



public interest
ADVOCACY CENTRE

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

21 August 2020

About the Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit legal centre based in Sydney.

Established in 1982, PIAC tackles barriers to justice and fairness experienced by people who are vulnerable or facing disadvantage. We ensure basic rights are enjoyed across the community through legal assistance and strategic litigation, public policy development, communication and training.

Our work addresses issues such as:

- Reducing homelessness, through the Homeless Persons' Legal Service
- Access for people with disability to basic services like public transport, financial services, media and digital technologies
- Justice for Aboriginal and Torres Strait Islander people
- Access to affordable energy and water (the Energy and Water Consumers Advocacy Program)
- Fair use of police powers
- Rights of people in detention, including equal access to health care for asylum seekers (the Asylum Seeker Health Rights Project)
- Government accountability.

Contact

Alastair Lawrie
Public Interest Advocacy Centre
Level 5, 175 Liverpool St
Sydney NSW 2000

T: (02) 8898 6515

E: alawrie@piac.asn.au

Website: www.piac.asn.au



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@PIACnews

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Recommendations

Recommendation 1 – The Bill should not be passed

The Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 should not be passed by Parliament.

Recommendation 2 – ‘a’, not ‘any’ religious belief

The definition of religious belief in section 22K should be amended to ‘holding or not holding a religious belief’.

Recommendation 3 – ‘Genuinely believes’

The definition of ‘genuinely believes’ in clause 22K, and the entirety of proposed section 22KA, should be removed.

Recommendation 4 – Definition of religious belief

Proposed section 22KB(1) should be simplified to read: ‘A reference in this Part to a person’s religious belief is a reference to a religious belief: (a) that a person holds, or (b) that a person is thought to hold (whether or not the person in fact holds the religious belief), or (c) that a person held in the past, or (d) that a person will hold in the future.’

Recommendation 5 – Definition of religious activities

The definition of ‘religious activities’ in section 22K should be amended to ‘engaging in, not engaging in or refusing to engage in a lawful religious activity.’

Recommendation 6 – Removal of ‘protected activity’ provisions

The ‘protected activity’ provisions in sections 22N(3)-(5), 22S(2)-(4) and 22V(3)-(5) should be removed.

Recommendation 7 – Removal of ‘religious dress’ limitation

Proposed section 22N(6) should be removed.

Recommendation 8 – Definition of ‘religious ethos organisation’

The definition of ‘religious ethos organisation’ in section 22K should be removed, and replaced with a standard definition covering ‘bodies established to propagate religion’.

Recommendation 9 – Remove ‘religious ethos organisation’ exemption

Proposed section 22M should be removed.

Recommendation 10 – Clarify scope of genuine occupational qualification

Proposed section 22U(d) should be removed.

Recommendation 11 – Religious discrimination against students

Religious educational authorities should be prohibited from discriminating against students on the basis of religious belief after the point of admission. The Bill and Act should be amended to

provide that proposed section 22M, as well as existing sub-section 56(d), do not apply to proposed section 22V(2).

Recommendation 12 – Standing for religious organisations

Proposed section 22Z(2) of the Bill should be removed. A definition of ‘aggrieved person’ as meaning ‘natural person’ should be introduced into s 4 of the ADA.

Recommendation 13 – Exemptions

Clause 3 of the Bill should be removed.

Recommendation 14 – Vilification

The Committee consider the inclusion of a prohibition on vilification on the basis of religious belief.

Recommendation 15 – Objects Clause

Clause 1 of the Bill should be removed.

Recommendation 16 – Comprehensive Review of the Anti-Discrimination Act

The Committee should call for a comprehensive expert review of the Anti-Discrimination Act 1977, to consider the addition of religious belief and activity as protected attributes as well as the Act’s modernisation.

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

1. Introduction

PIAC welcomes the opportunity to provide this submission in response to the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 ('the Bill').

We do so as a community legal centre that has a long history of work on anti-discrimination issues, both nationally and in New South Wales.

We have acted on behalf of a number of complainants under the *Anti-Discrimination Act 1977* (NSW) ('the ADA'), on a diverse range of subject matters. Our work has included complaints resolved through conciliation, that have progressed to the NSW Civil and Administrative Tribunal (NCAT), and which have been considered by the courts.

We also have significant experience in law reform in relation to both Commonwealth and NSW anti-discrimination law. This includes submissions to the 2018 Religious Freedom Review,¹ in response to both Exposure Drafts of the Commonwealth Government's proposed Religious Discrimination Bill,² and to the current NSW parliamentary inquiry into the Anti-Discrimination Amendment (Complaint Handling) Bill 2020.³

In assessing the Bill, we have applied the following principles:

1. Religious belief and activity should be protected consistent with other attributes

Consistent with our submissions to the Religious Freedom Review and the Commonwealth Government's Exposure Draft Religious Discrimination Bills, PIAC strongly supports the introduction of a protected attribute of religious belief and activity in both Commonwealth and NSW anti-discrimination law.

People of faith, and no faith, deserve access to protections against discrimination on the basis of their religious beliefs, consistent with and equivalent to other groups, such as race, sex, disability, age, sexual orientation and gender identity.

