



Anti-Discrimination
New South Wales

1. Introduction

1.1 Anti-Discrimination NSW (**ADNSW**) makes this submission on the Religious Discrimination Bill 2021 (the **Bill**) to the Legal and Constitutional Affairs Legislation Committee (the **Committee**). ADNSW previously made a submission to the Attorney General's Department on the First Exposure Draft of the Religious Discrimination Bill 2019 (**First Exposure Draft**) and wishes to reiterate some of the concerns put forward in that submission.

2. Current protections in NSW

2.1 ADNSW administers the *Anti-Discrimination Act 1977* (NSW) (**ADA**) 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.

2.2 Religion is not, of itself, a ground of unlawful discrimination under the ADA, however the definition of race includes descent and ethnic, ethno-religious or national origin.

Current NSW exceptions for religious activities and private educational authorities

2.3 Section 56 the ADA contains an exception from the provisions of the ADA for the following religious activities:

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

2.4 This exception enables religious bodies to conduct their religious practices in accordance with their religious doctrines.

2.5 The ADA also includes exceptions for private educational authorities, which include faith-based schools. These exceptions mean that private educational authorities will not breach the ADA if they discriminate against students, potential students, job applicants and existing employees on the grounds of sex, transgender status, marital or domestic status, disability, age (exception only applies to education, not to employment) and homosexuality.¹

Race includes ethno-religion

2.6 The definition of race under the ADA includes ethno-religion. The ADA was amended in 1994 and the definition of 'race' in section 4 was expanded to include 'colour, nationality, descent and ethnic, ethno-religious or national origin'.

2.7 In his Second Reading Speech, the then Attorney General, the Hon J.P. Hannaford indicated that the amendment was:

To clarify that ethno-religious groups, such as Jews, Muslims and Sikhs have access to the racial vilification and discrimination provisions of the Act...The amendment will make it clear that vilification or discrimination against a person on the basis of ethno-religious origin falls within the protections against racial discrimination and racial vilification currently contained in the Act.²

2.8 Since 1994 the NSW Civil and Administrative Tribunal (**NCAT**), including its predecessor the NSW Administrative Decisions Tribunal, and its Appeal Panel have considered the meaning of 'ethno-religious'. However, the extent to which the racial vilification and discrimination provisions of the ADA extend to all groups identified by the Attorney General remains uncertain. It has frequently been accepted that Jews are a group of people with an ethno-religious origin³ and constitute a race for the purposes of section 4 of the ADA.⁴ However, due to the development of NSW case law, despite the stated intention in the Second Reading Speech, the extent to which the ADA covers Muslims remains unclear.⁵

3. The Religious Discrimination Bill 2021

3.1 ADNSW welcomes the broad aims of the Bill to provide statutory protection to prohibit discrimination based on religious belief and activity (including not holding a religious belief or participating in a religious activity).

¹ *Anti-Discrimination Act 1977* (NSW) ss 25(3)(c), 31A(3)(a), 38C(3)(c), 38K(3), 40(3)(c), 46A(3), 49D(3)(c), 49L(3)(a), 49ZH(3)(c), 49ZO(3), 49ZYL(3)(b)

² [Anti-Discrimination \(Amendment\) Bill 1994 - Second Reading Speech](#), The Hon J.P. Hannaford, 4 May 1994

³ *Ekeremawi v Nine Network Australia Pty Ltd* [2019] NSWCATAD 29 at [51]

⁴ *Droga v Birch* [2017] NSWADTAP 22 at [35]; *Azriel v NSW Land and Housing Corporation* [2006] NSWCA 372 at [47]

⁵ *Ekeremawi v Nine Network Australia Pty Ltd* [2019] NSWCATAD 29 at [54] to [61]

3.2 However, despite the evolution of the Bill from the First Exposure Draft, ADNSW remains concerned the Bill does not strike the appropriate balance between protecting the human rights of freedom of thought and conscience, religion and belief and the protection of other fundamental human rights and equality before the law.

