

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

A SUBMISSION BY
MUSLIM WOMEN AUSTRALIA
TO THE JOINT SELECT COMMITTEE

NSW PARLIAMENT

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INTRODUCTION

1. The Anti-Discrimination Amendment (Religious Freedoms And Equality) Bill 2020 (the “Bill”) was introduced by the Hon. Mark Latham in May of 2020. In June 2020 the Parliament referred the Bill to a newly established Joint Select Committee to conduct an inquiry into the objectives of the Bill.
2. The terms of reference of the Joint Select Committee are:
 1. A Joint Select Committee, to be known as the Joint Select Committee on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020, be appointed.
 2. That the Committee inquire and report into the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020, including whether the objectives of the bill are valid and (if so) whether the terms of the bill are appropriate for securing its objectives.
 3. That the Committee, in undertaking (2), have to regard to:
 - (a) Existing rights and legal protections contained in the Anti-Discrimination Act 1977 (NSW) and other relevant NSW and Commonwealth legislation;
 - (b) The recommendations relevant to NSW from the Expert Panel Report: Religious Freedom Review (2018);
 - (c) The interaction between Commonwealth and NSW anti-discrimination laws and the desirability of consistency between those laws, including consideration of
 - (i) The draft Religious Discrimination Bill 2019 (Cth) which has been released for public consultation, and
 - (ii) The Australian Law Reform Commission’s reference into the Framework of Religious Exemptions in Anti-discrimination Legislation.¹
3. The Joint Select Committee has called for submissions from members of the public and other interested parties to assist in its inquiry. Muslim Women Australia tenders this submission for consideration by the Joint Select Committee.
4. Muslim Women Australia is a national representative body for Australian women of the Islamic faith and has been at the forefront of advocating for the rights of women generally,

¹ <https://www.parliament.nsw.gov.au/committees/listofcommittees/Pages/committee-details.aspx?pk=267#tab-otherdocuments>

and Muslim women in particular, for nearly 40 years. Muslim Women Australia has contributed to a range of government policies which impact Muslim women.

5. The following submission generally aligns itself to the terms of reference of the Joint Select Committee.

OBJECTIVES OF THE BILL

6. The Bill prohibits discrimination on the ground of religious belief or activity in key areas of public life. Under this Bill, a person will be entitled to make a complaint alleging that they have been subject to unlawful discrimination on the basis of their religious belief or activity if the:
 - person has or engages in a religious belief or activity;
 - person has been subject to direct or indirect discrimination on the basis of their religious belief or activity;
 - discrimination occurs in a specified area of public life, and
 - conduct is covered by this Bill and an exception does not apply.
7. In the explanatory notes to the Bill it is stated that these reforms are aimed at preventing discrimination based on religious beliefs or activities, or the absence of such.² We note that there is no positive right, enshrined in legislation, for religious freedom at either a State or Commonwealth level. This was the subject of extensive community feedback during the Commonwealth's Review into Religious Freedom (The Ruddock Review) and then the subsequent response to the findings of that Review by the Commonwealth.
8. In the absence of such a right, the protection against discrimination on the basis of religious belief or activity becomes even more important. It was noted by the Ruddock review that in relation to NSW:

“In New South Wales, religious belief and activity are not protected attributes under the Anti-Discrimination Act 1977, although that Act does protect against discrimination on the ground of race, which is defined to include ‘ethno-religious’ origin.¹⁵¹ This has meant that some people of faith are protected, while others are not. For example, ethno-religious origin has generally been interpreted to include Jewish people but not Muslim people, and accordingly the New South Wales legislation does not protect Muslim people against religious discrimination.”³

² [https://www.parliament.nsw.gov.au/bill/files/3736/XN%20Anti-Discrimination%20\(Religious%20Freedoms%20and%20Equality\).pdf](https://www.parliament.nsw.gov.au/bill/files/3736/XN%20Anti-Discrimination%20(Religious%20Freedoms%20and%20Equality).pdf)
p.1

³ Religious Freedom Review, Report of the Expert Panel, par.1.383.

