THE LAW SOCIETY
OF NEW SOUTH WALES

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27 November 2020

The Hon Gabrielle Upton MP
Chair
Joint Select Committee on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020
Parliament House, Macquarie Street
Sydney NSW 2000

By email: religiousfreedomsbill@parliament.nsw.gov.au

Dear Ms Upton,

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

The Law Society gave evidence to the Joint Select Committee on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 on 6 November 2019. Ms Maria Nawaz, Deputy Chair of the Law Society's Human Rights Committee, represented the Law Society at the hearing.

Six of the Joint Select Committee's questions were taken on notice by the Law Society at the hearing. The Law Society's responses are set out below.

1. **At page [17] of the hearing transcript dated 6 November 2020, the Hon. Scott Farlow asked:**

   "I just want to know, if you could take it on notice perhaps, as to whether you or the Law Society believes that… the definition [of religious belief] as outlined in this bill is consistent with that High Court definition [in *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120] applied to religious belief and religious institutions in that case which, I would suggest, is the greatest authority in terms of religious belief and religious institutions on what actually makes up a genuine religious belief."

   The Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 ("the Bill") defines religious activities and religious beliefs as follows:

   > **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.
   > **religious beliefs** includes the following—
   > (a) having a religious conviction, belief, opinion or affiliation,
   > (b) not having any religious conviction, belief, opinion or affiliation.

The Bill provides additional guidance on these terms at proposed s 22KB. It states that a reference to a religious activity includes:

> a religious activity… that a person will engage in in the future, or that it is thought a person will engage in in the future, or will not engage in or refuse to engage in in the future, or it is thought a person will not engage in or refuse to engage in in the future (whether or not the person in fact will engage in the religious activity).

Similarly, the Bill states that a reference to a religious belief includes:

> a religious belief… that a person will hold in the future or that it is thought a person will hold in the future (whether or not the person in fact will hold the religious belief).

In *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120, the High Court considered the criteria for a "religion", rather than a religious belief. Specifically, the High Court considered "whether the beliefs, practices and observances which were established by the affidavits and oral evidence as the set of beliefs, practices and observances accepted by Scientologists, are properly to be described as a religion". The High Court unanimously held they were, however the concurring judgments each contained somewhat different reasoning.

In their joint judgment, which was cited by the Hon. Scott Farlow at the hearing on 6 November, Mason ACJ and Brennan J concluded that:

> [F]or the purposes of the law, the criteria of religion are twofold: first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief, though canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion.[1]

As can be seen, Mason ACJ and Brennan J stated that the right to freedom of religion should not permit any conduct that would breach "ordinary laws". By contrast, the Bill provides protection for any activity motivated by a religious belief other than "any activity that would constitute an offence punishable by imprisonment under the law of New South Wales or the Commonwealth".

2. At page [18] of the transcript, the Hon. Mark Latham asked:

"…on this point about the public health order related to COVID, under the first part of this bill, which would apply across the Anti-Discrimination Act, the use of the *Siracusa Principles* out of [article] 18.3 of the *International Covenant on Civil and Political Rights*, do you recognise the point there in black and white that religious freedom or anti-discrimination here would be extinguished on the basis of a necessary public health order and under part A as prescribed by law that these health orders in New South Wales are a delegated authority of Government out of resolutions this Parliament passed in March?"

The 1984 *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* ("*Siracusa Principles*") recognise that rights may be limited for reasons of public health. However, any restrictions on rights, including freedom of religion and the right to equality and non-discrimination, should be, at a minimum:

- provided for and carried out in accordance with the law;

[1] *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120, 136.

- directed toward a legitimate objective;
- strictly necessary in a democratic society to achieve the objective;
- the least intrusive and restrictive means available to reach the objective;
- based on scientific evidence and neither arbitrary nor discriminatory in application; and
- of limited duration, respectful of human dignity, and subject to review.[2]

The power to make public health orders is found under sections 7 and 8 of the *Public Health Act 2010* (NSW). These sections apply where the Minister considers on reasonable grounds that a situation has arisen that is, or is likely to be, a risk to public health, and empowers the Minister to make orders necessary to deal with the risk.

The NSW government has made a number of public health orders that may have affected the exercise of religious freedom in NSW by restricting the number of people who may attend a religious service or limiting the number of people who may gather.

It is clear that public health orders may limit the right to freedom of religion. In our view, the references to the *International Covenant on Civil and Political Rights* ("ICCPR") and the *Siracusa Principles* at ss 3(1) and 3(2) of the Bill do not adequately allow for limitations on the right to freedom of religion to be considered alongside the need to protect other human rights, including the right to life and the right to health. It is for this reason that the Law Society suggested in our written submission and oral evidence to the Joint Select Committee that NSW would benefit from a well-drafted Human Rights Act containing a clear mechanism to consider and balance competing rights.