2. Religious protections should be consistent across different faiths

Protection from discrimination on the grounds of religious belief must cover all people of faith equally. It must not allow or encourage unnecessary and unjustified discrimination by religious

¹ PIAC, *Submission to the Religious Freedom Review*, 14 February 2018. Available at: <https://piac.asn.au/2018/02/14/submission-to-the-religious-freedom-review/>

² PIAC, *Religious Freedom Bills Submission on Exposure Drafts*, 1 October 2019. Available at: <https://piac.asn.au/2019/10/01/religious-freedom-bills-submission-on-exposure-drafts/> and PIAC, *Submission on the 2nd Exposure Draft of the Religious Freedom Bills*, 31 January 2020. Available at: <https://piac.asn.au/2020/01/31/submission-on-the-2nd-exposure-draft-of-the-religious-discriminaton-bill/>

³ PIAC, *Submission re Anti-Discrimination Amendment (Complaint Handling) Bill 2020*, 28 April 2020. Available at: <https://piac.asn.au/2020/04/28/submission-re-anti-discrimination-amendment-complaint-handling-bill-2020/>

individuals and organisations against other individuals and organisations of different faiths or no faith.

3. Existing protection must not be undermined

The introduction of anti-discrimination protections for religious belief and activity should not undermine existing anti-discrimination coverage of other attributes – in the context of the ADA this particularly relates to sex, marital or domestic status, homosexuality and transgender status.

Unfortunately, as set out below, the substantive provisions of the Bill are not consistent with these principles. The Bill

- gives excessive protections to religious organisations compared to other groups,
- allows unnecessary and unjustified discrimination by religious individuals and organisations against people and bodies of other faiths or no faith, and
- undermines the anti-discrimination protections enjoyed by other protected groups.

For these reasons, we do not support the Bill and our primary recommendation is that it should not be passed by Parliament.

Recommendation 1 – The Bill should not be passed

The Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 should not be passed by Parliament.

We nevertheless set out specific concerns with the Bill and amendments that should be made to avoid some of the problems it contains.

2. Areas of concern

2.1 Definition of religious belief

The Bill establishes two new, related protected attributes: ‘religious belief’, and ‘religious activity’.

Proposed section 22K provides that religious beliefs includes

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

The proposed section clarifies 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.’

Proposed section 22KA ‘Determining when a belief is held’ provides:

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 requested by, conflict with, accord or are consistent with, that belief) if the person genuinely believes the belief.

We have a number of concerns with this definition.

(a) ‘Any’ religious belief

First, the second part of the definition of religious beliefs – ‘not having *any* religious conviction, belief, opinion or affiliation’ (emphasis added) – may preclude protection for persons who are agnostic, who neither believe nor disbelieve in religious doctrine, because it is not accurate to say they do not have *any* belief. It is preferable that the definition refers only to not holding ‘a’ religious belief.

Recommendation 2 – ‘a’, not ‘any’ religious belief

The definition of religious belief in section 22K should be amended to ‘holding or not holding a religious belief’.

(b) A purely subjective test

Second, we are concerned about the breadth, and the entirely subjective nature, of these definitions, and especially the insertion of a ‘genuinely believes’ test.

While the Explanatory Notes state this is ‘a means to avoid courts determining matters of religious doctrine or disputation’⁴ – and suggests this is supported by the decision in *Church of New Faith v Commissioner for Payroll Tax (Vic)*⁵ – we submit it relies too much on subjectivity.

As noted by the Australian Discrimination Law Experts Group (ADLEG) in their submission,⁶ while Mason ACL and Brennan J concluded that a ‘narrow view to religious institutions in the context of fiscal legislation should not be adopted, their Honours also rejected an entirely subjective approach, labelling it as not acceptable:⁷

The mantle of immunity would soon be in tatters if it were wrapped around beliefs, practice and observances of every kind whenever a group of adherents chose to call them a religion.

Similar concerns arise here.

The adoption of an express ‘genuinely believes’ test, and the wording in proposed section 22KA, is also not replicated in other Australian jurisdictions which protect religious belief.

For example, the Queensland *Anti-Discrimination Act 1991*⁸ provides that ‘religious belief means holding or not holding a religious belief.’ The Victorian *Equal Opportunity Act 2010*⁹ states that ‘religious belief’ means ‘holding or not holding a lawful religious belief or view’.

⁴ Explanatory Notes, Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020, 2.

⁵ *Church of the New Faith v Commissioner for Payroll Tax (Vic)* (1983) 154 CLR 120.

⁶ Australian Discrimination Law Experts Group (ADLEG) submission on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020, p7.

⁷ *Church of the New Faith v Commissioner for Payroll Tax (Vic)* (1983) 154 CLR 120, [10].

⁸ Schedule: Dictionary, *Anti-Discrimination Act 1991* (Qld).

⁹ Section 4, *Equal Opportunity Act 2010* (Vic).

Meanwhile, the ACT's protected attribute of 'religious conviction' includes 'having a religious conviction, belief, opinion or affiliation' and 'not having a religious conviction, belief, opinion or affiliation.'¹⁰

We do not see a compelling argument to depart from standard practice elsewhere and note that to do so will prevent NSW law from being informed by case law in other jurisdictions.

We also note with concern the extension of the definition to what may be described as 'secondary' or 'ancillary' beliefs. The words in parenthesis extend to 'belief' to include 'the person's beliefs as to the actions, refusals, omissions or expressions that are motivated or requested by, conflict with, accord or are consistent with' their belief. It appears from this that a belief motivated by a religious belief, if sincere, is protected even if its connection with the teachings, doctrines and practices of the religion are irrational or idiosyncratic. This is too broad and vague to be a workable definition.