9. This situation means currently the Muslim population of NSW is not protected by any legislation, either State or Federal, against discrimination with the exception of the protection afforded in specific areas such employment under the Fair Work Act. Accordingly, the intent of the proposed Bill, is one which Muslim Women Australia supports and would urge a bipartisan approach to its acceptance.

CONSIDERATION OF THE RUDDOCK REVIEW & COMMONWEALTH RESPONSE

10. The Ruddock Review made 20 recommendations in relation to the area of Freedom of Religion and the Commonwealth, in its response, directly accepted 15 of those recommendations with the balance being referred for further consideration. Of those recommendations, accepted by the Commonwealth, a number of them relate directly to State Jurisdictions and would require action at the State level. Before considering those recommendations specifically, we wish to address the broader recommendations of the Ruddock Review as they relate to Religious Discrimination.
11. Recommendations 15 & 16 of the Ruddock Review relate specifically to the issue of discrimination. These stated:⁴
 - Recommendation 15

The Commonwealth should amend the Racial Discrimination Act 1975, or enact a Religious Discrimination Act, to render it unlawful to discriminate on the basis of a person's 'religious belief or activity', including on the basis that a person does not hold any religious belief. In doing so, consideration should be given to providing for appropriate exceptions and exemptions, including for religious bodies, religious schools and charities.
 - Recommendation 16

New South Wales and South Australia should amend their anti-discrimination laws to render it unlawful to discriminate on the basis of a person's 'religious belief or activity' including on the basis that a person does not hold any religious belief. In doing so, consideration should be given to providing for the appropriate exceptions and exemptions, including for religious bodies, religious schools and charities.
12. In 2019 the Commonwealth released for public comment a suite of legislative reforms to give effect to the Recommendations of the Ruddock Review including a Draft Exposure Religious Discrimination Bill.

⁴ Religious Freedom Review, Report of the Expert Panel, p.5

13. We note that this legislation has not been brought before the Parliament yet and has been the subject of a great deal of consultation and feedback from a range of interested parties. It is our view that, with the exception of a small number of contested issues, the intent and objectives of the proposed Bill have general support across the broader community.
14. In reviewing the proposed Commonwealth Legislation and the NSW Bill, that is before the Joint Select Committee, we respectfully submit that there is nothing in the NSW Bill that would be inconsistent with the intent of the Commonwealth Legislation and would give effect to Recommendation 16, noted above, by the Ruddock Review.

CURRENT ANTI-DISCRIMINATION LAWS AND THE CONCEPT OF 'ETHNO-RELIGIOUS'

15. As noted above there is no religious head of discrimination in either the NSW or Commonwealth legislative frameworks. There is, however, a concept of 'Ethno-Religious' that has been incorporated into both the Anti-Discrimination Act 1977(NSW) and the Racial Discrimination Act 1975 (Cth).
16. In its submission to the Ruddock Review, the Anti-Discrimination Board of NSW noted the following in relation the definition of 'Ethno-Religious':⁵

Introducing the amendments, the then Attorney General, the Hon J.P. Hannaford explained that the amendment would:

"clarify that ethno-religious groups, such as Jews, Muslims and Sikhs have access to the racial vilification and discrimination provisions of the Act(...), [and] make it clear that vilification or discrimination against a person on the basis of ethno- religious origin falls within the protections against racial discrimination and racial vilification currently contained in the Act".

17. The clear intent of the NSW Parliament when it introduced the concept of Ethno-Religious is that it would cover Muslims and afford to them the same level of protection against discrimination and vilification as other groups benefited from. The reality of this however has proven very different.
18. As the Board went on to note in that same submission that:⁶

⁵ <https://www.pmc.gov.au/sites/default/files/religious-freedom-submissions/16065.pdf>

⁶ Ibid par.6.5

In the over 20 years since the definition was amended, both the NSW ADT and its Appeal Panel have considered the meaning of ethno-religious. The Appeal Panel carefully considered this term in the 2011 case of *Jones and Harbour Radio Pty Limited v Trad* {No 2} [2011] NSWADTAP 62¹⁰

