what would constitute an offence *punishable by imprisonment*' gives a very wide scope to protected behaviours, including behaviours that would be unlawful if not protected.

The definition of religious belief to be protected under the Act includes conviction, belief, opinion and affiliation. While the explanatory notes capture the so-called sincerity test ('genuinely believes'), religious belief in these terms is essentially self-declared.

Since the draft Amendment's version of belief is solipsistic, and so self-defined in the Bill, it would be difficult to prove that any action *did not* derive from a protected religious belief though a complaint process, or in any evidence based judicial context.

Indeed the Explanatory Notes state that the sincerity test is a means 'to avoid courts determining matters of religious doctrine or disputation'. While belief must be 'genuine', it can be as random and fleeting as opinion, or as oblique as affiliation- where even a small number of people with a shared religious opinion could declare themselves religious believers.

WEL is also concerned that the loose and overlapping 'definitions' of belief and the interrelated 'activity' could lead to retrospective claims for religious protection on the basis of a recovered religious opinion, following acts of intimidation or expressions of contempt which would otherwise be unlawful.

There is no requirement for consistency of belief and the Bill gives explicit protection to contradictory and conflicted manifestations of belief and associated actions.

Section 22 KA 'Determining when a belief is held' provides extensive leeway for a 'person' seeking protection for religious belief to include in that protection '*refusals, omissions or expressions that are motivated by or required by, conflict with, accord or are consistent with, that belief*'. This section reinforces the difficulties that any attempt to disprove belief as a motivation for otherwise discriminatory actions would face.

Religiously inspired sexist or even misogynistic manifestations, boycotts and other campaigns conducted by employees outside a formal occupational and educational setting will be protected under the Bill.

Social media provides extensive opportunities for such activity, formally dissociated from an employer but which can undermine the ethos and reputation of an organisation. Sincere and genuine religious opinions which would be potentially damaging to workplace cultures and reputations could be as simple as 'The Bible (or the Koran) tells us that women must be subordinate to men', 'Biblical study tells us that women are created by God to be child bearers, they are the vessels of Western civilization', 'motherhood is women's God ordained destiny' or in 'using contraception a women is subverting God's plan'.

For example a law firm which does pro-bono work for women suffering domestic violence could suffer damage to their reputation and their clients' trust if a legal employee via social media reiterated religious messages regarding women fabricating stories of domestic

violence to undermine men as divinely ordained heads of households. The firm would have no redress as such an accusation would be protected as religious belief.

Religious Ethos Organisations

The Bill gives significant powers and status to new entities it titles ‘religious ethos organisations’.

The word ‘ethos’ suggests that there is a uniformity of views, practices and voices under the banner of particular religious organisations. In reality, many such organisations and the denominations that manage them, experience conflicts and disagreements on the constituents of ‘ethos’ and on their directions and leadership. They share this with non-religious organisations.

There is no indication in the Bill on the route to becoming a religious ethos organisation. Some religious charities might opt to join, others would not. The Bill names private education authorities, charities registered with the Australian Charities and Not for Profits Commission and ‘any other body conducted in accordance with the doctrines, tenets, beliefs or teachings or a particular religion’ as religious ethos organisations.

Faith-based schools, charities and bodies will retain the already broad exemptions they enjoy under section 56 of the NSW Anti-Discrimination Act.

Should they become religious ethos organisations, these will be expanded to allow them to discriminate on the grounds of religion in areas such as recruitment, employment, education and service delivery.

Religious ethos can discriminate against women

It is important for the Committee to consider some historically sexist and patriarchal aspects of ‘religious ethos’, which, if embedded into employment practices, could sanction conduct contrary to Government policies and programs designed to combat homophobic and sexist attitudes leading to abuse and domestic violence. These attitudes and practices are publicly repudiated by many church leaders. Some members and leaders of religious organisations are working hard to change these aspects of their ethos. In this respect it is difficult for WEL to understand the reasons the Bill confers such special status and enormous powers to religious ethos organisations over those –sometimes equally flawed, which are not religious.³

Women comprise a very significant proportion of Australian faith communities and contribute to these communities disproportionately as volunteers and active participants, but few occupy top leadership roles. In some faith traditions, theological and other discriminatory arguments are advanced to support their exclusion from leadership positions.

The heads of Christian denominations in NSW are overwhelmingly (but not exclusively) male, and this is also the case with Muslim, Hindu and Buddhist communities. Few Australian businesses of equivalent size to some of our major religious organisations retain such a blatant lack of diversity in their management hierarchies.

³ Baird, J (2018). Domestic Violence in the church: When women are believed, change will happen. ABC May 2018. <https://www.abc.net.au/news/2018-05-23/when-women-are-believed-the-church-will-change/9782184>

Unsurprisingly heads of religious denominations do not always represent the beliefs and practices of their communities, especially on everyday matters like family planning, marriage and divorce, and sexuality.

Data from the Pew Centre in the United States suggests that there can be wide disparities between the beliefs and practices of many ordinary faith community members and those propagated by their leaders, especially in relation to reproductive health.⁴

Under clause 22M of the Bill, 'religious ethos organisations' in the education, health, community services and care industries, where the majority of employees are women, could more easily adopt exclusionary and discriminatory recruitment and employment practices covering all employees.

By deploying deliberately discriminatory policies or procedures, 'religious ethos organisations' would simply have to *believe* that their conduct is consistent with religious beliefs, doctrine, or teachings, rather than having to make a case to justify such conduct.

No other organisations – such as cooperatives or volunteer and pro-bono organisations which take secular ethical beliefs as their basis- are able to act with such impunity.

WEL is also concerned that this radical proposal to transform recruitment and employment practices of some of our largest employers fails to take account of industrial law. Many large religious charities (schools, health, welfare services and care providers), are relatively highly unionised organisations, employing tens of thousands of casual, part time, low paid and contracted workers.