Recommendation 3 – 'Genuinely believes'

The definition of 'genuinely believes' in clause 22K, and the entirety of proposed section 22KA, should be removed.

(c) Imputed future belief: a vague test

A related concern to the Bill's broad and subjective definition of religious belief arises in the interpretation of religious belief in proposed section 22KB:

- (1) A reference in this part to a person's religious belief is a reference to a religious belief:
 - (a) that a person holds; or
 - (b) that a person is thought to hold (whether or not the person in fact holds the religious belief), or
 - (c) that a person held in the past, or is thought to have held in the past (whether or not the person in fact held the religious belief) or
 - (d) that a person will hold in the future or that it is thought a person will hold in in the future (whether or not the person in fact will hold the religious belief).

This section reflects the existing protections for disability in section 49A. This extends to '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).'¹¹ It therefore covers imputed status, previous status, and future status, including imputed future status.

We do not support the breadth of this approach in the context of an attribute that attaches to *beliefs*. The operation of the law simply becomes too vague. We endorse the ADLEG submission on this point.¹²

¹⁰ Dictionary, *Discrimination Act 1991* (ACT).

¹¹ Section 49A(d), *Anti-Discrimination Act 1977* (NSW).

¹² Australian Discrimination Law Experts Group (ADLEG) submission on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020, p8.

The inclusion of future imputed beliefs extends the protection offered by the ‘religious belief’ attribute too far: it is a very low bar to only have to establish that another person thought a person may at some unknown stage in the future come to hold a particular religious belief.

The definition should accordingly be simplified.

Recommendation 4 – Definition of religious belief

Proposed section 22KB(1) should be simplified to read: ‘A reference in this Part to a person’s religious belief is a reference to a religious belief: (a) that a person holds, or (b) that a person is thought to hold (whether or not the person in fact holds the religious belief), or (c) that a person held in the past, or (d) that a person will hold in the future.’

(d) Imputed and future belief: inconsistency in coverage

We note further that the breadth of coverage proposed for religious belief is inconsistent with the coverage provided in the ADA to all grounds other than disability. For example, the protection for homosexuality only includes imputed status, but not previous status,¹³ while the protections for race¹⁴ and sex¹⁵ do not appear to cover either imputed or previous status. None of the protections for transgender status,¹⁶ homosexuality, race or sex appear to apply to future status or imputed future status.

Marital and domestic status,¹⁷ and responsibilities as a carer,¹⁸ do not include future status or imputed future status, despite the fact it is reasonably foreseeable for such status to change, and for the possibility of change to be a motivating factor for discrimination (such as a young single woman being discriminated against on the assumption of future marriage, or a middle-aged worker with elderly parents being discriminated against because of possible future caring responsibility).

These inconsistencies highlight the need for a comprehensive review of the ADA – discussed in further detail below.

2.2 Definition of religious activity

The Bill’s second protected attribute is for religious activity, defined in proposed section 22K(1) as:

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.

(a) Clarity regarding failure or refusal to engage in activity

¹³ ‘Section 49ZF ‘A reference in this Part to a person’s homosexuality includes a reference to the person’s being thought to be a homosexual person, whether he or she is in fact a homosexual person or not’, *Anti-Discrimination Act 1977* (NSW).

¹⁴ Section 7, *Anti-Discrimination Act 1977* (NSW).

¹⁵ Section 24, *Anti-Discrimination Act 1977* (NSW).

¹⁶ Section 38A, *Anti-Discrimination Act 1977* (NSW).

¹⁷ Section 39, *Anti-Discrimination Act 1977* (NSW).

¹⁸ Section 49T, *Anti-Discrimination Act 1977* (NSW).

The definition does not itself refer to refusing to engage in such activities. This is subsequently covered in the proposed section 22KB(2), which provides that a reference to a person's religious activity is a reference to a religious activity 'that a person engages in, does not engage in or refuses to engage in'.

In the interests of clarity, it would be preferable for the refusal or failure to engage in activity to be included in the definition of religious activity itself in section 22K(1).

This would be consistent with the approach adopted in other jurisdictions. For example, the ACT definition of religious conviction, referred to earlier, also includes 'engaging in religious activity' and 'not engaging in religious activity'.¹⁹ Both Queensland and Victoria define 'religious activity' as 'engaging in, not engaging in or refusing to engage in a lawful religious activity'.²⁰

(b) Lawful religious activity

The more serious and substantive concern with the proposed definition of religious activities in the Bill is that it explicitly includes religious activities that are unlawful, provided they do not 'constitute an offence punishable by imprisonment under the law of New South Wales or the Commonwealth'.

This approach has wide-ranging consequences. While it would not prevail over Commonwealth laws, it would appear to protect conduct that would otherwise be unlawful under State and common law – including harassment, bullying, breach of contract, breach of consumer laws and breaches against other provisions of the ADA.

This would have a significant practical and normative impact, with people acting on religious motivations being exempted from legal consequences that would otherwise flow from their actions. Employers, providers of goods and services, educational institutions and accommodation providers will have great difficulty in knowing where they stand in dealing with otherwise unlawful conduct such as harassment, discrimination or bullying if such conduct is religiously-motivated.

This is again in contrast with the approach in Queensland and Victoria, which only protect 'lawful religious activity'. We submit this is the right approach and one that will avoid undermining existing protections against discrimination on the basis of other attributes, including sex, marital or domestic status, homosexuality or transgender status (contravening Principle 3).