...Despite its findings about the meaning of "ethno-religious origin", the Appeal Panel found on the facts that the material complained of in that case did not target Muslims as other than a religious group.⁷

19. This approach was confirmed in 2019 in the case of [Ekmawi v Nine Network Australia Pty Limited \[2019\] NSWCATAD 29](#) (15 Feb 2019) which involved an action brought by a Muslim complainant in relation to comments made by media personality Sonia Kruger. In that matter the Tribunal found:⁸

[101] [T]here is no objective evidence that would allow the Tribunal to be comfortably satisfied that Muslims living in Australia regard themselves as being a distinct community irrespective of their different ethnic origins, religious traditions (conservative or liberal, Sunni or Shia), place of birth or how long they have lived in Australia.

[102] In conclusion, the evidence does not support a finding that Muslims living in Australia are a 'race' by reason of a common ethnic or ethno-religious origin. Section 20C is therefore not engaged and the application is to be dismissed.

20. We note that there has been no case brought under either the State or Federal Jurisdictions where the term 'Ethno-Religious' has been found by a court or tribunal to include Muslims. It is well established now that, despite the intent of the Parliament when introducing this concept, it does not cover or protect members of the Muslim community. This factor makes the case for the inclusion of a religious head of discrimination even more compelling in our submission.

SUBSTANTIVE PROVISIONS OF THE BILL

21. The proposed legislative framework, in its approach to both direct and indirect discrimination, is by-and-large consistent with other anti-discrimination legislation and is generally supported. However, there are specific areas that we wish to make further comment as outlined below.

⁷ Ibid par.6.10

⁸ <https://www.caselaw.nsw.gov.au/decision/5c6481bee4b0196eea4045ea>

S.22N(4) EMPLOYER CONDUCT RULES - INDIRECT DISCRIMINATION

22. For the purpose of the test of indirect discrimination, the Bill seeks to clarify the protection afforded to employees in relation to religious activities engaged in outside of work. This is in response to situations such as those faced by Israel Folau and Margaret Court in recent times and which were clearly the impetus for this legislation as was made clear in the First Reading Speech.
23. The proposed Bill makes it illegal to discriminate against an employee who undertakes a religious activity outside of the workplace where that activity does not reference the employer, does not constitute an attack on the employer and does not cause any direct and material financial harm to the employer.
24. The proposed section in this Bill is less problematic than its equivalent in the proposed Commonwealth legislation however it still has the potential to cause confusion. It is important to note here that the conditions being discussed are those that prevent an individual from making statements of religious belief in their private capacity. This is problematic as it broadens the current rules around what a person can or can't do in their private capacity as well as link this to the financial outcomes of an organisation.
25. There are already general laws that limit what action an employer can take against an employee to those matters that are linked to their employment. If a link to the individual's employment cannot be made, then an employer can take no action. It is unclear whether this new provision will still require that threshold test, the link to employment, to be established in the first instance before any further consideration is made. If it does NOT, then it may very well end up providing less protection than the current industrial laws do.
26. If statements of religious belief are made by a person in their capacity as a private individual and that commentary has no reasonable connection with their employment in any way, then why should an employer have the right to restrict such commentary? If an employer would be able to establish financial hardship as a result of such comments, then we would suggest that they would be able to establish a connection between the individuals conduct and their employment under the current rules anyway.
27. The proposed Commonwealth approach is to declare such employer rules relating to conduct unreasonable unless financial hardship is established. We note that the proposed State Bill, while still referencing material financial harm to an employer, does explicitly eliminate secondary boycotts and the loss of sponsorships from this consideration. Again,

this is clearly in response to situations that arise similar to Folau and the Australian Rugby Union.

