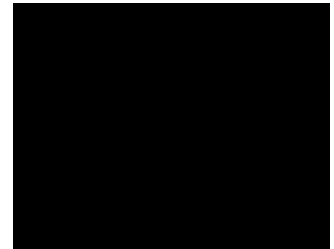







Equality Australia  
ABN: 20 609 977 764



16 December 2020

**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 religiousfreedombill@parliament.nsw.gov.au

 EqualityAustralia  
 EqualityAU  
 EqualityAustralia

Dear Chair

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

I refer to the email from the Committee dated 25 November 2011 seeking a response to additional questions regarding the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 (Bill). The additional questions, and my response to each, is below.

Thank you for clarifying that witnesses are not compelled to answer these questions. I have endeavoured to so in good faith for the purpose of assisting the Committee in its deliberations, and to extent that the questions are relevant to the Bill under consideration and I have relevant knowledge or expertise to answer them in my role as Legal Director.

- 1. Given the impact of section 54 of the NSW Anti-Discrimination Act 1977 do you acknowledge that, if enacted, the proposed Bill cannot render unlawful compliance with any other NSW Act, regulation or by-law, including the 2019 Abortion Act, existing health legislation, the COVID health orders, domestic violence laws, sexual abuse laws, NSW Crimes Act, the Local Government Act, business regulations, consumer protection, education statutes and industrial relations laws?**

The impact of section 54 of the NSW *Anti-Discrimination Act 1977* (if any) would depend on the conduct and any Act, regulation, by-law or order in question.

Section 54 is a defence which applies to excuse otherwise discriminatory conduct where the alleged discriminator's conduct was "necessary in order to a comply with a requirement of" an Act, regulation, by-law or order. Courts have construed provisions like section 54 narrowly, requiring the legal obligation to be 'mandatory' and 'specific'.<sup>1</sup>

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<sup>1</sup> *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 413 per McHugh J.

Accordingly, section 54 may not provide a defence for discriminatory conduct if, for example:

- The law in question confers a discretionary power which could be exercised in a number of ways, including ways which do not discriminate: *Waters*.
- The regulation, by-law or order is itself ultra vires and therefore invalid, including because it has breached the legal requirement in proposed section 22Z for a person to exercise their power (including any powers to make a regulation, by-law or order) in a non-discriminatory way.
- The legal obligation falls on someone other than the alleged discriminator who is seeking to rely on the defence.

So, let's consider some examples:

- Section 7 of the *Public Health Act 2010* (NSW) provides the Minister with a wide discretionary power to make public health orders, “as the Minister considers necessary”, to deal with a risk to public health and its possible consequences. This power has been used to make the COVID-19 public health orders. However, under proposed section 22Z of the Bill, the Minister’s powers to make instruments under any state law are limited to the extent that the exercise of those powers discriminates based on religious belief or activity. How section 7 of the *Public Health Act* would be read against proposed section 22Z is untested, as NSW law has no equivalent provision to section 22Z in any discrimination protection apart from the narrowly defined field of sexual harassment. So, if the COVID-19 public health orders were successfully challenged on the basis that the Minister did not have the power to make discriminatory public health orders, the COVID-19 public health orders would not be a valid “*regulation, ordinance, by-law, rule or other instrument*” made under any other Act for the purposes of section 54. Accordingly, there would be no requirement to comply with them, and so section 54 could not apply in defending compliance with them.
- Under section 9(3) of the *Abortion Law Reform Act 2019* (NSW), it is the registered health practitioner who must comply with the professional obligation to provide information or a referral to patients seeking abortions if the health practitioner objects to performing or assisting in the provision of abortions. This obligation is a professional (civil) obligation, not a criminal one. So, if a registered health practitioner were to challenge a disciplinary process brought against them because they failed to comply with that obligation, section 54 would have no impact. This is because section 54 is a defence available to the alleged *discriminator* that is, in this case, the disciplinary body which has no obligation to comply with section 9(3) of the Act. To the contrary, the obligation falls on the registered health practitioner, being the person alleging the religious discrimination. And because the definition of “religious activities” in this Bill includes conduct, motivated by a religious

belief, which may breach the law (provided it is not an imprisonable crime), a breach of this professional obligation would not prevent a health practitioner alleging religious discrimination if they were disciplined or lost their license to practice for refusing to comply with this professional obligation.

