

**Submission
No 55**

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

Organisation: Anti-Discrimination NSW

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

August 2020

1 Introduction

Anti-Discrimination NSW (**ADNSW**) makes this submission to the Joint Select Committee on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 (the **Bill**).

ADNSW thanks the Committee for the opportunity to provide feedback on the Bill's proposed changes to the *Anti-Discrimination Act 1977* (NSW) (the **Act**). On behalf of the President and the Board, ADNSW administers the Act, which makes it unlawful to discriminate in specified areas of public life against a person on grounds which include their sex, race, age, disability, homosexuality, marital or domestic status, transgender status and carer's responsibilities. Vilification on the grounds of race, homosexuality, transgender status or HIV/AIDS status is also unlawful.

ADNSW acknowledges and is in favour of the broad aims of the Bill to provide statutory protection to the community to prohibit discrimination on the basis of religious belief and activity (including beliefs such as atheism or agnosticism).

However, the human rights of religion and belief are not absolute and may be limited when they impinge upon the fundamental rights of others. Under Article 18.3 of the International Covenant on Civil and Political Rights (ICCPR), freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.¹

In principle, ADNSW would have no objection to the introduction of religion as a protected ground under the Act, however ADNSW has significant concerns about the manner in which religious freedoms and protection from religious discrimination are set out in the Bill. ADNSW's primary concern is that the scope of religious freedom in the Bill could be used as a "sword" against others, rather than as a "shield" protecting religious people from discrimination. Anti-discrimination legislation is beneficial legislation providing protections for those who experience discrimination in society. The proposed changes could weaken existing protections, which would be inconsistent with the purpose of the Act.

¹ [International Covenant on Civil and Political Rights \(ICCPR\)](#), Article 18.3, 16 December 1966

2 Summary

ADNSW opposes the Bill in its current form and encourages the Committee to closely consider ADNSW's concerns.

The Act currently protects all people of New South Wales from discrimination, with some groups also having protection from vilification. ADNSW is concerned that the Bill does not strike an appropriate balance between the existing protections from discrimination and vilification in the Act, and the religious freedoms provisions contained in the Bill.

ADNSW is concerned that the Bill promotes the rights of religious people and religious organisations over others, including those currently protected by the Act.

In principle, ADNSW would have no objection to the introduction of religion as a protected ground under the Act, however, ADNSW does not consider the Bill achieves this end in an appropriate way. ADNSW considers that a comprehensive review of the Act may be required to ensure protection for a range of grounds and areas.

Should a wider review be undertaken, ADNSW considers that potential areas for reform could include not only religion, but also race (with options including providing clarity about which groups are protected under "ethno-religious origin" or protecting religion as a separate ground), together with updating definitions and providing improved protection for the grounds of sex, sex characteristics (intersex persons), sexual orientation, gender identity and gender expression.

3 Context

Before examining the content of the Bill itself, it is important to consider the wider context of protection of religious freedoms in Australian jurisdictions, including reviews that have already been concluded, and others that are ongoing.

In 2017, the then Prime Minister appointed an expert panel to examine whether Australian law adequately protects the human right to freedom of religion (the Ruddock review). Dr Annabelle Bennett AC SC was a member of this expert panel. The Panel delivered its report to the Prime Minister on 18 May 2018, and the Australian Government's response to the report was released on 13 December 2018.

On 10 April 2019, the Commonwealth Attorney-General requested the Australian Law Reform Commission conduct an Inquiry into the Framework of Religious Exemptions in Anti-discrimination Legislation. The Terms of Reference of that Inquiry were altered on 29 August 2019, and on 2 March 2020 the reporting deadline was amended to be 12 months from the date the Religious Discrimination Bill (see below) is passed by Parliament.

In 2019 the Australian Government released exposure drafts of a package of legislation on religious freedom, inviting submissions on the first exposure draft between August – October 2019, and on the second exposure draft from December 2019 – January 2020. ADNSW provided submissions to both the Ruddock review and the first exposure draft of the Commonwealth Bills. ADNSW understands the Commonwealth Bill has not progressed since submissions on the second exposure drafts closed in January 2020.