Recommendation 5 – Definition of religious activities

The definition of 'religious activities' in section 22K should be amended to 'engaging in, not engaging in or refusing to engage in a lawful religious activity.'

2.3 Protected activity provisions

In proposed section 22L, the Bill adopts an approach to defining what constitutes direct discrimination and indirect discrimination on the basis of both religious belief and religious activity which is consistent with the existing framework of the ADA.

¹⁹ Dictionary, *Discrimination Act 1991* (ACT).

²⁰ Schedule: Dictionary, *Anti-Discrimination Act 1991* (Qld); Section 4, *Equal Opportunity Act 2010* (Vic).

Specifically, in terms of indirect discrimination proposed section 22L(1)(b) covers situations where a discriminator:

requires the aggrieved person to comply with a requirement or condition with which a substantially higher proportion of persons who-

- (i) do not have the same religious beliefs, or
- (ii) have such a relative or associate who does not have the same religious beliefs, comply or are able to comply, being a requirement or condition that is not reasonable having regard to the circumstances of the case and with which the aggrieved person does not or is not able to comply.²¹

The inclusion of this 'reasonableness' test is appropriate, being consistent with the test for other protected attributes in the Act and aligned with the approach in other jurisdictions. However, the ordinary reasonableness test is then undermined in several key areas by the introduction of specific provisions covering 'protected activities'.

(a) Protected activity in employment

Proposed sections 22N(1) and (2) provide general protections in relation to employment, including hiring processes and decisions, the terms and conditions of employment, training and termination provisions. These sections should be sufficient on their own to address workplace discrimination on the basis of religious belief and activity.

However, proposed sections 22N(3)-(5) then seek to provide for 'protected activity', defined as:

- (a) a religious activity performed by the employee that:
 - (i) occurs at a time other than when the employee is performing work and at a place other than the employer's place of work, and
 - (ii) does not include any direct criticism of, or attack on, or does not cause any direct and material financial detriment to, the employer.

As discussed above, given the broad definition of religious activity proposed in section 22K, protected activity includes unlawful conduct, provided it is not punishable by imprisonment.

Sub-section (5) then further limits employer options in these circumstances:

For the avoidance of doubt, the following do not constitute direct and material financial detriment to an employer for the purposes of subsection 4(a) and 4(b)-

- (a) any boycott or secondary boycott of the employer by other persons because of the employee's protected activity, or the protected activity of their associate, or
- (b) the withdrawal of sponsorship or other financial or corporate support for the employer because of the employee's protected activity, or the protected activity of their associate.

²¹ Proposed subsection 22L(2)(b) provides an equivalent test for indirect discrimination on the basis of religious activity.

The combined impact of these provisions is to expose employers to the risk of considerable harm, because of the actions of their employees, when it would otherwise have been reasonable for the employer to take action to protect their organisation.

An employer will only be able to take action if an employee engages in:

- direct criticism of the employer, *and*
- that includes an attack on the employer, *and*
- causes direct and financial detriment to the employer (not related to boycotts, secondary boycotts or the withdrawal of sponsorship).

This significantly limits the ability of organisations to promote the safety and equality of their workforce and to safeguard their brand and public reputation.

As a consequence, employers will need to develop codes of conduct which regulate conduct outside of the workplace differently depending on whether a person is religious or not, and when they are acting in a manner that is motivated by their religious belief or not.

It will also mean that activity, including public statements, outside the workplace will be regulated differently depending on whether an activity or statement is undertaken because of religious belief, or on another basis – such as a social, cultural, political, moral or scientific belief. This double standard does not appear to be justified.

Highlighting the double-standard, ‘religious ethos organisations’ are not subject to these provisions: proposed section 22N(9).

This type of provision does not exist with respect to other protected attributes in the ADA, nor is it found in other Commonwealth, state or territory anti-discrimination laws (contravening Principle 1).

(b) Protected activity in qualifying bodies

Proposed sections 22S(2)-(4) provide equivalent ‘protected activity’ protections in relation to qualifying bodies. The same problems arise, including introducing double standards for activities and statements depending on whether they are religious, and whether motivated by religious belief, or not.

The broad definition of ‘religious activity’ in proposed section 22K – which protects actions that are unlawful provided they are not punishable by imprisonment under NSW or Commonwealth law – creates particular problems here. As a result, a professional accreditation board, in determining whether someone is a ‘fit and proper’ person to be a member of that profession, would not be able to consider a long history of unlawful acts, including acts which may be closely related to the relevant profession, if those acts were motivated by a religious belief.

As with protected activity protections in employment, we submit that ordinary protections against direct and indirect discrimination, including the ordinary test of reasonableness with respect to the

latter, provide appropriate protection. A special standard for religious belief and activity is not justified.

(c) Protected activity in education

Proposed sections 22V(3)-(5) include equivalent provisions for 'protected activity' by students in relation to educational authorities (such as schools, colleges and universities).

Once again, this would introduce a double-standard and protect unlawful acts committed by students where motivated by religious beliefs. As with employment and qualifying bodies, we submit that the ordinary protections against discrimination should apply in these situations.

Recommendation 6 – Removal of 'protected activity' provisions

The 'protected activity' provisions in sections 22N(3)-(5), 22S(2)-(4) and 22V(3)-(5) should be removed.

2.4 Religious dress

The definitions of both direct and indirect discrimination on the basis of religious activity in proposed section 22L provide appropriate protection against unreasonable discrimination on the basis of religious dress, including in the workplace.

