

21 August 2020

Joint Select Committee on the  
Anti-Discrimination Amendment  
(Religious Freedoms and Equality) Bill 2020  
Parliament of NSW

Via email: [ReligiousFreedomsBill@parliament.nsw.gov.au](mailto:ReligiousFreedomsBill@parliament.nsw.gov.au)

Dear Committee Secretary

## **Submission to the Joint Select Committee on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020**

### **Introduction**

1. Rape & Domestic Violence Services Australia ('RDVSA') welcome the opportunity to contribute to the inquiry of the Joint Select Committee on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 ('the Bill').
2. RDVSA is a non-government organisation that provides a range of trauma specialised counselling services for those who have experienced sexual, domestic or family violence and their supporters. Our services include the NSW Rape Crisis counselling service for people in NSW whose lives have been impacted by sexual violence; Sexual Assault Counselling Australia for people accessing the Redress Scheme resulting from the Royal Commission into Institutional Responses to Child Sexual Abuse; and the IAG-funded counselling service and support for people experiencing domestic and family violence across Australia. In the 2018/19 financial year, RDVSA provided 34,877 occasions of service to 14,649 clients nationally, with 90% of callers identifying themselves as female, and 92% identifying themselves as someone who had experienced sexual, domestic and/or family violence.
3. In making this submission, RDVSA does not propose to address all aspects of the Bill.
4. As a general proposition, RDVSA believes that individuals should be protected against discrimination on the basis of their religious beliefs or religious activities (including having no religious belief and declining to participate in religious activities).

However, the key issue is how the balance should be struck between competing rights. RDVSA believes that this Bill fails to strike an appropriate balance between the protection of freedom of religion and the need to protect the fundamental human rights of others. Our particular concern is that the Bill would permit the expression of offensive, harmful and potentially dangerous views about women and members of the LGBTIQ+ community with impunity.

5. Violence and intolerance in the name of religion has historically been disproportionately directed at women, girls and members of the LGBTIQ+ community. As stated by the Special Rapporteur on freedom of religion and belief in a report to the United Nations Human Rights Council:<sup>1</sup>

Countless examples demonstrate that violence in the name of religion usually displays a pronounced gender dimension. Many women and girls are victims of “honour” killings, acid attacks, amputations or floggings, sometimes pursuant to penal codes that are based on religious laws. Women and girls also disproportionately suffer from sexual violence, such as rape, abduction, sexual enslavement, female genital mutilation, forced marriage, often in conjunction with forced conversion, or other cruelties.

Furthermore, homophobic and transphobic violence against lesbian, gay, bisexual and transgender (LGBT) persons may also be perpetrated in the name of religion. Those perceived as LGBT may be targets of organized abuse, including by religious extremists. Violence against LGBT persons includes brutal gang rapes, so-called “curative” rapes and family violence owing to their sexual orientation and gender identity. There is a strong connection between discrimination in law and practice, and incitement to violence in the name of religion and violence itself. Violence against women and against LGBT persons is often justified and given legitimacy by discriminatory laws based on religious laws or supported by religious authorities, such as laws criminalizing adultery, homosexuality or cross-dressing. The Human Rights Committee has noted with concern hate speech and manifestations of intolerance and prejudice by religious leaders against individuals on the basis of their sexual orientation, in a broader context of acts of violence, including killings of LGBT persons. There have also been reports of direct violence exercised by religious authorities against LGBT persons, although many of them are religiously interested in practising.

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<sup>1</sup> Heiner Bielefeldt, *Report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/HRC/28/66 (29 December 2014), [10]-[11], references omitted.

6. As recently as February 2020, the Special Rapporteur reported that gender-based violence and discrimination continues to be perpetrated and advocated on religious grounds against women, girls and LGBT+ persons.<sup>2</sup>
7. As an organisation with feminist underpinnings, RDVSA advocates for equal political, economic and social rights for women, including the right to protection from discrimination on the basis of sex, marital status, sexual orientation or gender identity. Violence against women is rooted in gender inequities and cannot be eliminated until these inequities are addressed.