ADNSW notes that religious discrimination and religious freedom are contentious issues requiring careful consideration and that, while the Commonwealth consultation on the religious freedom bills and the inquiry by the Australian Law Reform Commission are ongoing, the changes proposed by the Bill may be premature, as the proposed changes may turn out to be inconsistent with the Commonwealth framework of protections. Allowing these Commonwealth processes to run their course would enable their results to inform the NSW government for future law reform in this area. If the Commonwealth Bill does not eventuate, consideration could be given to amending the Act to include the ground of religion as a protected attribute. Separate to the Commonwealth Bill, there are currently inconsistencies between Australian state and territory jurisdictions regarding religious discrimination and religious freedoms. Consideration should be given to the existing provisions regarding religion in other state and territory jurisdictions and the inconsistencies between these jurisdictions, to provide an informed and considered approach to any law reform.

4 Religion – current provisions and exceptions

The Act does not currently provide separate protection for religion, however the definition of race in section 4 includes descent and ethnic, ethno-religious or national origin. Ethno-religious origin was considered in the 1983 House of Lords (UK) case of *Mandla v Dowell Lee*² which described the essential features of such groups as:

- (1) a long shared history, of which the group is conscious as distinguishing it from other groups and a memory of which it keeps alive; and*
- (2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with a religious observance.*

Some religious groups have been held to meet this definition, such as Jews and Sikhs, meaning these groups currently have protection under the Act.

Cases on whether Muslims are an ethno-religious group under the Act have come before the NSW Administrative Decisions Tribunal (ADT) and NSW Civil and Administrative Tribunal (NCAT). The ADT Appeal Panel has generally ruled that Muslims are covered by the Act as an ethno-religious group; however single member decisions have not been so consistent.

Most Australian jurisdictions expressly include religious belief (or similar term) as a separate protected attribute and the lack of coverage in NSW is unusual.

4.1 Exceptions for religious bodies

The Act currently includes a range of exceptions that relate to faith-based organisations, religious bodies and aspects of religious discussion. These exceptions are:

4.1.1 Religious bodies and faith-based organisations

Religious bodies are not currently defined in the Act, however section 56 of the Act provides a general exception from *all* the provisions of the Act in relation to:

² *Mandla v Dowell Lee* [1983] 2 A.C. 548

- (a) *the ordination or appointment of priests, ministers of religion or members of any religious order,*
- (b) *the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order,*
- (c) *the appointment of any other person in any capacity by a body established to propagate religion, or*
- (d) *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.*

Section 59A provides a further exception from Part 3A (Discrimination on transgender grounds) and 4C (Discrimination on the ground of homosexuality) for any policy or practice of a faith-based organisation concerning the provision of adoption services. For the purposes of this section, **faith-based organisation** means an organisation that is established or controlled by a religious organisation and that is accredited under the *Adoption Act 2000* to provide adoption services.

ADNSW highlights that these exceptions narrowly define the acts or practices that are exempt from discrimination law.

4.1.2 Private educational authorities

The Act contains exceptions from discrimination law for private educational authorities, which include faith-based schools. These exceptions operate in the areas of employment and education, on the grounds of sex, transgender status, marital or domestic status, disability, homosexuality, and age (education only). These exceptions apply for both potential and current students and employees.

4.1.3 Vilification complaints

Finally, the Act contains a defence to a complaint of vilification, where the public act complained of was “done reasonably and in good faith, for academic, artistic, scientific, research or religious discussion or instruction purposes or for other purposes in the public interest, including discussion or debate about and expositions of any act or matter”.

5 Proposed changes

5.1 New “Principles of Act” – section 3

ADNSW has a number of concerns about the inclusion of the new “Principles of Act” in section 3 that would require the Minister, Board, President, Tribunal and Courts to consider certain international human rights instruments when carrying out functions and making determinations under the Act.

First, ADNSW is not aware of any other Australian jurisdictions requiring discrimination or human rights bodies to consider international covenants or human rights principles when exercising functions.