Despite this, proposed section 22N(6) provide specifically for discrimination on the basis of religious symbols and religious clothing in employment. It provides:

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 religious clothing during work hours, but only if-

- (a) the symbol or item of clothing is of a kind recognised as necessary or desirable by persons with the same religious beliefs or who engage in the same religious activities as that of the employee, and
- (b) wearing the symbol or item of clothing during working hours is reasonable having regard to the circumstances of the employment, including-
 - (i) the workplace safety, productivity, communications and customer service requirements of that employment, and
 - (ii) the industry standards of that employment.

In practice, these provisions may unnecessarily limit the protections offered to employees on the basis of their religious dress (contravening Principle 1). In particular, the reference to 'the industry standards of that employment', may 'bake in' existing discriminatory practices.

It is unclear why the ordinary prohibition of direct and indirect discrimination is considered inadequate to protect against discrimination on the basis of religious dress. We are unaware of any anti-discrimination law in Australia which seeks to address this issue in this way. The proposed section is unnecessary and should be removed.

Recommendation 7 – Removal of 'religious dress' limitation

Proposed section 22N(6) should be removed.

2.5 Definition of religious ethos organisation

Proposed section 22K would introduce a new type of organisation into the ADA:

religious ethos organisation means-

- (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.

This definition is inconsistent with the existing approach to religious organisations in the Act. Current section 56 currently provides an exception for:

- (c) the appointment of any 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 (emphasis added).

This terminology – a body established to propagate religion – has already been interpreted generously by the courts, including in the case of *OV and OW v Members of the Board of Wesley Mission Council*, where the NSW Administrative Decisions Tribunal held that a foster care agency attached to the Wesley Mission was a body established to propagate religion for the purposes of the Act.²²

The proposed new definition – a body ‘that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion’ – would significantly expand the category of organisations covered.

A large number of charities (including health providers, and community services including homelessness and domestic violence) and even commercial businesses, could potentially qualify for protections under the Act depending on how they are operated and by whom – even though they have *not* been established to propagate religion.

This expansive definition would privilege ‘religious ethos’ organisations from other charities and community organisations (contrary to Principle 1). It would also cause the ADA to be out of step with the approach in other jurisdictions, all of which currently apply to ‘bodies established for religious purposes.’²³ We therefore submit that the existing approach – bodies ‘established to propagate religion’ – should be retained.

²² *OV and OW v Members of the Board of Wesley Mission Council* [2010] NSWADT 293 (10 December 2010). PIAC represented the applicants in that case.

²³ *Sex Discrimination Act 1984* (Cth) s 37(1)(d); *Age Discrimination Act 2004* (Cth) s 35. *Anti-Discrimination Act 1998* (Tas) s 52(d); *Anti-Discrimination Act 1991* (Qld) s 109(1)(d); *Equal Opportunity Act 1984* (SA) s 50(1)(c); *Equal Opportunity Act 1984* (WA) s 72(d); *Equal Opportunity Act 2010* (Vic) s 82(2)(a); *Anti-Discrimination Act 1992* (NT) s 51(d); *Discrimination Act 1991* (ACT) s 32(d).

For the reasons set out below, we believe there is no reason to provide special exceptions for religious ethos organisations, meaning that there is no need for a definition of such organisations. Should, however, a definition be required, it should be limited to bodies established to propagate religion’.

Recommendation 8 – Definition of ‘religious ethos organisation’

The definition of ‘religious ethos organisation’ in section 22K should be removed, and replaced with a standard definition covering ‘bodies established to propagate religion’.

2.6 Scope of religious ethos organisation exceptions

The broad definition of a religious ethos organisation is particularly important given the approach to religious exceptions adopted by the Bill.

This includes an extraordinarily broad exception in proposed section 22M:

Religious ethos organisations taken not to discriminate in certain circumstances

- (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).

There are a number of significant problems with the exception.

First, it is unnecessary. Section 56 of the ADA already provides a broad exemption that applies across the Act for acts and practices of bodies established to propagate religion that conform to the doctrines of the religion or are necessary to avoid injury to the susceptibilities of the adherents of that religion.

Second, the proposed section purports to apply an entirely subjective test based on the what ‘the organisation genuinely believes’. It is not clear how the ‘genuine belief’ of an *organisation* – as distinct from a natural person – could or would be determined. This formulation is entirely novel, flawed and should be removed.

Third, paragraph (c) is extraordinarily broad, applying to any conduct the ‘organisation genuinely believes... furthers or aids the organisation in acting in accordance with the doctrines, tenets, beliefs or teachings of the religion of the organisation’. This does not require that the conduct is itself in accordance with the organisation’s religious doctrines.

As ADLEG has highlighted in their submission:²⁴

This third limb under s22M(1)(c) is unorthodox, wide in scope, and easier to satisfy than *any* religious body exception test found in *any* other existing federal, state or territory discrimination law in Australia. This significantly undermines the purpose of this Bill – to prohibit religious discrimination – by providing a much wider exception than seen in other comparable discrimination laws.

In practice, there will be very few limits on the ability of religious ethos organisations to discriminate on the basis of religious belief and religious activity. This will therefore allow discrimination by religious schools, health care providers, community services and a wide range of other organisations operating in a public setting (including some engaged in commercial activities), to discriminate against both employees and potential employees, and against people accessing their services.

