



THE LAW SOCIETY
OF NEW SOUTH WALES

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20 August 2020

The Hon Gabrielle Upton MP
Chair

Joint Select Committee on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020
Parliament House, Macquarie Street
Sydney NSW 2000

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

Dear Ms Upton,

Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020

Thank you for the opportunity to make a submission to the Joint Select Committee on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 ("the Bill").

The Law Society's Human Rights, Employment Law, and Public Law Committees have contributed to this submission.

While the Law Society supports legislative protections for the right against religious discrimination and the right to freedom of religion, we do not believe the Bill should be passed in its current form, due to the issues outlined at 2 and 3 below, which include fundamental definitional concerns.

1. General comments

The Law Society holds the view that it is essential to approach any reforms to the anti-discrimination framework in NSW in a comprehensive manner. The most recent review of the *Anti-Discrimination Act 1977* (NSW) ("ADA"), conducted by the NSW Law Reform Commission, was released over 20 years ago, in November 1999.¹ Since 1999 there have been significant developments in anti-discrimination law at the federal and international level, in addition to shifting community standards and expectations. The Law Society therefore believes that a detailed review of the ADA would be timely and constructive. Any such review should consider the operation of the ADA in full, including the current set of general exemptions available under Part 6, and provide practical recommendations on expanding the scope of the ADA to cover new grounds of discrimination, including religion and political belief.

For the purpose of the current inquiry, the Law Society notes its support, in principle, for the introduction of protections against discrimination on the basis of religion. The right against religious discrimination has a strong foundation under international law. Article 26 of the

¹ 'Review of the Anti-Discrimination Act 1977', *Law Reform Commission*, <https://www.lawreform.justice.nsw.gov.au/Pages/lrc/lrc_completed_projects/lrc_completedprojects1990_1999/lrc_reviewoftheantidiscriminationact1977.aspx>.

International Covenant on Civil and Political Rights (“ICCPR”), to which Australia is a party, affirms that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.²

In the 1981 *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, the UN General Assembly clarified states’ obligations in relation to implementing the right against religious discrimination:

All States shall take effective measures to prevent and eliminate discrimination on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, economic, political, social and cultural life.

All States shall make all efforts to enact or rescind legislation where necessary to prohibit any such discrimination, and to take all appropriate measures to combat intolerance on the grounds of religion or belief in this matter.³

The Bill not only seeks to amend the ADA to prohibit religious discrimination, but also includes a number of provisions that seek to promote the right to freedom of religion. The basis of the right to freedom of religion is distinct from the right against religious discrimination,⁴ and is articulated at Article 18 of the ICCPR. That Article states that the right to adopt a religion or belief is absolute, but the right to manifest those beliefs may be limited in order to protect “public safety, order, health, or morals or the fundamental rights and freedoms of others”. The UN Human Rights Committee in its General Comment 22 of 1993 provided guidance as to the interpretation of Article 18:

In interpreting the scope of permissible limitation clauses [to Article 18], States parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination.⁵

A common approach to protecting the right to freedom of religion in other jurisdictions has been through a statutory charter or bill of rights. This is the approach followed, for example, in the *New Zealand Bill of Rights Act 1990*,⁶ the *Canadian Charter of Rights and Freedoms*,⁷ the *Victorian Charter of Human Rights And Responsibilities Act 2006*⁸ and Queensland’s *Human Rights Act 2018*.⁹ Each of these instruments includes provision for a proportionality approach to its application, which allows the right to freedom of religion to be balanced with other rights. We note that the Law Society’s longstanding position is to support the enactment of human

² *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 26.

³ UN General Assembly, *Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief*, GA Res 36/55, UN GAOR, 3rd Comm, 36th sess, 73rd plen mtg, Agenda Item 75, UN Doc A/RES/36/55 (25 November 1981) art 4. Available:

<https://www.ohchr.org/EN/ProfessionalInterest/Pages/ReligionOrBelief.aspx>.