Second, ADNSW considers the principles in the Bill would impose a significant burden on its operational staff. The majority of the President's complaint-handling functions are carried out under delegation by clerical staff, and ADNSW considers that the new principles would require its staff to have significant and specific expertise in international human rights law. If these provisions of the Bill were to be enacted into law, ADNSW would require a significant increase in funding and resources to secure skilled staff to carry out these increased functions.

Inclusion of these other factors places a significant burden on decision makers at ADNSW to consider matters that may be outside of the relevant factors that are presented to them by parties to a complaint. The Bill would require administrative decision makers to make determinations on issues of international law. A respondent could claim their conduct is related to their religious beliefs or activities, and the Bill does not provide clarity on how this could be tested.

ADNSW considers it more appropriate that consideration of relevant international human rights instruments should take place in the drafting of legislation, rather than in the daily exercise of ADNSW's functions.

Third, ADNSW is concerned that consideration of these human rights instruments is only required on the ground of religion and not on other protected grounds. Human rights are inalienable and the Bill risks promoting religious rights over other human rights and protection from discrimination. If human rights instruments *are* to be included for consideration, ADNSW considers it would be appropriate to include a broad range of instruments, including for example, the International Convention on the Elimination of All Forms of Racial Discrimination, and the Convention on the Rights of Persons with Disabilities.

5.2 Definitions in the Bill – 22K

ADNSW is concerned the wording of the Bill does not provide sufficient clarity in its definitions or provisions for either ADNSW staff or the community, which could lead to confusion and potential breaches of the Act. Key concerns are set out below.

5.2.1 Religion not defined

ADNSW has significant concerns about the definitions contained in the Bill and also about the omission of certain definitions, including any definition of "religion".

The Bill does not define religion so it would be left to courts and tribunals to interpret this term. Discrimination law is interpreted broadly as it is beneficial legislation that confers rights, so it is likely that a wide range of belief systems, potentially including sects and cults could be given protection. This may unintentionally extend coverage to wide range of groups that have not previously been recognised.

ADNSW does not support the scope of religious freedom including provisions which undermine the right of others to be protected against discrimination, including women, LGBTI people, single parents, people in de facto relationships, divorced people and people with a disability. Given the very broad definitions of religious activity and religious ethos

organisations, conduct presently defined as discrimination and/or vilification in the Act could be defensible under the Bill.

5.2.2 Religious beliefs:

The Bill includes a wide definition of religious beliefs, which includes both having and not having “religious conviction, belief, opinion or affiliation”.

5.2.3 Religious activities:

The Bill provides a very broad definition of “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.”

ADNSW has significant concerns about this broad definition because:

- is only limited by activities punishable by imprisonment;
- it imposes no test of reasonableness or that activities must be undertaken in good faith;
- it extends protection to any activity “motivated by” religious belief.

Given that “religion” is not defined, and that “religious activity” includes any activity motivated by “religious belief”, (which is itself broadly defined) it is challenging to identify any limits to conduct that could be defended on this basis, apart from imprisonable offences.

Under the Bill, conduct including discrimination and vilification could be defended as “religious activity”, provided it was motivated by that person’s subjective religious belief.

ADNSW considers that there may be a conflict between the Bill’s requirement to consider Article 18(3) of the *International Covenant on Civil and Political Rights*, which provides “that limitations upon a person’s right to manifest their religion or belief must only be made where such are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others” and proposed clause 22K which only permits religious activity to be limited where the conduct would amount to an imprisonable offence. For example, if a person’s religious activity required them to preference men in employment, women would have less rights and freedoms.

ADNSW is also concerned that the broad definition of “religious activity”, which is only limited by imprisonable offences, will weaken or undermine existing protections from discrimination and vilification under the Act, including on ethno-religious grounds (such as Jewish and Sikh people).

5.2.4 Genuinely believes:

ADNSW is concerned that “genuinely believes” as defined in section 22K of the Bill is a very subjective term and that it would be challenging for any court or tribunal to establish whether a person “genuinely believes”. This could create difficulties for both ADNSW as an administrative body, as well as courts and tribunals, as neither could test the doctrines, beliefs, tenets or teachings or a religion. The only person who has that knowledge would be

the person claiming to hold the “genuine belief”, making it nearly impossible for any another person to establish or disprove. Beliefs can also change over time, meaning that a person could claim they held a genuine belief at the time of an alleged incident, even if they no longer hold that belief at the time of conciliation or hearing.