**2. Do you agree with submissions from the Australian National Imams Council, the Anglican Archbishop of Sydney and the Catholic Archdiocese of Sydney that the Bill generally fits the structure and intent of the remainder of the NSW Anti-Discrimination Act? If not, what is the unacceptable point of difference you have identified?**

There are key differences between this Bill and the structure and intent of the remainder of the *Anti-Discrimination Act*, including:

- **This Bill protects unlawful behaviour.** “Religious activities” are defined to include activities which may breach laws, provided they do not amount to imprisonable crimes.<sup>2</sup> No other attribute currently protected under the NSW Anti-Discrimination Act (e.g. race, sex, disability etc) is expressly defined to protect unlawful behaviour.
- **This Bill protects harm caused to others.** The Bill protects certain conduct which may cause harm to others provided that conduct occurs outside normal workplace and educational settings or hours.<sup>3</sup> All other protected attributes apply a standard definition of discrimination, which includes a ‘reasonableness’ test as part of the definition of indirect discrimination, allowing all the circumstances to be taken into account (including harm to others) when considering whether employment or educational policies and standards are reasonable.
- **This Bill affords protections to legal entities as individuals.** Organisations which define themselves as religious are given personal rights to bring complaints for discrimination, as if they were human beings.<sup>4</sup> This is novel. All other grounds protect personal attributes which are not attributable to legal entities (e.g. sex, race, disability etc).
- **This Bill allows people and organisations to challenge NSW government programs, policies, contracts and decisions.**<sup>5</sup> No other protected attributed is afforded the ability to challenge government programs, policies, contracts and decisions which discriminate on other grounds, such as race, age, sex, homosexuality, disability or transgender status. The sexual harassment

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<sup>2</sup> Bill, ss 22K(1) (definition of *religious activities*).

<sup>3</sup> Bill, ss 22N(3)-(5), 22S(2)-(4) and 22V(3)-(5).

<sup>4</sup> See e.g. Bill, s 22Z(2).

<sup>5</sup> Bill, s 22Z.

provisions narrowly prohibit specific conduct – being unwelcome sexual advances, requests for sexual favours and conduct of a sexual nature – which is why they have been framed to apply to a wider area of public life.

- **This Bill privileges certain religious values and institutions.** Organisations which define themselves as religious are given their own protections and rights to bring discrimination claims,<sup>6</sup> while enjoying broad exemptions allowing them to discriminate against others based on religion.<sup>7</sup> Secular organisations are not given the same latitude as organisations which define themselves as religious to define and live by their own values.

Accordingly, there are significant differences in the details of this Bill which make it quite different from the protections afforded to others under the remainder of the NSW *Anti-Discrimination Act*.

Further, as stated in our submission, every protected attribute needs to be considered carefully. The ground of religious belief and activity (including lack of belief or not engaging in religious activity) is particularly complex because everyone has the attribute, the range of beliefs protected are limitless, diverse and evolve with time, and it captures conduct that may impact on others, including others with different beliefs. Any legislation proposing to enter the field of religious discrimination needs to confront and accommodate these policy considerations. Through its provisions and exceptions, this Bill has not done this effectively.

**3. Given that the Bill – unlike other parts of the Act for HIV/AIDS, Homosexual, Transgender and Racial Vilification – offers no protections for Religious Vilification, do you acknowledge that these other attributes are afforded stronger protections than those proposed in the Bill? If not, why?**

No, because the *Anti-Discrimination Act* protects against discrimination and vilification on various grounds in different ways.

In respect of vilification protections, religious people are given latitude to vilify people based on their HIV/AIDS status, homosexuality and transgender grounds through exceptions for religious discussion and instruction.<sup>8</sup>

In respect of discrimination protections, religious organisations are also given broad exemptions to discriminate against others.<sup>9</sup>

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<sup>6</sup> See e.g. Bill, s 22Z(2).

<sup>7</sup> Bill, ss 22M, 22N(9), 22S(5) and 22V(6).

<sup>8</sup> *Anti-Discrimination Act 1977* (NSW) (ADA), ss 38(2)(c), 49ZT(2)(c) and 49ZXB(2)(c).

<sup>9</sup> ADA, s 56.

In respect of vilification, some religious people are protected under the ‘ethno-religious’ grounds of vilification.<sup>10</sup> For those who are not, they should be afforded the same protections as others – but this Bill’s deliberate intention is not to provide that protection.<sup>11</sup>

**4. Given that s22Z of the Bill is similar to the provisions for Sexual Harassment in the existing Act and non-government schools and charities are already exempted (re s.22M) and the existing Disability provisions cover ‘Future Belief’, how can your argument of ‘special treatment’ or a ‘hierarchy of protections’ for religion be sustained?**

Yes, see the differences set out in question 2 above. There are significant differences in this Bill which have the effect of privileging the rights and interests of some people and organisations which define themselves as religious, over the rights and interests of others.