For example, a homelessness service using State Government money that is operated by a religious organisation will be able to turn away people simply because of their religious belief, or lack of belief (contravening Principle 2).

The exemption would enable larger faith groups, with higher numbers of schools, charities and other services linked to them, to discriminate against people from minority faiths as well as people who are agnostic or atheist in a way that would cause significant disadvantage: for example, by denying access to local or specialist services. This is contrary to what a Religious Discrimination Bill should achieve.

Organisations could also discriminate on the basis of specific tenets of faith. For example, a religious health care provider could discriminate against employees who may be of the same faith as the provider, but do not subscribe to every individual belief, such as that disability is a trial imposed by God, homosexuality is sinful, or that same-sex marriage should be prohibited. An organisation would be entitled to terminate the employment of an employee who refused to sign a statement supporting such doctrines, despite being a practicing member of that religion.

For these reasons, the exception for religious ethos organisations in proposed section 22M should be removed. The existing exemption in s 56(d) of the Act will continue to apply.

Recommendation 9 – Remove ‘religious ethos organisation’ exemption

Proposed section 22M should be removed.

2.7 Scope of ‘genuine occupational qualification’

Proposed section 22U(d), which seeks to make an exemption for a ‘genuine occupational qualification’ is also excessively broad.

It allows for discrimination in employment where services promoting welfare are being provided for persons of a particular religious association, affiliation or belief, ‘where those services can be most effectively, efficiently or appropriately provided by a person with the same religious association, affiliation or belief as the intended recipient of that welfare’.

²⁴ Australian Discrimination Law Experts Group (ADLEG) submission on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020, p18.

The criteria of effectiveness, efficiency and appropriateness are, in PIAC's view, too vague and broad to be a basis upon which discrimination (here, denial of employment on the basis of religious belief) can be justified. As noted above, s 56(d) of the ADA already provides an exemption for religious organisations, including those providing welfare services. Paragraph (d) of proposed section 22U should therefore be removed.

Recommendation 10 – Clarify scope of genuine occupational qualification

Proposed section 22U(d) should be removed.

2.8 Religious discrimination against students

The application of the exception in proposed section 22M to religious schools should also concern the Committee. The proposed section would allow religious schools, colleges and universities to discriminate against students on the basis of religious belief and activity at any point in their education – not just at the point of enrolment. In practice, this will mean a student could attend a school for the entirety of their school years, but be expelled in the middle of Year 12 should they become agnostic, an atheist, cease to share some of the beliefs of the school, or change faiths.

This is an unacceptable infringement on the right of the student to receive an education and determine their own religious beliefs. It is for this reason that the Tasmanian *Anti-Discrimination Act 1998* allows religious schools to discriminate at the point of admission, but not afterwards.²⁵ The anti-discrimination laws of Queensland, the ACT and Northern Territory²⁶ have also adopted this approach.

If religious belief is to be added as a protected attribute to the ADA, the exceptions provided to religious educational authorities should be restricted to the point of admission only, and prohibit religious discrimination against students post-enrolment.

If proposed section 22M is passed, it should be amended to provide that it does not apply to section 22V(2), which covers discrimination after enrolment.

Existing section 56 of the ADA should also be amended to clarify that sub-section 56(d) does not apply to proposed section 22V(2).

Recommendation 11 – Religious discrimination against students

Religious educational authorities should be prohibited from discriminating against students on the basis of religious belief after the point of admission. The Bill and Act should be amended to provide that proposed section 22M, as well as existing sub-section 56(d), do not apply to proposed section 22V(2).

²⁵ Section 51A(1) *Anti-Discrimination Act 1998* (Tas).

²⁶ *Anti-Discrimination Act 1991* (Qld) s 41(a); *Discrimination Act 1991* (ACT) s 46; *Anti-Discrimination Act 1992* (NT) s 30(2).

2.9 Standing for religious organisations

Another serious concern with the Bill is the granting of standing to 'religious ethos organisations', enabling them to bring anti-discrimination complaints on their own behalf.

Proposed section 22Z(2) provides:

Without limiting subsection (1), a person is taken to discriminate against a religious ethos organisation on the ground of religious beliefs or religious activities if the person requires 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-

- (a) in the course of performing any function under a State law or for the purposes of a State program, or
- (b) in the course of carrying out any other responsibility for the administration of a State law or the conduct of a State program.

It also appears that religious organisations would be able to bring other forms of religious discrimination claims in their own right as a 'person',²⁷ particularly in relation to religious activities.

PIAC does not support standing for organisations to bring complaints in their own right under legislation that is intended to protect human rights. These are rights that, by their very nature, attach to human beings and their personal attributes.

PIAC also opposes granting special rights to religious organisations that are not enjoyed by other organisations which represent groups based on race, sex, age, disability, homosexuality or transgender status. There does not appear to be a justification for this special treatment (contravening Principle 1).

The Bill and ADA should be amended to ensure only natural persons have standing to bring claims. For the ADA this could be achieved by including a definition of 'aggrieved person' in s 4 to mean 'natural person'.

Recommendation 12 – Standing for religious organisations

Proposed section 22Z(2) of the Bill should be removed. A definition of 'aggrieved person' as meaning 'natural person' should be introduced into s 4 of the ADA.

2.10 State laws and programs

Proposed section 22Z(1) prohibits discrimination on the basis of religious belief and activity in relation to state laws and programs:

It is unlawful for a person to discriminate against another person on the ground of religious beliefs or religious activities-

- (a) in the course of performing any function under a State law or for the purposes of a State program, or
- (b) in the course of carrying out any other responsibility for the administration of a State law or the conduct of a State program.