5.2.5 Religious ethos organisation:

ADNSW has further concerns regarding the definition of religious ethos organisations and the rights conferred upon them. It is highly unusual for human rights to be attributed to organisations, and ADNSW does not support this aspect of the Bill.

The Bill includes a very broad definition of religious ethos organisations, including private educational authorities, charitable organisations and *any other body* “conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion”. As an administrative body, ADNSW would be unable to test what these are. Even different people from the same religion may not agree, with differences of opinion and interpretations of religious texts.

ADNSW is concerned this promotes the rights of religious organisations over non-religious organisations, as there is no equivalent protection for secular organisations. The Bill’s lack of definition of religion adds to these concerns, as organisations aligned with sects or cults, not generally accepted as religions by the community, could be conferred human rights and protections.

The Act already includes broad exceptions for private educational authorities and accommodation for older persons (see discussion in 4 above) and ADNSW is concerned about any expansion of this. ADNSW considers that the Australian Law Reform Commission’s current inquiry into exceptions for religious organisations will be an invaluable tool in considering potential changes in this area.

ADNSW is concerned that this provision will create unintended consequences by permitting discrimination on other protected grounds. Under the Bill a religious ethos organisation may legitimately discriminate against people on the basis of their sexual orientation, gender identity, marital status, race, age and/or disability, provided that this accords with the organisation’s religious belief. Further, there is no requirement that the beliefs accord with the current, accepted or mainstream beliefs of the religion meaning that archaic and out-dated interpretations of religious texts could be used to justify conduct that is currently unlawful. For example, under this provision a registered religious charity may decide to refuse to provide social welfare services to a single unwed woman with children.

The wide scope of the definition also means that protection would extend to any ‘religious ethos organisation’ regardless of whether that body is part of an official or recognised religious denomination. The Bill does not require a “religious ethos organisation” to be established to propagate religion for it to be covered by this definition.

Many other equal opportunity jurisdictions in Australia include exceptions for places of religious or cultural significance, religious schools, accommodation established for religious purposes, ordination of priests and acts carried out in accordance with the doctrine of a particular religion or to avoid offending the religious sensitivities of any person of that

religion. These are generally exemptions on the limited grounds of religion, gender, sexual identity and relationship status.

ADNSW is concerned that the Bill does not contain equivalent limits on the types of organisations that can be religious ethos organisations, and as such, political parties, government organisations, trade unions and qualifying bodies could potentially identify as religious ethos organisations. These organisations could then discriminate against or vilify others.

As previously stated, ADNSW would not oppose the inclusion of religious belief as a protected attribute, but this protection should not undermine the rights of others to be protected against discrimination, including women, LGBTI people, single parents, people in de-facto relationships, divorcees or people with a disability through conduct that could be defended as “religious activity”.

ADNSW is concerned that the Bill risks promoting conflict between religious ethos organisations and people with different religious beliefs. Many religious people do not want their religious rights to be promoted over the rights of others. People often identify with multiple characteristics, for example, a gay religious person. The Bill could also allow discrimination and harassment between people of the same religion, with differing beliefs and practices.

5.3 Religious belief or activity includes past, future and presumed religious belief or activity 22KB

ADNSW is concerned by the broad definition of religious belief or activity including “past, future and presumed religious belief or activity”. Future believe appears to be a very broad concept and ADNSW is concerned about how future belief could be determined in court or tribunal hearings. This definition appears to mirror language from the Act’s disability discrimination provisions, however ADNSW believes this language would be impractical when determining religious belief. For example, the disability discrimination provisions provide protection for people who may have family members with hereditary conditions or a degenerative condition that is likely to worsen. It is hard to see how a person’s future religious belief could be established, or how past and future beliefs and activities would apply in considering converts to particular religions.