3.3 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.⁶

3.4 ADNSW's concerns about several provisions are detailed below.

4. Overriding state, territory and federal laws – section 12

4.1 ADNSW is concerned about the effect of section 12. Section 12 provides that a statement of belief, does not constitute discrimination for the purposes of the Act and state, territory and federal anti-discrimination and human rights laws. This means that a person would have no redress if they experienced discrimination because of another person's statement of belief.

4.2 Section 5 of the Bill defines 'statement of belief' as being:

- a religious belief held by a person; and
- is made, in good faith, by written or spoken words or other communication (other than physical contact), by the person; and
- is a belief that the person genuinely considers to be in accordance with the doctrines, tenets, beliefs or teachings of that religion.

4.3 Or, the statement must be:

- a belief held by a person who does not hold a religious belief; and
- is made, in good faith, by written or spoken words or other communication (other than physical contact), by the person; and
- is of a belief that the person genuinely considers to relate to the fact of not holding a religious belief.

4.4 There are limits to the kinds of 'statements of belief' that are provided with protection under section 12. Section 12 (2) provides that protection is not given to a statement of belief that:

- is malicious; or

⁶ [International Covenant on Civil and Political Rights \(ICCPR\)](#), Article 18.3, 16 December 1966

- a reasonable person would consider would threaten, intimidate, harass or vilify a person or group; or
- a reasonable person would conclude amounts to counselling, promoting, encouraging or urging conduct that would constitute a serious offence.

4.5 In practice it is already very hard to establish vilification under the ADA. A person must demonstrate that there has been a public act that incites hatred towards, serious contempt for or severe ridicule of, a person or group of persons on the ground of their race (section 20D), transgender status (section 38T), homosexuality (section 49ZTA), or HIV/AIDS status (section 49ZXC). It is unlikely that section 12 (2) would provide much support to individuals or groups experiencing vilification.

4.6 ADNSW is concerned that unintended consequences may arise from the overriding effect of section 12 on state and territory laws. An example of a situation that may be protected by section 12 arose in the case of *Bevege v Hizb ut-Tahrir Australia*⁷. In this case the Tribunal made a finding of unlawful sex discrimination in the terms of the provision of a service within the meaning of section 33 (1) (b) of the ADA. The Complainant alleged that at a lecture staged by a Muslim organisation she was directed by the Respondent to sit in an area designated for women and children, which was behind an area set aside for male audience members. The Tribunal found that the seating in the men's section offered better seating than the seats in the women's section and therefore, the direction constituted less favourable treatment within section 33 (1) (b) of the ADA.⁸

4.7 In making its finding, the Tribunal considered whether the Respondent's conduct came within the exception for religious bodies in section 56 (d) of the ADA which states:

Nothing in this Act affects...

...

(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.⁹

4.8 Ultimately, the Tribunal found that the separation of seating for men and women was not necessary in order to avoid injury to the religious susceptibilities of adherents to the Islamic faith attending the lecture. Therefore, it was not satisfied that section 56 (d) or any other exception provided under the ADA applied.

4.9 ADNSW is concerned that proposed section 12 would protect a direction given to a woman such as that in *Bevege* as a 'statement of belief' and therefore that segregation or other differential treatment by sex could become more common. ADNSW is concerned that by limiting the operation of state law, conduct that has previously been found or could be

⁷ *Bevege v Hizb ut-Tahrir Australia* [2016] NSWCATAD 44

⁸ *Bevege v Hizb ut-Tahrir Australia*, *ibid*, at [71] to [83]

⁹ *Bevege v Hizb ut-Tahrir Australia*, *ibid*, at [90]

found to constitute discrimination under the ADA, such as discrimination on the basis of sex (as in the case of *Bevage*) would be protected under federal law, with no remedy available to those discriminated against.

