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By email

The Hon. Gabrielle Upton MP
Chair of the Joint Select Committee
on the Anti-Discrimination Amendment
(Religious Freedoms and Equality) Bill 2020
e religiousfreedomsbill@parliament.nsw.gov.au

Dear Chair

Inquiry into the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020: Response to questions on notice

Thank you for the opportunity to appear as a witness before the NSW Parliamentary Joint Select Committee Inquiry into the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 (**Bill**) on 23 October 2020.

I was asked a question by Mr Alex Greenwich MP, to be taken on notice, regarding whether the Bill, if passed into law in its current form, could *'allow people to get around public health orders'* (Draft Transcript, 23 October 2020, p.26).

My response to Mr Greenwich's question is below.

Could the Bill allow people to get around public health orders?

The short answer is that this Bill, if passed into law in its current form, could allow people to challenge public health orders, such as COVID-19 public health orders, on the basis that they discriminate on the ground of religious belief or religious activity (including not having a religious belief and not engaging, or refusing to engage, in a religious activity). It would also allow a 'religious ethos organisation' to do so where it was required to engage in conduct, including use of its property, contrary to its doctrines, tenets, beliefs or teachings. Whether such a challenge would be successful, would depend on the particular circumstances in a specific case.

There are two arguments that might support a challenge against COVID-19 public health orders:

1. First, there are disparities in the number of people who have been permitted to gather in places of worship as compared with other places (such as in hospitality venues and for corporate events). For example, a limit of 100 people was placed on places of public worship while hospitality venues enjoyed a limit of 300 people and corporate events enjoyed a limit of 150

people.[1] That difference in approach would require an explanation to survive a challenge which argued that it discriminates against religious belief or activity.

2. Secondly, latitude has been given to people to gather for religious activities which has not been extended to people gathering for other reasons, such as to atheists or people seeking to participate in protests. That difference in approach could give rise to a challenge that people who do *not* engage in, or refuse to engage in, religious activities are disadvantaged by the COVID-19 public health orders.

For 'religious ethos organisations' in particular, the grounds of challenge appear much simpler. A person is *taken* to have discriminated against such an organisation if that organisation is required to engage in conduct, including use of its property, in a manner which is contrary to its doctrines, tenets, beliefs or teachings. An order which, for example, required a 'religious ethos organisation' to close its places of worship or avoid engaging in religious ceremonies that posed a COVID-19 risk might be challenged.

The legal reasoning for this response is below.

Legal reasoning

These are the key legal propositions which support my response above:

1. **Public health orders are administrative decisions.** Public health orders are made under the *Public Health Act 2010* (NSW) (the **PHA**). Section 7 of the PHA gives the Minister for Health the power to make directions *'as the Minister considers necessary'* to deal with risks to public health, *'if the Minister considers on reasonable grounds that a situation has arisen that is, or is likely to be, a risk to public health'*.[2] The COVID-19 public health orders have been made under this provision.[3]

2. **Administrative decisions can be challenged under the Bill.** Proposed section 22Z(1) of the Bill would make it unlawful for a person to discriminate against another person on the ground of religious beliefs or religious activities in the course of performing any function under a State law, or carrying out any other responsibility for the administration of a State law. This would include a Minister exercising a function or responsibility under a law.[4] Accordingly, a

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[1] *Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 4) 2020* (NSW), cls 8A(1), 9(1), 14A(2) and 14A(4).

[2] *Public Health Act 2010* (NSW), s 7(1)-(2).

[3] See, for example, *Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 5) 2020* (NSW).

[4] For example, see *Carreon v Vanstone* [2005] FCA 865 (challenge to a Minister's order to remove people from Australia under Commonwealth law). See also *Webb v Child Support Agency* [2007] FMCA 1678 (challenge to a child support assessment under Commonwealth law) and *Rohner & Tineo v Scanlan & Minister for Immigration and Multicultural Affairs* [1997] FCA 1202, affirmed on appeal in *Rohner & Tineo v Scanlan & Minister for Immigration and Multicultural Affairs* [1998] FCA 1006 (challenge to regulations made under Commonwealth law).

Minister making a decision to issue a public health order under a State law appears liable to challenge under section 22Z(1).

3. **Administrative decisions can be challenged if they discriminate against people with particular religious beliefs or who in engage in particular religious activities, and those without such beliefs or who do not engage, or refuse to engage in particular religious activities.** This outcome is achieved by the prohibition in section 22Z(1) of the Bill, along with the definition of what constitutes discrimination in section 22L (as extended by the definitions of 'religious beliefs' and 'religious activities' in section 22K(1), and the capturing of future activities in section 22KB). In simple terms, a court in such a case would be looking at:

    a. whether materially similar circumstances are being treated in the same way by the COVID-19 public health orders regardless of a person's religious belief or activity (direct discrimination); and/or

    b. whether a requirement or condition under a COVID-19 public health order has a disparate effect on people based on their religious beliefs or activities (or lack of, or lack of engagement in, such beliefs and activities), and that requirement or condition is not reasonable (indirect discrimination).[5]

    That is why disparities in the number of people who can gather for different purposes under the COVID-19 public health orders, and the latitude given to people with particular religious beliefs to gather which is not similarly afforded to people without religious beliefs (such as atheists, for example) could be challenged under the Bill.

4. **Where a claim is brought by a 'religious ethos organisation', the pathway to challenging an administrative decision appears simpler.** Proposed section 22Z(2) of the Bill goes further than the protections afforded by section 22Z(1) to individuals. It says that a person is *'taken'* to have discriminated against a 'religious ethos organisation' on the grounds of its religious beliefs or activities if, in the course of *'performing any function under a State law'* or *'carrying out any other responsibility for the administration of a State law'*, the person requires that organisation *'to engage in conduct, including use of its property, in a manner which is contrary to… [its] doctrines, tenets, beliefs or teachings'*.

    Pausing there, this seems to be a 'deeming clause'. That is, it appears to have the effect of extending the definition of discrimination under the Bill so that, if a court is satisfied that the matters in section 22Z(2) apply, it does not need to consider the ordinary definitional requirements for direct and indirect discrimination under section 22L (as set out in paragraph 3 above). That

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[5] *Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020* (NSW) (the **Bill**), proposed s 22L.

means, for example, that the court does not have to ask in any indirect discrimination claim whether a condition or requirement imposed by a COVID-19 public health order is reasonable. The deeming nature of this clause tells a court what constitutes discrimination against a 'religious ethos organisation'. Accordingly, any administrative decision under a State law that requires a 'religious ethos organisation' to engage in conduct, including use of its property, in a manner contrary to its doctrines, tenets, beliefs or teachings might be liable to challenge.

5. **Challenging discriminatory COVID-19 public health orders as ultra vires.** One way to challenge COVID-19 public health orders might be to bring a complaint under the *Anti-Discrimination Act 1977* (NSW). That Act gives the NSW Civil and Administrative Tribunal powers to enjoin a respondent from continuing or repeating any conduct rendered unlawful by the Act (e.g. preventing enforcement of COVID-19 public health orders which are found to be have breached the Act).[6] But a more direct route may be to seek judicial review of the COVID-19 public health orders in the NSW Supreme Court on the ground that the Minister did not, in the first place, have the power (or jurisdiction) to make public health orders that otherwise breached the non-discrimination limitations placed on that power by section 22Z of the Bill.

Yours sincerely,

Ghassan Kassisieh
Legal Director

[6] *Anti-Discrimination Act 1977* (NSW), s 108.