3. At page [19] of the transcript, Ms Jenny Leong asked:

"…can you comment on how this [s 22Z of the Bill] would intersect with, for example, a law requiring reporting of child sexual assault versus the confidentiality of the confessional?"

Proposed s 22Z of the Bill provides as follows:

> (1) It is unlawful for a person to discriminate against another person on the ground of religious beliefs or religious activities—
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> (a) in the course of performing any function under a State law or for the purposes of a State program, or
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> (b) in the course of carrying out any other responsibility for the administration of a State law or the conduct of a State program.
>
> (2) 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.
>
> (3) In this section—
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> ***State law*** means—
>
> (a) an Act, a statutory rule, or a determination made under or pursuant to an Act, or

[2] UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* ("*Siracusa Principles*"), 28 September 1984, E/CN.4/1985/4.

(b) an order or award made under or pursuant to such a law.
State program means a program conducted by or on behalf of the State Government.

Following the passage of the *Children's Guardian Act 2019* (NSW), mandatory reporting provisions at s 27 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) require a person in religious ministry, or a person providing religion-based activities to children, to provide a report to the Secretary of the Department if – based on information gained during their work or role – they suspect on reasonable grounds that a child is at risk of significant harm. The *Children's Guardian Act 2019* (NSW) also expanded the Reportable Conduct Scheme to the religious and faith-based sector. In the Legislative Council second reading speech accompanying the Children's Guardian Bill 2019 (NSW), the Hon. Damien Tudehope noted that "religious bodies have supported these suggested changes",[3] which represented part of the Government's response to the Royal Commission into Institutional Responses to Child Sexual Abuse.

There is a risk that s 22Z of the Bill, as currently worded, may conflict with the mandatory reporting requirements contained in the *Children's Guardian Act 2019* (NSW). We therefore recommend that, if the Bill is to proceed, it be amended to ensure that it does not impact the operation of s 27 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) and the Reportable Conduct Scheme.

4. At page [22] of the transcript, the Hon. Greg Donnelly asked:

"Is it the position of the Law Society of New South Wales that the existing [exception] provisions in the ADA should be removed?"

The Law Society's position is that the operation of the general exceptions available under Part 6 of the *Anti-Discrimination Act 1977* (NSW) ("ADA") should be considered in the context of a detailed review of the ADA, with regard to developments in anti-discrimination law at the federal and international level since the ADA was last reviewed in 1999, in addition to shifting community standards and expectations.

The Law Society acknowledges that there may be a diversity of views amongst its membership on whether existing exceptions should be retained, however we note the following issues without taking a formal position at this stage.

Existing exceptions under Part 6 of the ADA permit religious bodies to discriminate against individuals on the basis of otherwise protected attributes – including disability, homosexuality, carer's responsibilities, sex, marital or domestic status, and race – in circumstances where the act or practice "conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion".[4] This exception is permanent, broad, and does not require analysis of reasonableness and proportionality. The exception also arguably privileges the right to freedom of religion over other rights, including the right to equality and the right to be free from discrimination, which may conflict with Australia's obligations under the ICCPR. We note that the UN Human Rights Committee in its General Comment 22 of 1993 provided guidance as to the interpretation of Article 18 of the ICCPR, which concerns freedom of thought, conscience and religion:

[3] New South Wales, *Parliamentary Debates*, Legislative Council, 13 November 2019, (The Hon. Damien Tudehope, Minister for Finance and Small Business).
[4] *Anti-Discrimination Act 1977* (NSW), s 56(d).

> In interpreting the scope of permissible limitation clauses [to Article 18], States parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination.[5]

A review of the ADA may be able to consider whether a general exception clause, rather than numerous individual exceptions, would streamline the operation of the ADA and result in greater consistency with obligations under international law. Such a clause may provide for the balancing of rights to determine whether an exception is reasonable, necessary and proportionate.

We also note that many religious organisations in NSW receive public funding to conduct essential services in education, aged care, child welfare, adoption and employment services. These organisations are exempt from the requirements in the ADA, provided they fall within the definition of religious body at s 56(d) ("a body established to propagate religion"). This differs, in part, from the approach under the *Sex Discrimination Act 1984* (Cth), which at s 37(2) prohibits religious organisations in receipt of Commonwealth aged care funding from discriminating on the basis of several sex and sexuality protected attributes in the provision of aged care services, other than employment. A review of the ADA may consider whether the broad exception available for religious organisations strikes an appropriate balance between the freedom to manifest one's religion and protections for other rights.