⁴ Tarunabh Khaitan and Jane Calderwood Norton, ‘The right to freedom of religion and the right against religious discrimination: Theoretical distinctions’ (2019) 17(4) *I CON* 1125. Available:

<https://academic.oup.com/icon/article/17/4/1125/5710828>.

⁵ UN Human Rights Committee (HRC), *CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, UN Doc CCPR/C/21/Rev.1/, 48th sess, (30 July 1993), 3.

⁶ *New Zealand Bill of Rights Act 1990* (NZ) ss 13, 15.

⁷ *Canada Act 1982* (UK) c 11, sch B pt I (‘*Canadian Charter of Rights and Freedoms*’) art 2(a).

⁸ *Charter of Human Rights and Responsibilities Act 2006* (VIC) s 14.

⁹ *Human Rights Act 2019* (QLD) s 20.

rights legislation in NSW. Such legislation would provide an important safeguard for the full suite of human rights in NSW, including the right to freedom of religion and belief.

2. The objects of the Bill

The Explanatory Notes accompanying the Bill state that its objects are to amend the ADA as follows:

- (a) to establish principles of the Act for the purpose of reconciling conflicting human rights and anti-discrimination provisions, using international conventions and other instruments,
- (b) to define religious beliefs and activities in a comprehensive and contemporary way, making religious freedoms and the fair treatment of believers and non-believers possible,
- (c) to prohibit discrimination on the ground of a person's religious beliefs or religious activities in work and other areas, so that religion has protections equal to other forms of discrimination in NSW,
- (d) to prohibit discrimination against people who do not have any religious conviction, belief, opinion or affiliation,
- (e) to provide that a religious ethos organisation is taken not to discriminate on the ground of religious beliefs or religious activities by engaging in certain conduct because of the doctrines, tenets, beliefs or teachings of the religion of the organisation, so as to recognise that religion is integral to the existence and purpose of these organisations; and that religious and associational freedoms are fundamental to a free and democratic society,
- (f) to make it unlawful for an employer, qualifying body or educational authority to restrict, limit, prohibit or otherwise prevent people from engaging in a protected activity, or to punish or sanction them for doing so, or for their associates doing so,
- (g) to ensure the provisions of the Bill extend to discrimination concerning applicants and employees, commission agents, contract workers, partnerships, industrial organisations, qualifying bodies, employment agencies, education, goods and services, accommodation, registered clubs and State laws and programs, and
- (h) to limit exceptions to this part of the Act to those specified, such as for religious ethos organisations and genuine occupational qualifications, rather than encouraging tribunal activism.

Paragraphs (c), (d) and (g) are consistent with the objective of including protections against discrimination on the basis of religion within the ADA. As noted above, the Law Society supports this position in principle.

Paragraphs (e) and (f) appear to have the objective of promoting the right to freedom of religion. It is the Law Society's view that a human rights act, rather than the ADA, would be a more suitable means of protecting the right to freedom of religion. This would be consistent with the established approach of other jurisdictions, and would reflect the equal status in international law of all human rights. Similarly, the object outlined in paragraph (a) – reconciling conflicting human rights and anti-discrimination provisions – would be better achieved through the operation of comprehensive human rights legislation.

3. Terms of the Bill

The Law Society provides the following comments on specific provisions of the Bill.

3.1. Proposed s 22KA: Determining when a belief is held

Section 22KA of the Bill provides that:

For the purposes of this Act, a person holds a religious belief (inclusive of the person's beliefs as to the actions, refusals, omissions or expressions that are motivated or required by, conflict with, accord or are consistent with, that belief) if the person genuinely believes the belief.

This must be read together with proposed s 22K(1)(b), which provides that "genuinely believes in relation to a person means the person's holding of the religious belief is sincere and is not fictitious, capricious or an artifice".

This test is highly subjective, and may be difficult for a decision-maker to reach an informed position on. We also query how it would interact with the provisions in the Bill pertaining to presumed and future belief. Given the operation of a key term in the Bill – "religious belief" – is contingent on the "genuinely believes" test, this may leave a general uncertainty around the Bill's application. If the Bill is to proceed, we therefore suggest the Joint Committee consider whether it is necessary to retain s 22KA.