28. As stated previously, in the field of employment law there are already well-established principles to determine when an employer can or cannot take action against an employee for conduct outside of work hours. It is not our intention to canvass these in detail however some important principles should be noted:
 - a. “It is only in exceptional circumstances that an employer has a right to extend any supervision over the private activities of employees.”⁹
 - b. The out of hours conduct must have a relevant connection to the employment relationship.¹⁰
29. The courts and tribunals are well placed to take into account any relevant circumstances arising, and the potential financial hardship that a business may suffer would be a factor that is relevant in determining the link between the conduct and the employment relationship. It is hard to envisage a scenario where an employer could establish financial hardship but not a connection to the work relationship.
30. In relation to the proposed legislation, we respectfully submit that the threshold test should be the ability of an employer to link the statements of religious belief or the religious activity to the employment relationship. Only if the employer is able to do this should the assessment of the conduct rules be made to determine whether they are reasonable or not and, in that assessment, the financial impact on the employer, regardless of size, should be considered. If the employer is unable to establish the connection with the employment relationship then such rules should be considered unreasonable regardless of any other consideration, financial or otherwise.

S.22N(6) RELIGIOUS DRESS AND SYMBOLS IN THE WORKPLACE

31. Sub-section 6 covers religious dress & symbols and states that it is discrimination to prevent an employee from wearing religious dress or religious symbols provided:
 - (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

⁹ Appellant v Respondent, Print R1221 (AIRC FB, MacBean SDP, Duncan SDP, Deegan C, 1 February 1999), [(1999) 89 IR 407 at p. 416].

¹⁰ Rose v Telstra Corporation Limited, Print Q9292 (AIRC, Ross VP, 4 December 1998); see also Kedwell v Coal & Allied Mining Services Pty Limited T/A Mount Thorley Operations/Warkworth Mining [2016] FWC 6018 (Saunders C, 9 September 2016) at para. 104.

- (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.

- 32. This is an important section given its potential application for Muslim women. While workplace safety is an already entrenched principle in the law when it comes to this issue, the wording of the balance of that section may lead to some difficulties particularly the question of ‘productivity’ and ‘communication’. The Explanatory Memorandum already gives the example of a prospective employee who wears the niqab as being unsuitable for a bank teller position and this being acceptable under the language of the Bill.

- 33. We respectfully submit that the Bill makes presumptions about what is appropriate, or viable, in a workplace setting that cannot be objectively justified. Our organisation has direct experience, over decades of women’s grass roots advocacy, of significant and persistent discrimination against Muslim women based on their dress and appearance. While workplace safety and operations requirements are always a priority the notion of communication or customer service being impacted by how a woman, any woman, dresses is problematic.

- 34. We note that in the current environment where society as a whole is coming to terms with new norms of dress and interaction in a workplace setting, the basis for such an assertion, that how a woman dresses will impact on her ability to communicate or provide exceptional service, has clearly been shown to be a fallacy.

- 35. We believe that the provision should simply say that the wearing of religious symbols or dress while undertaking duties of work should be reasonable in all the circumstances having regards to workplace safety and operational requirements. The obligation should be on the employer to establish that this is not the case.

S.22W PROVISION OF GOODS AND SERVICES & COMMERCIAL ACTIVITIES

- 36. This section makes it unlawful to discriminate in the provision of goods and services based on religious activity or belief. While s.22M provides a general exception for religious ethos organisations it is unclear whether this would be read broadly enough to cover the provision of all goods and services. The Explanatory memorandum does give an example

of a community hall that is leased out by a religious ethos organisation being exempt but not about other types of goods and services.

37. As state, s.22M provides an exception to Religious Ethos Organisations for actions undertaken in good faith based on their religious beliefs or tenets. It is unclear whether this exception however extends to bodies that have been established for commercial or principally commercial activities even if they are owned by a Religious Body. We agree with the general position that purely commercial activity should not be protected under the guise of a religious affiliation.
38. However, there are scenarios that we submit need to be clarified. A Religious Body may establish what would otherwise be considered a commercial activity, but which is done so purely for the benefit of its congregation and is located in such a way that it is clearly a part of the Religious Body's physical structures. It may however be accessible to the general public or have been established as an independent commercial entity for a range of reasons. This may include such things as:
 - a. A childcare centre that is an independent entity from a religious school but is owned by the religious school. It is located adjacent to the religious school and is principally to provide before and after school care as well as general day care for the parents of students enrolled in the school.
 - b. A café or restaurant that is located within or adjacent to a place of worship and is clearly identifiable as being a part of or affiliated to that place of worship.
 - c. A community hall that is available to be hired out by members of the public but is a part of a site that principally holds a place of worship and is considered to be a part of the general location identified with that place of worship.
39. In all of the above scenarios there may be various reasons why such a commercial activity is established as a separate legal entity to the religious body itself but is clearly a part of that body due to both its physical location, in reference to the religious body, as well as its identity and branding.
40. We submit that the proposed Bill should provide an exemption for commercial activity that has been established by a Religious Body, is situated in such a way and in such proximity to the Religious Body that a reasonable person would understand that it was connected to and a part of that Body and bears such name and branding that a reasonable person would understand that it forms a part of the religious body.