### Principles of the Act: proposed section 3

8. Proposed sub-section 3(1) would require that, in carrying out their functions and making determinations under the *Anti-Discrimination Act 1977* ('the **ADA**'), the Minister, Board, President, Tribunal and Courts should have 'fundamental regard' to the International Covenant on Civil and Political Rights ('the **ICCPR**'), the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief ('the **Religious Discrimination Declaration**') and the Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR ('the **Siracusa Principles**'). In addition, under proposed sub-section 3(3), all provisions under the ADA must be interpreted in a way that is compatible with these three international instruments. RDVSA is strongly opposed to this proposed section.
9. Australia has signed and ratified the ICCPR and has adopted the Religious Discrimination Declaration (which is not binding). However, Australia has also signed and ratified a number of other international human rights treaties, including the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Racial Discrimination, and the Convention on the Rights of Persons with Disabilities. Precedence should not be given to the Religious Discrimination Declaration over these other instruments.
10. The Siracusa Principles should not be given special recognition under the ADA to guide the interpretation of the 'limitations clauses' in the ICCPR as suggested in proposed sub-sections 3(1)(c) and 3(2). The Siracusa Principles are but one source of guidance on the application of limitations to human rights; there are other sources of guidance, for example, the Charter of the United Nations, the Human Rights Committee and the reports of the Special Rapporteur on freedom of religion and belief.<sup>3</sup>
11. Article 18(3) of the ICCPR contains an explicit recognition of the fact that the freedom to manifest one's religion or beliefs may be subject to limitations 'as are prescribed

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<sup>2</sup> Ahmed Shaheed, *Report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/HRC/43/48 (27 February 2020), [8]-[9], [14]-[15], [33]-[34].

<sup>3</sup> *Religious Freedom Review: Report of the Expert Panel*, 18 May 2018, [1.22]-[1.31].

by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others'. The Expert Panel on Religious Freedom cited, with approval, the description of article 18(3) as performing 'an important "corrective" function, which is necessary because of the potential for an overly broad freedom of religion to lead to the misuse of that right, and to the suppression of the rights and freedoms of others.'<sup>4</sup> While the right to manifest religion and belief can be subject to limitations to protect the rights of others, the universal right to equality is unqualified.<sup>5</sup> The Bill would undermine that fundamental principle.

12. The dangers of prioritising religious freedom other the right to protection against gender discrimination and inequality are very real. As stated in the 2010 Interim report of the Special Rapporteur on freedom of religion or belief:<sup>6</sup>

... the mandate needs to continue highlighting discriminatory practices that women have had to suffer over the centuries **and continue to do so**, sometimes in the name of religion or within their religious community. **It can no longer be taboo to demand that women's rights take priority over intolerant beliefs that are used to justify gender discrimination.** During the Special Rapporteur's missions and interaction with religious leaders she has been repeatedly told that most religions recognize gender equality. Yet, religious zealots and their followers often launch campaigns to discriminate against women rather than support gender equality. Many women are denied basic rights of equality within the most fundamental social unit, the family. In a number of countries, such denial of their rights is supported by discriminatory legislation and justified in the name of religion or tradition. There can never be true gender equality in the public arena if women continue to be oppressed by the weight of discrimination within their homes, all too often in the name of divine sanction.

13. This statement was fully affirmed by the current Special Rapporteur in his report to the Human Rights Council on 27 February 2020.<sup>7</sup> The Special Rapporteur noted that governments in all regions of the world 'failed to uphold their obligations to protect people from gender-based violence and discrimination perpetuated against them by private individuals or entities claiming a religious justification for their actions and to sanction the perpetrators of such acts.'<sup>8</sup> He also rejected 'any claim that religious beliefs can be invoked as legitimate "justification" for violence or discrimination

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<sup>4</sup> *Religious Freedom Review: Report of the Expert Panel*, 18 May 2018, [1.60], citing Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel, 2<sup>nd</sup> revised ed, 2005) 408-9.