5.4 What constitutes discrimination on the ground of religious beliefs or religious activities 22L

ADSNW is concerned about the provisions in 22L, based on the broad definitions of religious beliefs and religious activities, as well as characteristics listed below. ADNSW believes it would be challenging to establish any characteristics due to the subjective and broad definition of religious belief, which may include personal belief systems not generally recognised by established religions. It would be challenging for any court or tribunal to make determinations regarding who would have these characteristics and how to identify this group.

For the purposes of this section, something is done on the ground of a person’s religious beliefs or religious activities if it is done on the ground of—

- (a) the person's religious beliefs or religious activities, or*
- (b) a characteristic that appertains generally to persons with those religious beliefs or who engage in those religious activities, or*
- (c) a characteristic that is generally imputed to persons with those religious beliefs or who engage in those religious activities.*

5.5 Religious ethos organisations taken not to discriminate in certain circumstances 22M

The Bill is highly unusual as it provides that organisations can *hold* beliefs. The Bill provides a very broad definition of religious ethos organisations and religious beliefs. ADNSW is concerned the Bill does not provide clarity regarding secular or non-religious organisations, such as those that identify as atheist, agnostic, humanist or feminist.

The Bill does not sufficiently define when an organisation is considered a “religious ethos organisation”, nor how the beliefs of the organisation could be ascertained. It does not provide clarity about whether an organisation would need to be initially established as a religious ethos organisation or if it could later decide to identify as such. It also is unclear if it would be sufficient for the organisation’s leader to be from a particular religion or if all, or a majority of, staff would need to identify as being from a particular religion for an organisation to be identified as a religious ethos organisation.

5.6 Discrimination in work – division 2

ADNSW is further concerned about the broad religious freedoms provided in the discrimination in work section of the Bill. The Bill does not include any reasonableness test in its definition of “protected activity”, which may lead to a very broad interpretation.

5.6.1 Discrimination against applicants and employees 22N; commission agents 22O; contract workers 22P; and partnerships 22Q

ADNSW is concerned the Bill would make it challenging for employers to manage staff and implement codes of conduct. The broad definition of religious activity, only limited by imprisonable offences, again promotes religious freedoms over the rights of others.

For example, a health care employer collecting blood donations could have an employee, whose out of work activities include actively campaigning against donating blood based on their religious beliefs. The employer would have limited recourse to manage this behaviour. Employers may also have reputational risk if employees, outside the course of their work, promote activities that are illegal and imprisonable, but the encouragement itself does not meet this threshold. For example, if an employee promoted religious beliefs supporting prohibited consanguineous marriage, polygamy, or anti-miscegenation while not at work. The employer may not be able to sanction the employee even if their business suffered or if other employees or customers felt unsafe in the workplace due to the promotion of these beliefs.

Direct and material detriment would be very challenging to determine by courts or tribunals. Customers may avoid businesses if they are aware of employees’ beliefs with which they do

not agree. The Bill's exclusion of financial detriment caused by boycott or secondary boycott may leave businesses with limited opportunity to address behaviour that adversely affects them.

5.6.2 Industrial Organisations 22R

ADNSW considers that there could be confusion if an industrial organisation identified as a religious ethos organisation.

5.6.3 Qualifying bodies 22S

ADNSW is of the view that the Bill could limit the powers of qualifying bodies to regulate professions. For example, if a nurse or psychologist promoted beliefs that people with disabilities should not receive assistance. Other professional organisations such as the Bar Association or Law Society may also have limited options to sanction members if they promote religious beliefs such as, that women should not be in leadership positions and should submit to their husbands. The Bill does not appear to prevent qualifying bodies identifying as a religious ethos organisation.

5.6.4 Exception – genuine occupational qualification 22U

ADNSW considers that section 56 of the Act already provides sufficient protections for religious leaders (see 4.1.1 above). ADNSW is concerned that the exceptions as set out in 22U are overly complicated and may cause confusion. The clause as drafted is too broad. ADNSW does not believe that religion is relevant to artistic performance, food and drink service, nor provision of welfare. ADNSW is concerned that the broad scope of the Bill may limit opportunities to others. For example, a disability, community service, or aged care provider could be given broad discretion to only hire people from a particular religion.