41. While commercial activities should not be provided with protection under the Act those activities, that may be commercial, but which a reasonable member of the public would in all the circumstances clearly understand are part and parcel of services provided by a religious body and that are part of a hub that includes the non-commercial activities of the religious body should be protected.

VILIFICATION

42. We note that the proposed Bill does not include any proposal for amendments to, or introduction of, any laws that pertain to vilification. However, given that it is a matter that was raised by the Ruddock Review and is included in the proposed Commonwealth reforms we wish to raise some matters in this regard.
43. It is unquestionable in our submission that Australian society has become more intolerant of minorities, and religious minorities specifically, over the last 2 decades. That intolerance we would submit has led to an increased level of discrimination, which may or may not have redress under existing laws, and incitement that has no practical redress at all. In the Muslim context there is now a growing body of evidence to support this increased intolerance towards Muslims and their beliefs and practices. Briskman¹¹, in 2015 article, notes:

“In Camden, just outside Sydney, in 2007, pigs’ heads adorned with the Australian flag were placed at the site proposed for an Islamic school (Kruger 2007; Al-Natour 2010). In 2011, a campaign was run to bar a Muslim prayer group from using a community house in the Melbourne suburb of East St Kilda for one hour per week (AJDS 2011). In mid-2014, there were vocal objections in the regional Victorian city of Bendigo about the building of a mosque. Opponents said that a mosque would bring violence to Bendigo and the city would be overtaken by Sharia law. Said one protester: ‘If you’re Muslim and you want a mosque, go back to the Middle East. This is Australia’ (ABC News 2014a).

Visibly Muslim women suffer immeasurable hurt through condemnation of their religion and religious symbolism. As in Europe, debates about covering for women have reached hysterical proportions, with a recent furore in Australia centring on whether burqas should

¹¹ Linda Briskman: The Creeping Blight of Islamophobia in Australia, www.crimejusticejournal.com IJCJ&SD 2015 4(3): 112-121

be banned in Parliament House in Canberra. The well-researched report by the Australian Human Rights Commission (AHRC 2011) told of discrimination against wearing the hijab in employment and education settings, as well as negative reactions from the public generally. There are fears that such reactions will increase, and not just verbal insults. In October 2014 a Muslim woman was attacked in a suburban shopping centre with taunts of: 'You Muslims, go back to where you came from'. After being pushed to the ground by her assailant she suffered a broken arm. In another incident a woman wearing a hijab was pushed down the steps of a tram where she hit a metal barrier injuring her knee (Millen 2014).

Hate speech has been allowed to flourish and there is arguably a fine line between language and physical violence (Poynting and Perry 2007). Alarming, in 2013, right-wing Dutch politician Geert Wilders was permitted to visit Australia at the behest of the anti-Muslim Q Society. Wilders is a canny politician. Upon realising that his audience was on side, his anti-Muslim fervour reached a disturbing crescendo as he emphatically called for bans on Muslim immigration, cessation of mosque building and conversion of Muslims. He proudly proclaimed the superiority of 'our culture' over theirs. Attending this event I found the atmosphere chilling where in cult-like zeal reminiscent of a Nazi rally, the audience rose, applauded and cheered his call to stand together so Australia would not be swept away by the rising tide of Islamisation."