²⁷ See *Interpretation Act 1987* (NSW) which defines person to include 'an individual, a corporation and a body corporate or politic'.

This type of provision is not unprecedented in Australian anti-discrimination law. For example, the *Sex Discrimination Act 1984* (Cth) includes the following:

26 Administration of Commonwealth laws and programs

- (1) It is unlawful for a person who performs any function or exercises any power under a Commonwealth law or for the purposes of a Commonwealth program, or has any other responsibility for the administration of a Commonwealth law or the conduct of a Commonwealth program, to discriminate against another person, on the ground of the other person's sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, or breastfeeding, in the performance of that function, the exercise of that power or the fulfilment of that responsibility.²⁸

The ADA itself has an equivalent provision in relation to sexual harassment:

22J State laws and programs

- (1) It is unlawful for a person to sexually harass another person-
- (a) in the course of performing any function under a State law or for the purposes of a State program, or
 - (b) in the course of carrying out any other responsibility for the administration of a State law or the conduct of a State program.

However, there is no such protection in relation to the other attributes in the Act, including race, sex, disability, age, marital or domestic status, responsibilities as a carer, homosexuality or transgender status (contravening Principle 1).

This highlights the need for a more comprehensive review of the ADA to ensure consistency of treatment – discussed below.

2.11 Exemptions

Clause 3 of the Bill proposes to amend section 126 of the ADA so that the President of Anti-Discrimination NSW is not able to grant exemptions in relation to discrimination on the basis of religious belief and religious activity.

This would treat the protected attributes of religious belief and religious activity very differently from the existing attributes of race, sex, disability, age, marital or domestic status, responsibilities as a carer, homosexuality and transgender status, all of which may have exemptions issued by the President (again contravening Principle 1).

While exemptions should only be issued sparingly with respect to any protected attribute, we do not see a justification for disallowing exemptions solely with respect to religion.

This issue would be another one to be considered in more detail in the course of an overall review of the ADA – discussed below.

²⁸ See also section 29, *Disability Discrimination Act 1992* (Cth).

Recommendation 13 – Exemptions

Clause 3 of the Bill should be removed.

2.12 Absence of vilification protections

The Bill does not propose any prohibitions against vilification on the basis of religious belief.

We note that, following the *Crimes Act Amendment (Publicly Threatening and Inciting Violence) Act 2018*, it is now a criminal offence to ‘intentionally or recklessly threaten or incite violence towards another person or a group of persons’ on the basis of religious belief or affiliation.²⁹ This places religious belief alongside several other protected attributes, which are also covered:³⁰

- race
- sexual orientation
- gender identity
- intersex status, and
- HIV/AIDS status.

However, religious belief would not be given the protection of civil vilification provisions, which apply to grounds of race, homosexuality, transgender status and HIV/AIDS status.

This is significant given vilification in the Act offers broader protection than that in the *Crimes Act 1900*. For example, section 20C(1) provides that: ‘It is unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group.’

This inconsistency in protection is exacerbated because race is defined in the Act as ‘includes colour, nationality, descent and ethnic, ethno-religious or national origin’, which has been interpreted to include Jewish and Sikh persons, but not Muslim, Hindu or Buddhist persons – meaning some religious groups would have access to both criminal and civil protections, while others would only have access to the more limited criminal protections.

This means the Bill is inconsistent with both Principles 1 and 2: it does not provide protection for religious belief consistent with other grounds, nor does it provide protection for all people of faith equally.

We therefore recommend the Committee consider the inclusion of a prohibition on vilification on the basis of religious belief in the Bill, to make it consistent with existing prohibitions on racial, homosexual, transgender status and HIV/AIDS vilification.

Recommendation 14 – Vilification

The Committee consider the inclusion of a prohibition on vilification on the basis of religious belief.

²⁹ Section 93Z(1)(b), *Crimes Act 1900* (NSW)

³⁰ Section 93Z(1), *Crimes Act 1900* (NSW).

2.13 Objects clause

The final substantive concern with the Bill relates to clause 1, which would insert a new 'Principles of Act' section in the ADA.

This section would require 'the Minister, Board, President, Tribunal and Courts [to] have fundamental regard to the following-

- (a) The *International Covenant on Civil and Political Rights*
- (b) The *UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, proclaimed by the UN General Assembly on 25 November 1981; and
- (c) The *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*.³¹

Particularly in the context of a general *Anti-Discrimination Act*, this list is extremely selective, and omits a wide range of other important international human rights instruments – including the *International Convention on the Elimination of All Forms of Racial Discrimination*, the *Convention on the Elimination of All Forms of Discrimination Against Women*, *ILO Convention No 111 – Discrimination (Employment and Occupation)*, the *Convention on the Rights of the Child*, and the *Declaration on the Rights of Disabled Persons*.

We are especially concerned that the selectivity of the list of instruments included in proposed sub-section (1), combined with the interpretative direction in proposed sub-section (3), would skew the interpretation of provisions in the Act in favour of 'religious belief' over other rights, including the right to be protected against discrimination on other grounds. This could undermine existing protection from discrimination (contravening Principle 3).