5. At page [24] of the transcript, Ms Jenny Leong asked:

"There have been some submissions raising questions around the difficult position this bill might put an employer into in determining what is unlawful discrimination in balancing that in their obligations under the protection of people on the basis of their religious beliefs. One example that has been brought to my attention is that potentially an employer during the time of the marriage plebiscite may have had two employees both engaging in what was to be deemed unacceptable bullying or behaviour around their advocacy for a yes and a no vote, but in the case of a no vote, because it was done in the context of it being part of their religious belief they would have to treat those employees differently because of the protections that this bill might provide. So it would be good to get your comments on that. But also in relation to that, the challenge that employers would have in trying to balance the protected attributes that currently exist in the Anti-Discrimination Act with the additional provisions that this bill would provide around broad protections for religious ethos organisations and religious activity."

Proposed s 22N of the Bill would establish a separate unlawful act, outside of the general prohibitions on direct and indirect discrimination in the Bill and the ADA. This would create a presumption that any conditions or requirements imposed by an employer which restrict "religious activities" are unlawful acts of discrimination, rather than relying on the approach in relation to other protected attributes in the ADA – including race,[6] sex,[7] marital status,[8] and disability[9] – whereby a respondent can avoid liability for indirect discrimination by proving that that the condition or requirement was reasonable.

We note that the *Work Health and Safety Act 2011* (NSW)[10] imposes a positive duty on a person conducting a business or undertaking to ensure the health and safety of workers,

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[5] UN Human Rights Committee, *CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, UN Doc CCPR/C/21/Rev.1/, 48th sess, (30 July 1993), 3.
[6] Ibid s 7(1)(c).
[7] Ibid s 24(1)(b).
[8] Ibid s 39(1)(b).
[9] Ibid s 49B(1)(b).
[10] *Work Health and Safety Act 2011* (NSW), s 19.

which includes preventing bullying in the workplace. The *Fair Work Act 2009* (Cth) empowers the Fair Work Commission ("FWC") to make an order to "stop bullying" following an application from a worker if the FWC is satisfied that the worker has been bullied at work, and there is a risk the bullying will continue.[11] Due to the broad definition of "religious activities" in the Bill, it is conceivable that certain behaviour that might otherwise be regarded as "bullying" would be protected as a "religious activity". For example, the hypothetical activity referred to by Ms Leong in her question regarding behaviour in relation to the marriage plebiscite might have been protected by the bill if it was established that the action was motivated by a religious belief, provided the activity did not constitute an offence punishable by imprisonment. This would be the case even if the activity involved unreasonable behaviour directed towards a worker (or workers) and created a risk to health and safety. As such, proposed s 22N may undermine existing workplace laws by creating confusion for employers on how to operationalise their obligations under these laws without breaching the new provisions established by the Bill.

6. **At page [25] of the transcript, Dr Joe McGirr asked:**

   "I would like to clarify something. I make the point that a Human Rights Act is some way off and we have an issue in relation to religious freedom. But in relation to the point that we are discussing, is the issue that in section 3(2) the limitations specifically refer to religion? Would you support some reference to the Siracusa Principles applying more generally across the Act?

   The *Siracusa Principles* provide guidance on the interpretation of specific limitations clauses contained in various articles of the ICCPR. The *Siracusa Principles* are non-binding and advisory in nature, however they can serve as an aid to governments and parliaments when developing legislation that might limit the operation of a right in the ICCPR. The 2018 *Religious Freedom Review: Report of the Expert Panel* recommended the *Siracusa Principles* be utilised in this way.[12] The Law Society cannot identify any clear benefit from including a specific reference to the Siracusa Principles in the text of the ADA. It is our understanding that no other anti-discrimination or human rights instrument in Australia includes a reference to the *Siracusa Principles*.

   The Law Society's position is to support the enactment of human rights legislation in NSW. A well-drafted Human Rights Act would provide an important safeguard for the full suite of human rights in NSW, and could include a limitations provision, as is the case in human rights instruments in other jurisdictions, including New Zealand, Canada, the United Kingdom, Victoria, the Australian Capital Territory and Queensland. A limitations provision in a Human Rights Act stating that human rights may be subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society would be consistent with Part I of the *Siracusa Principles*.

Should you have any questions or require further information, please contact Andrew Small, Policy Lawyer, on 02 9926 0252 or email andrew.small@lawsociety.com.au.

Yours sincerely,

Richard Harvey
President

[11] *Fair Work Act 2009* (Cth), ss 789FA-789FI.
[12] *Religious Freedom Review: Report of the Expert Panel* (Report, 18 May 2018), 1.