



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

IN BRIEF

The NSW One Nation leader has introduced a bill to amend the *Anti-Discrimination Act 1977* (NSW). It will prohibit discrimination based on religious beliefs and activities. But the Bill has fundamental problems. It elevates religious expression above other human rights, allowing people to use religion to hurt others (including other people of faith).

Here are five fundamental issues with the Bill:

- **religion overrides government rules:** faith-based organisations and even commercial bodies which define themselves as religious will be able to challenge NSW government programs, policies, contracts and decisions which contradict their particular religion;
- **no consequences for conduct:** it will be almost impossible for government and non-government employers, educators and professional and licencing bodies to foster inclusive cultures, or meet shareholder, customer or community expectations, when their employees or members use their religion privately to hurt others;
- **double standards in employment, education and service delivery:** faith-based organisations will be exempt from the new provisions, allowing them to discriminate on the grounds of religion in employment, education and service delivery, even when receiving public funding;
- **religion above the law:** it gives protection to religious activities which may be unlawful, such as religious activity that vilifies others or breaches civil obligations;
- **religion above other human rights:** the freedom of religion will be prioritised above other rights and freedoms when applying NSW's anti-discrimination laws.

RELIGION OVERRIDES GOVERNMENT RULES (SECTION 22Z)

Faith-based organisations and even commercial bodies which define themselves as religious will be able to challenge NSW government programs, policies, contracts and decisions which contradict their particular religion.

Proposed section 22Z would make it unlawful to discriminate against a person (including a 'religious ethos organisation') on the grounds of a religious belief or activity when performing a function or administering a NSW law or program. This type of provision is not currently applicable to any other protected attribute in the *Anti-Discrimination Act* apart from protections against sexual harassment.

It means that any executive action taken under a NSW law, and any NSW government contract, decision or policy, could be challenged if it contradicts the religion of a person or organisation, such as:

- a contract requiring a faith-based organisation to provide publicly funded services to everyone equally;
- an executive order, such as the recent COVID-19 public health orders, restricting public gatherings.

This provision gives organisations that define themselves as religious the right to bring their own human rights complaints under laws which are intended to protect *humans* not organisations. It protects religious schools, charities and 'any other body' conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion, meaning that even commercial operations could be protected.

NO CONSEQUENCES FOR CONDUCT (SECTIONS 22N(3)-(5), 22S(2)-(4) AND 22V(3)-(5))

It will be almost impossible for government and non-government employers, educators and professional and licencing bodies to foster inclusive cultures, or meet shareholder, customer or community expectations, when their employees or members use their religion privately to hurt others.

Proposed sections 22N(3)-(5), 22S(2)-(4) and 22V(3)-(5) prohibits employers, educational authorities, and qualifying bodies (such as organisations which confer qualifications or professional or trade licenses) from restricting or disciplining a person who engages in religious activities outside their normal hours or places of work or education, except where those activities directly criticise or attack their organisations or cause them 'direct and material financial detriment'. However, that financial detriment cannot include any boycotts, or the withdrawal of sponsorships or 'other financial or corporate support' from the organisation resulting from that religious activity. 'Religious activities' are broadly defined to include any activity, which is not an imprisonable offence, that is motivated by a religious belief.

This means that all NSW government and non-government employers, educators and qualifying bodies will be unable to respond appropriately to religiously-motivated conduct which may breach civil obligations (such as breaches of contract, professional obligations, or civil vilification laws) or cause harm to others.

For example:

- the NSW Government, as an employer, may not be able to discipline a police officer or teacher who expresses offensive or outdated views off-duty based on religious beliefs, notwithstanding the detriment such public statements could have to maintaining community confidence in their ability to perform their role impartially;
- a health disciplinary body may not be able to investigate a doctor or psychologist who promotes LGBT conversion 'therapies' through their church, notwithstanding that such opinions carry more weight because of their standing as health professionals;
- an employer would not be able to prevent a prominent employee and public figure from expressing offensive or outdated views based on their religious beliefs even if it destroys their sponsorship revenue or customer base.

DOUBLE STANDARDS IN EMPLOYMENT, EDUCATION AND SERVICE DELIVERY (SECTION 22M)

Faith-based organisations will be exempt from the new provisions, allowing them to discriminate on the grounds of religion in employment, education and service delivery, even when receiving public funding.

Proposed section 22M exempts 'religious ethos organisations' from the new provisions, meaning they can discriminate against a person on the grounds of their religion (or lack thereof) even in publicly-funded employment, education and service delivery, if this is broadly consistent with the organisation's religion or is required to meet the 'religious susceptibilities' of its adherents. These exemptions protect religious schools, charities and 'any other body' conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion, meaning that even commercial operations could be protected. These exemptions are in addition to the already broad religious exemptions which apply to other protected attributes such as marital or relationship status, homosexuality and transgender status.

RELIGION ABOVE THE LAW (DEFINITION OF 'RELIGIOUS ACTIVITY')

The Bill gives protection to religious activities which may be unlawful, such as religious activity that vilifies others or breaches civil obligations.

Religion is not defined by the Bill, meaning that a wide range of religious beliefs and activities may be protected. 'Religious activities' are also broadly defined to include any activity, which is not an imprisonable offence, that is motivated by a religious belief. Many acts or omissions motivated by religious beliefs which breach civil obligations are therefore given protection by the Bill, such as:

- breaches of contract and tort laws, such as negligence and confidentiality;
- breaches of civil obligations, such as professional obligations and anti-discrimination and vilification obligations.

RELIGION ABOVE OTHER HUMAN RIGHTS (SECTION 3(2))

Freedom of religion will be prioritised above other rights and freedoms when applying NSW's anti-discrimination laws.

Proposed section 3 introduces an interpretative principle into the *Anti-Discrimination Act* which prioritises the freedom of religion when carrying out functions and making determinations under the Act. So, rather than consider all human rights and freedoms equally, decision makers are instructed to have specific regard to principles that limit interference on the right to manifest religion or belief.