3.2. Proposed s 22KB: Religious belief or activity includes past, future and presumed religious belief or activity

In proposed s 22K, the Bill defines religious activities and religious beliefs as follows:

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

religious beliefs includes the following—

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

The Bill provides additional guidance on these terms at proposed s 22KB. It states that a reference to a religious activity includes:

a religious activity... that a person will engage in in the future, or that it is thought a person will engage in in the future, or will not engage in or refuse to engage in in the future, or it is thought a person will not engage in or refuse to engage in in the future (whether or not the person in fact will engage in the religious activity).

Similarly, the Bill states that a reference to a religious belief includes:

a religious belief... that a person will hold in the future or that it is thought a person will hold in the future (whether or not the person in fact will hold the religious belief).

Law Society members have noted that of all the grounds of discrimination currently in the ADA, only one – disability – encompasses a trait that a person "will have in the future". Section 49A(d) of the ADA states that "a reference in this Part to a person's disability is a reference to a disability... that a person will have in the future, or that it is thought a person will have in the future (whether or not the person in fact will have the disability)". This section was introduced to the ADA through the *Anti-Discrimination (Amendment) Act 1994* (NSW). Mr Hartcher, the Minister for Environment at the time, gave the second reading speech for the Anti-Discrimination (Amendment) Bill 1994 (NSW), and stated in relation to s 49A(d) that "this amendment will protect persons who are discriminated against on the basis of their family medical history, for example."¹⁰

¹⁰ New South Wales, *Parliamentary Debates*, Legislative Assembly, 12 May 1994, (Christopher Hartcher). Available: <https://api.parliament.nsw.gov.au/api/hansard/search/daily/pdf/HANSARD-1323879322-62235>

Whereas a person's family medical history can provide a degree of inevitability as to future disability, it is difficult to have the same level of certainty about a religious belief a person "will hold" in the future. Proposed s 22KB may, therefore, create practical difficulties if enacted in its current form. As the terms "religious belief" and "religious activity" appear in every section of the Bill, any ambiguity over their definition would have significant impact on the Bill's operation and scope.

3.3. Proposed s 22M Religious ethos organisations taken not to discriminate in certain circumstances

Section 22M of the Bill provides that:

(1) For the purposes of this Part, a religious ethos organisation is taken not to discriminate against another person on the ground of the person's religious beliefs or religious activities by engaging in conduct if the organisation genuinely believes the conduct—

- (a) is consistent with the doctrines, tenets, beliefs or teachings of the religion of the organisation, or
- (b) is required because of the religious susceptibilities of the adherents of the religion of the organisation, or
- (c) furthers or aids the organisation in acting in accordance with the doctrines, tenets, beliefs or teachings of the religion of the organisation.

(2) Without limiting subsection (1), conduct referred to in that subsection includes giving preference to persons of the same religion as the religion of the religious ethos organisation.

(3) Nothing in this section, or any provision of this Act that refers to a religious ethos organisation, affects the operation of section 56 (Religious bodies).

"Religious ethos organisation" is defined elsewhere in the Bill as:

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

The proposed definition of "religious ethos organisation" may allow for a broad interpretation. The term appears to be significantly broader than the description of a "religious body" at s 56 of the ADA. If the Bill is to proceed, the Law Society is of the view that this provision should either be omitted or modified to narrow the scope of its application and/or a proportionality or reasonableness test should be introduced in relation to the conduct permitted by the exception.