5. Overriding state and territory laws - section 11

5.1 Section 11 provides that a religious body that is an educational institution will not contravene state and territory laws, when giving preference in employment based on religious faith.

5.2 Although the ADA contains some exceptions for private educational authorities (including faith-based schools) in employment, section 11 of the Bill would override other provisions in the ADA that limit the circumstances under which faith-based schools can discriminate against job applicants and existing employees.

6. Access to justice issues with sections 11 & 12

6.1 Sections 11 & 12 would also create significant procedural and access to justice issues. If a claim of unlawful discrimination is brought in proceedings in NCAT and sections 11 or 12 are raised as a defence, NCAT may not have jurisdiction to consider the defence. This is because NCAT does not have the power to determine matters involving an exercise of federal jurisdiction of the kind referred to in ss. 75 and 76 of the Constitution, including where Commonwealth legislation is raised as a defence in a matter.¹⁰

6.2 Given the defence would pose a question of federal law, the proceedings would need to be transferred to a court (pursuant to Part 3A of the *Civil and Administrative Tribunal Act 2013 (NCAT Act)*). This would result in additional procedural and financial burdens on complainants and create a barrier to access to justice.

6.3 Further, if a claim of unlawful discrimination is made in a state jurisdiction, provisions in the federal discrimination acts prevent a person from raising the same claim in the federal jurisdiction. If a respondent raises sections 11 or 12 as a defence during proceedings underway in a state jurisdiction, a complainant has lost the ability to make a complaint in the federal jurisdiction and therefore, would be left without a remedy.

6.4 In addition, in proceedings brought under the ADA, a respondent may raise the defence in sections 11 or 12 at any time. Given that the defence is external to the ADA, this undermines the ability of complainants to obtain reliable legal advice at the outset of their claim and for ADNSW to effectively conciliate matters.

7. Conduct of religious bodies

7.1 A further concern of the Bill is section 7, which provides broader exceptions for religious bodies to discriminate under the Act. Section 7 provides that the conduct of a 'religious body' carried out in good faith, that a person of the same religion of the religious body

¹⁰ *Burns v Corbett* [2018] HCA 15

would reasonably consider accords with its doctrines, tenets, beliefs or teachings, cannot be considered to be discrimination.

7.2 In particular, ADNSW is concerned about the wide definition of 'religious bodies' which extends to include religious schools, religious charities and other religious bodies (other than a body that engages solely or primarily in commercial activities) and the broad exemptions afforded to these bodies under the new law.

7.3 ADNSW is concerned that this provision will create unintended consequences by permitting discrimination on other protected grounds. Under the new law a religious body may legitimately discriminate against people on the basis of their sexual orientation, gender identity, marital status, race, age and disability provided that this accords with the body's religious belief. This would be out of step with the general community's obligations to not discriminate on these grounds.

8. Limitation on qualifying bodies making conduct rules

8.1 Section 15 of the Bill places a limitation on qualifying bodies to make professional conduct rules that prohibit a person from making a statement of belief, except where body can show that compliance with the rule is an essential requirement of the profession, trade or occupation.

8.2 ADNSW is concerned that this would restrict a qualifying body from taking action against one of its members for making discriminatory or offensive statements (purported to be based on a religious belief).

9. Protection for corporations associated with religious people

9.1 Finally, ADNSW is concerned that section 16 extends anti-discrimination protections to bodies corporate associated with individuals who hold or engage in a religious belief or activity. A corporation, who is an 'associate' of a person with a religious belief or who engages in a religious activity, could make a claim of unlawful discrimination. This is a significant departure from all other federal, state and territory discrimination law where protection against unlawful discrimination is limited to people. The proposed law could result in corporations taking action against individuals, something that does not occur in relation to other grounds of discrimination, as corporations generally do not possess other protected characteristics.

ADNSW thanks the Committee for its invitation to provide submissions on the Bill.

Elizabeth Wing
A/g President and Executive Manager
Anti-Discrimination NSW