Taken to an extreme, these clauses allowing 'religious ethos organisations' to act as 'laws unto themselves' in relation to otherwise discriminatory conduct, could lead to discriminatory covert or overt 'faith tests' as conditions of employment for 'religious ethos organisation' workers.

Largely female applicants in the charity, health and aged care sectors could be asked to disclose their religious beliefs and practices and, if employed, could be required to regularly reaffirm these as part of their employment conditions. Some religious hospitals in the US already use faith tests to monitor and recruit staff.

Employees' private lives are likely to be monitored, especially in small and closed religious communities, where rumours spread quickly. Women are particularly vulnerable to intrusions in their private lives arising from religious traditions hostile to women's autonomy and sexual expression.

Women who contravene religious codes of sexual conduct by living in de facto and /or lesbian relationships, seeking IVF, seeking contraceptives and reproductive health care from a local pharmacist or doctor, being single mothers in small communities, could be especially susceptible to interrogation and dismissal from 'Religious Ethos Organisations'. Even immodest dress that may offend religious sensibilities could provoke reprimand or dismissal if dress codes formed part of conditions of employment sanctioned under protections for religious belief.

⁴ Pew research Centre August 29 201n 'US Public continues to support legal abortion: Opposes overturning Roe vs Wade'. See <https://www.people-press.org/2019/08/29/u-s-public-continues-to-favor-legal-abortion-oppose-overturning-roe-v-wade/>

Nurses, midwives, pharmacists and ordinary care workers living in de facto relationships, single women pregnant and with children and of course LGBTI+ people are all vulnerable

The Bill establishes unfair double standards, with no clear justification. For example, it would allow a religious authority controlled domestic violence service, operating as a 'religious ethos organisation', to recruit, employ and give preference to staff and volunteers whose beliefs and opinions are consistent with those of a particular denomination.

On the other hand, a domestic violence service run on ethical principles deriving from a commitment to enhancing the autonomy of women would be able to claim no such privileges and could even be subject to religious discrimination claims if their employment policies specified ethical commitments consistent with their feminist ethos.

Section 22Z of the Bill has alarming implications for women's health, status and safety. We understand it is unprecedented in anti-discrimination law to give standing to an organisation as a complainant. The NSW Anti-Discrimination Act currently allows only natural persons to bring a claim of discrimination. Section 22Z would enable 'religious ethos organisations' to pursue discrimination claims against other such organisations and against State laws, rules, determinations and programs.

Section 22Z of the Bill is effectively a proposal to 'weaponise' 'religious ethos organisations' against government. Under this section, 'religious ethos organisations' such as churches, charities, religiously controlled health, community services and education providers also will be able to challenge an extensive range of government measures and decisions, many of which contribute to the equal status of women and encourage safe and diverse, healthy and inclusive communities and workplaces..

Such initiatives include guidelines and programs to raise awareness of domestic violence and protocols in dealing with domestic violence, health guidelines and policies, government strategies to improve the position of women, codes of conduct and non-sexist policies in government agencies.

Procedures to support children against abuse, public health programs and policies, community services policies and programs plus school curriculum directives and syllabuses could also be challenged. It is possible that criteria for and decisions on Government contracts and services could also be claimed as religious discrimination.

In this section of the Bill and in the subsequent section 22Z (2), the primarily Christian religious charities, which already dominate delivery of publicly funded welfare and aged care services and play major roles in education and health care provision, will now be able to discriminate in terms of who they employ and in terms of the people they service and the services they provide.

Religious Ethos Organisations and Reproductive Health Care

WEL is particularly concerned that some publicly funded religious hospitals and clinics could seek to constitute themselves as 'religious ethos organisations' to further restrict or even exclude provision of reproductive health care, including medical and non-medical terminations and contraception. The NSW Abortion Law Reform Act 2019 enables medical and health practitioners to exercise conscientious objection on the basis that the:

practitioner must, without delay—

- (a) *give information to the person on how to locate or contact a medical practitioner who, in the first practitioner's reasonable belief, does not have a conscientious objection to the performance of the termination, or*
- (b) *transfer the person's care to—*
 - (i) *another registered health practitioner who, in the first practitioner's reasonable belief, can provide the requested service and does not have a conscientious objection to the performance of the termination, or*
 - (ii) *a health service provider at which, in the first practitioner's reasonable belief, the requested service can be provided by another registered health practitioner who does not have a conscientious objection to the performance of the termination.*
- (4) *For the purposes of subsection (3)(a), the first practitioner is taken to have complied with the practitioner's obligations under that paragraph if the practitioner gives the person information approved by the Secretary of the Ministry of Health for the purposes of that paragraph.*

Note.

The information to be approved by the Secretary is to consist of contact details for a NSW Government service that provides information about a range of health services and resources, including information about medical practitioners who do not have a conscientious objection to the performance of terminations.

- (5) *This section does not limit any duty owed by a registered health practitioner to provide a service in an emergency.⁵*

In seeking to establish legal foundations for 'religious ethos organisations' to claim religious belief as the basis for both their own discriminatory actions and for challenging 'state laws and programs', the Bill could allow publicly funded religious hospitals and other medical services to claim religious based conscientious objection and to refuse provision of reproductive health services, including any referrals as set out in Part 2, section 9 of the Act.

Such a development would further constrain medical services for women, would extend the already extensive provision for individuals to exercise conscientious objection in the Act and impose constraints on the scope for professional practice of medical and health practitioners employed by the religious ethos organisation.

Final Version

⁵ Abortion Law reform Act 2019 Part 2 Section 9 registered Health Practitioner with Conscientious Objection <https://www.legislation.nsw.gov.au/#/view/act/2019/11/title>