4. Additional issues related to the inquiry's terms of reference

4.1. Existing rights and legal protections contained in the ADA and other relevant NSW and Commonwealth legislation

The Australian Human Rights Commission ("AHRC") has identified that anti-discrimination laws of each state and territory, with the exception of NSW and South Australia, contain a

prohibition against discrimination on the ground of religious belief.¹¹ The ADA does include 'ethno-religious origin' within the definition of discrimination, however this only provides a ground of discrimination on the basis of religion "in some circumstances which may not be carefully defined".¹² Residents of NSW who suffer religious discrimination in employment on the basis of religion may have protection under the *Australian Human Rights Commission Act 1986* (Cth)¹³ and the *Fair Work Act 2009* (Cth).¹⁴ Despite these federal provisions, residents of NSW do not have the same level of protection against discrimination on the ground of religion as residents of most other states and territories, as the AHRC and the NSW Law Reform Commission have noted.¹⁵

4.2. The recommendations relevant to NSW from the Expert Panel Report: Religious Freedom Review (2018)

The Law Society has identified the following recommendations from the Expert Panel Report: Religious Freedom Review relevant to NSW:

Recommendation 1: Those jurisdictions that retain exceptions or exemptions in their anti-discrimination laws for religious bodies with respect to race, disability, pregnancy or intersex status should review them, having regard to community expectations.

Recommendation 2: Commonwealth, State and Territory governments should have regard to the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights when drafting laws that would limit the right to freedom of religion.

Recommendation 3: Commonwealth, State and Territory governments should consider the use of objects, purposes or other interpretive clauses in anti-discrimination legislation to reflect the equal status in international law of all human rights, including freedom of religion.

Recommendation 6: Jurisdictions should abolish any exceptions to anti-discrimination laws that provide for discrimination by religious schools in employment on the basis of race, disability, pregnancy or intersex status. Further, jurisdictions should ensure that any exceptions for religious schools do not permit discrimination against an existing employee solely on the basis that the employee has entered into a marriage.

Recommendation 8: Jurisdictions should abolish any exceptions to anti-discrimination laws that provide for discrimination by religious schools with respect to students on the basis of race, disability, pregnancy or intersex status.

Recommendation 9: State and Territory education departments should maintain clear policies as to when and how a parent or guardian may request that a child be removed from a class that contains instruction on religious or moral matters and ensure that these policies are applied consistently. These policies should:

- (a) include a requirement to provide sufficient, relevant information about such classes to enable parents or guardians to consider whether their content may be inconsistent with the parents' or guardians' religious beliefs, and

¹¹ Australian Human Rights Commission, Submission to the Expert Panel, *Religious Freedom Review* (February 2018) 20. Available: https://humanrights.gov.au/sites/default/files/AHRC_20180214_Religious_Freedom_Review_Submission.pdf.

¹² NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)* (Report No 92, 1999) 5.14. Available: <https://www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report-92.pdf>.

¹³ *Australian Human Rights Commission Act 1986* (Cth) ss 3, 31.

¹⁴ *Fair Work Act 2009* (Cth) s 772(1)(f).

¹⁵ NSW Law Reform Commission (n 12) 5.144.

(b) give due consideration to the rights of the child, including to receive information about sexual health, and their progressive capacity to make decisions for themselves.

Recommendation 16: New South Wales and South Australia 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.

The Law Society considers that it would be appropriate for these recommendations to be considered in the context of a holistic review of the ADA, as suggested at 1 above.

We note that in framing its recommendations, the Religious Freedom Review stated that "by and large, Australians enjoy a high degree of religious freedom, and that basic protections are in place in Australian law."¹⁶ The Expert Panel also stated that in conducting the review it "received limited information to suggest that the right to freedom of religion is currently being infringed [in Australia]".

4.3. The interaction between Commonwealth and NSW anti-discrimination laws and the desirability of consistency between those laws

The Law Society supports amending Commonwealth and NSW anti-discrimination laws to promote harmonisation and reduce complexity. Any reforms should harmonise best practice, and either preserve or enhance existing protections against discrimination and promote substantive equality.

Should you have any questions or require further information about this submission, please contact Andrew Small, Policy Lawyer, on (02) 9926 0252 or email andrew.small@lawsociety.com.au.

Yours sincerely,



Richard Harvey
President

¹⁶ *Religious Freedom Review: Report of the Expert Panel* (Report, 18 May 2018), 104. Available: <https://www.ag.gov.au/sites/default/files/2020-03/religious-freedom-review-expert-panel-report-2018.pdf>.