44. Data from the Scanlon Foundation Mapping Social Cohesion Report in 2017 supports this phenomenon. The Report Author, Professor Andrew Markus, said "There are continuing relatively high levels of negative feeling towards Muslims, and a close examination of survey responses indicates an increase, albeit of less than ten percentage points, of those indicating strong negative views."¹²
45. The above is provided as context for the discussion on just how 'free' some religious minorities are to practice their religion. In the Muslim context, a public environment where there is an increasing negative rhetoric on many, if not all, aspects of Muslim beliefs and practices, impacts on the freedom of Muslims to practice their religion in public.
46. This may not be in the sense that there are laws that prevent them from doing so but there has arisen an environment where people, who would enact such laws if they could, feel

¹² http://scanlonfoundation.org.au/research_surveys/2017/

- empowered to make the public displays of such religiosity uncomfortable at best and physically dangerous in some cases. Referring to such people, the Islamophobia in Australia 2014-2016 report notes that “The danger of these groups is that they may subtly push the normative boundaries in the public and political discourse around the place of Islam and Muslims in Australia”¹³
47. The importance of safe guarding the rights of people to practice their religion becomes paramount in such an environment in our submission. We respectfully submit that it is open and available to Government to redress this issue.
48. While the Anti-Discrimination Act contains a vilification provision, as mentioned previously, it does not include Religion as a head of complaint. We have already discussed the problems associated with the category of ‘Ethno-Religious’ above noting that it does not cover people of the Muslim faith.
49. We also note that in 2018 the NSW Government introduced s.93Z to the Crimes Act NSW which created a new crime of “publicly threatening, or inciting, violence” on a number of grounds including religion.¹⁴ No action has been brought under this provision to date and it is unclear how the Courts will approach such matters. In any event we submit that it is likely to only be used in the most serious of cases given that the incitement has to be to ‘violence’. This would not prevent the vast majority of acts we have noted above.
50. This issue of vilification of people of faith generally, and the protections afforded against it, is of vital importance to our social fabric. Responding to this issue in the NSW context is much simpler than other jurisdictions we would submit.
51. As noted, there is already a general vilification provision in the Anti-Discrimination Act. All that is required is for an inclusion of a category of ‘Religion’, separate to that of ethno-religious, to remedy this anomaly. We urge the Joint Select Committee to give consideration to recommending the inclusion of this in the proposed Bill.

CONCLUSION

52. As stated at the outset of this submission Muslim Women Australia is generally supportive of the measures in the proposed Bill. We have outlined matters that we believe require further clarification or specific additional reforms to properly ensure that individuals are neither discriminated against for their religious beliefs or practices and are not subjected to

¹³ http://www.deakin.edu.au/_data/assets/pdf_file/0006/1075164/Islamophobia.pdf, p.16

¹⁴ http://www5.austlii.edu.au/au/legis/nsw/consol_act/ca190082/s93z.html

harassment, vilification or incitement of hatred towards them based on their religious beliefs or practices.

53. In summary Muslim Women Australia makes the following recommendations:

- a. In relation to the ability of employers to take action against employees for conduct outside of the work environment we respectfully submit that the threshold test should be the ability of an employer to link the statements of religious belief or religious activity to the employment relationship. Only if the employer is able to do this should an assessment be made to determine whether the employers conduct is reasonable or not and, in that assessment, the financial impact on the employer, may be considered. If the employer is unable to establish the connection with the employment relationship then such rules or action should be considered unreasonable regardless of any other consideration, financial or otherwise.
- b. With respect to the wearing of religious symbols or dress in the workplace we submit that any rules pertaining thereto or restrictions on such attire should be reasonable having regard to workplace health and safety and operational requirements. Specific reference to any other factors should be removed from the provisions and it made clear that the onus is on the employer to establish that the wearing of such symbols or dress is unreasonable not the employee.
- c. We submit that provisions relating to religious ethos organisations and their commercial activities should be clarified to make it clear that not all commercial activity of such bodies is exempt from the Act but just those that situated in such proximity to the Religious Body, or through their branding and identity, that a reasonable person would understand that it was connected to and a part of that Body and bears such name and branding that a reasonable person would understand that it forms a part of the religious body.
- d. We submit that the Joint Select Committee should recommend the inclusion of 'Religion' as a head under the vilification provisions of the Act.