One example from the Explanatory Notes highlights the apparent imbalance of the Bill and the difficulties its practical application will cause for employers and small business operators. The example on page 5 provides:³²

A Satanist requests that a publisher print materials that promote the teachings of Satanism. A Jewish employee of the publisher requests that she not be required to facilitate the order. Having fundamental regard to the International Covenant on Civil and Political Rights and the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, it would not be necessary or proportionate, for the employer to require her involvement in the order where alternative employees who do not have a genuine religious objection are available to facilitate the order. Similarly, it would not be necessary or proportionate for the employer to require her involvement in the order where alternative publishers are reasonably available to facilitate the order. In both of these cases, for the employer to require her involvement in the order would use 'more restrictive means than are required'. In addition, to require such conduct would not be compatible with the international instruments stated at section.

³¹ Proposed subsection 3(1) Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020.

³² Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020, Explanatory Notes, p5.

In this example, the Jewish employee is ostensibly being protected against discrimination on the basis of their religious belief. However, this comes at the expense of the rights of others, including the right to be protected against discrimination.

From the perspective of the customer, the example indicates they can be refused service on the basis of their religious beliefs if 'alternative publishers are reasonably available'. It is worth nothing that the customer could not have known before approaching the publisher that the religious beliefs of an individual employee could mean their request would be rejected. The Bill, however, seems to contemplate, that any person undertaking any transaction in the public sphere – buying goods or services, hiring accommodation etc – must be prepared to be refused service on the basis of their belief, or lack of belief, because of the views of individual employees who may have contrary views.

This discrimination could apply to other attributes. In the example, the employee could have refused to facilitate orders publishing materials about divorce, disability, marriage equality, rainbow families, gender equality or gender identity.

From the perspective of the publisher, the example suggests that in order to not discriminate against their employee, they must instead discriminate against a potential customer (opening themselves to a discrimination complaint on that basis) and lose business to a competitor.

This places employers and small businesses in an unenviable position, with their ability to do business and respect the rights of their customers being dictated by the individual religious beliefs of employees. Concerningly, this may create an incentive for employers to screen out potential employees with strong religious views. This would undermine the purpose of legislating to protect against discrimination on the grounds of religious belief.

We therefore recommend that the proposed objects clause be removed and the Committee carefully consider the extent to which, in seeking to depart from a standard discrimination law framework, this Bill may have wide-ranging unintended consequences.

Recommendation 15 – Objects Clause

Clause 1 of the Bill should be removed.

3. Conclusion: The Bill in context

In this submission, we have expressed serious concerns about the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020.

This includes definitions of religious belief and religious activity that are too broad, inappropriate and unnecessary limitations imposed on the ordinary 'reasonableness' test for indirect discrimination, and curtailed protections for discrimination on the basis of religious dress.

It also includes an excessively wide definition of religious ethos organisation, which, combined with an extremely easily satisfied test for religious exceptions, would allow for unjustified discrimination against individuals and organisations on the basis of religious belief, lack of belief – as well as, *de facto*, against other protected attributes.

The Bill fails to provide anti-vilification protections to minority faiths, while also introducing a selective objects clause which would skew interpretation of the Act to privilege religious belief above the rights of others to be protected against discrimination.

Assessed against the three principles identified at the outset, the Bill:

- does not provide access to anti-discrimination protections which are consistent with and equivalent to existing protections for other groups, such as race, sex, disability, age, sexual orientation and gender identity;
- does not cover all people of faith equally, because it allows and encourages unnecessary and unjustified discrimination by religious organisations against other individuals and organisations of different faiths or not faith; and
- undermines anti-discrimination coverage for other protected attributes under the ADA, especially sex, marital or domestic status, homosexuality and transgender status.

We therefore urge the Committee to recommend that the Bill not pass. PIAC recognises, however, that this would leave people in NSW without appropriate protection from discrimination on the grounds of religious belief. This highlights the need for a more fundamental review of the ADA.

This legislation is 43 years old. It has not been subject to comprehensive review for more than two decades, and even then, the majority of recommendations from the 1999 NSW Law Reform Commission Review of the Act³³ have still not been implemented.

The Act has many inconsistencies and gaps. This is something that passage of the proposed Bill would exacerbate, for example through differential approaches to imputed, previous, future and future imputed protected attributes, and very different standards for religious exceptions – both in the scope of organisations that are covered, and the test that is applied.

The ADA was once a leader in Australian anti-discrimination law. It is now a laggard. Across a wide range of areas it has fallen behind best practice protections for the people of NSW: not just in the failure to protect religious belief and activity, but also in terms of its limited protections for the LGBTI community, the widest religious exceptions in Australia, the exemption of all private educational authorities and the limited own-motion powers of Anti-Discrimination NSW.

For these reasons, PIAC recommends a comprehensive expert review of the ADA, to consider how to protect religious belief and activity while addressing its other major flaws, inconsistencies and omissions.

The goal of such review should be to ensure the people of NSW have a modern, fit-for-purpose *Anti-Discrimination Act* that protects our fundamental human right to live free of discrimination.

³³ NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977*, published 17 December 1999. Available at: https://www.lawreform.justice.nsw.gov.au/Pages/lrc/lrc_completed_projects/lrc_completedprojects1990_1999/lrc_reviewoftheantidiscriminationact1977.aspx

Recommendation 16 – Comprehensive Review of the Anti-Discrimination Act

The Committee should call for a comprehensive expert review of the Anti-Discrimination Act 1977, to consider the addition of religious belief and activity as protected attributes as well as the Act's modernisation.