**5. If not by the Siracusa Principles how can any clash of gay and religious rights be reconciled in an Act such as this?**

I already provided evidence on the legal problem with using the Siracusa principles in an Act which uses other legal tests, such as reasonableness and unjustifiable hardship: see the transcript of my evidence on 23 October 2020, p. 23.

This question assumes a ‘clash’ that may not exist. There are many LGBTQ+ people of faith, and many people of faith who support, affirm and love LGBTQ+ people.

**6. Why has your submission/evidence to the Committee prioritised a concern about the beliefs and statements of born-again Christians that are integral to the spiritual faith and existence of these citizens? If all human rights are equal, as they should be, isn’t it time for the gay-Left community to learn to tolerate the different beliefs, values and moral code of law-abiding born-again Christians and indeed where any illegality might exist, vice versa?**

Please provide references to the submission or evidence you are referring to.

Our laws must protect all of us, equally. Any group which seeks the protection of discrimination laws, must be willing to abide by those same laws with respect to discrimination against others.

Otherwise, it is not clear the relevance of this question to the Bill in question.

- 7. Would your organisation refuse employment to someone who:**
- a. opposes same-sex marriage and supports traditional marriage?**
  - b. believes in the literal teachings of the Bible?**

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<sup>10</sup> ADA, s 20C.

<sup>11</sup> See Second Reading Speech, Legislative Council, 13 May 2020, delivered by the Hon Mark Latham MLC.

Equality Australia do not impose requirements for personal adherence with any belief in order to work with us, nor do we ask staff such questions. Equality Australia is proud to have people of faith among its staff and supporters. We expect all our employees, regardless of their beliefs, to act in a way which treats others with dignity and respect.

Otherwise, it is not clear the relevance of this question to the Bill in question.

**8. Why doesn't Equality Australia regard offence as an individual choice by some, balanced by the way in which most people see language use as an individual matter of no lasting consequence?**

Words matter. They can give hope, comfort and support to others, inspire many, and can also cause great harm. That is why there must be consequences for conduct which harms others, as the law already recognises in making unlawful defamation, offensive behaviour and verbal harassment or assault.

Otherwise, it is not clear the relevance of this question to the Bill in question.

**9. On Israel Folau's well-known long list of sinners, why did the Left-wing gay community yell 'offence', while others on the list (such as myself, multiple times) saw it as a footy player paraphrasing an ancient text according to his own spiritual beliefs not relevant to those who don't share those beliefs?**

LGBTIQ+ people come from all walks of life, have a range of views, and include people of faith and those without. As does the rest of the community.

Otherwise, it is not clear the relevance of this question to the Bill in question.

**10. Isn't one of the cornerstones of our civilisation and the Enlightenment that defines it, the capacity for individuals to understand and tolerate the specific spiritual beliefs and statements of others without the primal reaction of screaming 'offence'?**

It is not clear the relevance of this question to the Bill in question.

**11. If this organisation believes that all human rights are equal, why has it failed to advocate for anyone other than the LGBTIQ community and ignore the needs of:**

- a. the homeless
- b. public housing tenants
- c. the unemployed, and
- d. other poor people?

Equality Australia works to ensure the equality of LGBTIQ+ people and their families. People who are homeless, tenants of public housing, who are unemployed and who are poor, are part of the LGBTIQ+ communities, and we work for them too. For example, in our recent COVID-19 survey, we found that LGBTIQ+ people had higher rates of

unemployment than the national unemployment rate, and we have advocated on behalf of these people.<sup>12</sup>

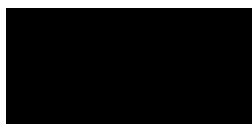
Otherwise, it is not clear the relevance of this question to the Bill in question.

**12. Why does Equality Australia promote identity politics, looking at people through the prism of race, gender and sexuality, when true tolerance is to look through and ignore these innate personal characteristics and treat all people equally based on their quality and character?**

LGBTIQ+ people are whole and valid, just as they are. We see them in all their diversity, complexity, and strength, and look forward to a world in which they are valued, affirmed, supported and treated equally.

Otherwise, it is not clear the relevance of this question to the Bill in question.

Yours sincerely,



Ghassan Kassisieh  
**Legal Director**

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<sup>12</sup> See Equality Australia (2020) [Inequality Magnified: Submission to the Australian Senate Inquiry into Australia's Response to COVID-19](#).