5.7 Discrimination in other areas – division 3

5.7.1 Education 22V

The Act currently provides broad exceptions for private educational authorities (see 4.1.2). ADNSW is concerned that the Bill limits the powers of schools to manage students' behaviour when it may pose a risk towards other students. For example, if a student posted on social media that adherents of their religion were superior to people of other religions and defended this on the basis it was their genuine religious belief, the school may have little power to intervene.

5.7.2 Provision of goods and services 22W; accommodation 22X; and registered clubs 22Y

ADNSW considers there may be conflict where the provider of goods and services, accommodation or registered club is itself a religious ethos organisation, and the person or people they are providing services to are of another religion. Given the broad definition of religious activity, this conduct could include harassment and vilification of other customers.

5.7.3 State laws and programs 22Z

ADNSW has significant concerns about the provisions regarding state laws and programs. Government discretion when awarding contracts and funding could be severely limited, having a negative impact on vulnerable communities. For example, there are current Covid-19 restrictions for places of worship. These restrictions do not involve imprisonable offences for places of worship, and religious ethos organisations could claim these restrictions amounted to discrimination.

ADNSW is concerned that vulnerable people could face discrimination from religious ethos organisations which have been awarded government contracts, and the government would be unable to intervene. For example, if a religious ethos organisation was awarded a contract to provide welfare services and declined to provide support to unmarried parents. The Bill provides that requiring a religious ethos organisation to “engage in conduct, including use of its property, in a manner which is contrary to the doctrines, tenets, beliefs or teachings of that organisation” is religious discrimination.

Case study – potential application of the Bill

During the transfer of state-run disability services to non-government organisations with the introduction of the National Disability Insurance Scheme, there was a tender process to identify suitable organisations. If the changes proposed in the Bill was in force, the government may have been required to award the contract to a religious ethos organisation even if it did not provide the services the residents in those properties previously had access to. For example, a religious ethos organisation may decline to facilitate access to safe sex education, sex worker services, or consensual relationships. The religious ethos organisation may also decline to facilitate access to necessary medication and treatment. Residents of the property may then need to leave the accommodation to access the services they were previously eligible for. The government may require organisations to hire existing staff as a part of the tender process, and a religious ethos organisation may decline on the basis that only staff of the same religion will be hired.

Section 22Z of the Bill may also conflict with the current provisions in section 54 of the Act. This provision also appears to promote religious beliefs over other protected grounds. Section 54 of the Act provides:

- (1) *Nothing in this Act renders unlawful anything done by a person if it was necessary for the person to do it in order to comply with a requirement of—*
- (a) *any other Act, whether passed before or after this Act,*
 - (b) *any regulation, ordinance, by-law, rule or other instrument made under any such other Act,*
 - (c) *an order of the Tribunal,*
 - (d) *an order of any court, not including an order or award of a court or tribunal having power to fix minimum wages and other terms and conditions of employment*

5.8 Practical operation of the Bill

One further aspect of concern to ADNSW is the potential for one set of circumstances to constitute discrimination and simultaneously be a protected activity on the ground of religious belief. For example, if a job applicant of one faith were refused employment by a religious ethos organisation of a different faith on the grounds that the applicant's religion was not the same as the organisation's, the applicant could lodge a complaint of discrimination on the ground of religion, whilst the organisation could claim protection under the Bill's provisions on the grounds that its actions were motivated by its religious beliefs. It is unclear from the provisions of the Bill whose rights would prevail in such a situation.

ADNSW's role includes providing information about rights and responsibilities under the Act, together with investigating and attempting to resolve complaints through conciliation. It is difficult to see how ADNSW could advise parties about the operation of the Act in these circumstances.

5.9 Exemptions

Finally, ADNSW is opposed to the exclusion of proposed Part 2B from the power of the President to grant temporary exemptions under s. 126 of the Act. This exclusion further establishes religion as a special category under the Act, that is not subject to the normal powers of the President.

Anti-Discrimination NSW

August 2020