<sup>5</sup> Ahmed Shaheed, *Report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/HRC/43/48 (27 February 2020), [69].

<sup>6</sup> Asma Jahangir, *Interim report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/65/207 (29 July 2010), [69], emphasis added.

<sup>7</sup> Ahmed Shaheed, *Report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/HRC/43/48 (27 February 2020), [69].

<sup>8</sup> Ahmed Shaheed, *Report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/HRC/43/48 (27 February 2020), [8].

against women and girls or against people on the basis of their sexual orientation or gender identity.<sup>9</sup>

### Definition of religious activities: proposed section 22K

14. Religious activities are defined in proposed section 22K(1) to exclude any activity that would constitute an offence punishable by imprisonment under the law of NSW or the Commonwealth. This provision sets the bar too low. Conduct may be unlawful under NSW or Commonwealth law without attracting a term of imprisonment. Examples include racial vilification (s.20C) transgender vilification (s.38S), homosexual vilification (s.49ZT) and HIV/AIDS vilification (s.49ZXB), which do not constitute criminal offences, but are unlawful under the ADA.
15. Although there is a criminal offence under s.93Z of the *Crimes Act 1900* of publicly threatening or inciting violence on the grounds of race, religion, sexual orientation, gender identity, intersex or HIV/AIDS status, with a maximum penalty of imprisonment for 3 years, this offence is notoriously difficult to prove. When the offence was amended and transferred from the ADA to the *Crimes Act* in 2018, it was acknowledged by the Attorney General that there had been no prosecutions at all for any of the vilification offences when they were contained in the ADA.<sup>10</sup>
16. Any definition of religious activities should exclude any unlawful conduct, regardless of whether or not it constitutes a criminal offence, or whether it attracts a custodial sentence on conviction.

### Determining when a belief is held: proposed sections 22K & 22KA

17. A person is said to hold a religious belief under proposed section 22KA if the person 'genuinely believes the belief', while proposed section 22K provides that 'genuinely believes' means the person's belief is 'sincere' and 'not fictitious, capricious or an artifice'.
18. These provisions would allow a person to make a complaint of religious discrimination based on an entirely subjective belief system, whether or not attributable to the doctrines, tenets, beliefs or teachings of a religious organisation. The belief essentially only needs to be 'sincere' to constitute a religious belief; the qualification that it not be 'fictitious, capricious or artifice' adds little if any constraint to the definition.

### Exemptions: proposed section 22M

19. RDVSA opposes the exemption under proposed section 22M. The Bill includes an exemption from anti-discrimination provisions for a 'religious ethos organisation'

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<sup>9</sup> Ahmed Shaheed, *Report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/HRC/43/48 (27 February 2020), [70].

<sup>10</sup> The Hon Mr Mark Speakman, Second Reading Speech, Crimes Amendment (Publicly Threatening and Inciting Violence) Bill 2018, *Hansard*, Legislative Assembly, 5 June 2018.

where the *organisation* holds a genuine belief about the otherwise discriminatory conduct. It is difficult to see how it would be possible to determine the genuine belief of an organisation, particularly where there are degrees of adherence within religions. Religions are generally not homogenous.<sup>11</sup> The right to religious freedom under Article 18 of the ICCPR is a right held by individuals, not by religions or religious organisations.<sup>12</sup> Furthermore, the exemption in proposed section 22M applies to engagement in any 'conduct'. The term 'conduct' is not defined, other than that, without limiting what may amount to 'conduct', it 'includes giving preference to persons of the same religion' (proposed sub-section 22M(2)). The proposed exemption is effectively limitless.

20. Section 56 of the ADA already contains a general exemption for the training, ordination or appointment of members of a religious order, the appointment of any other person by a body established to propagate religion and any 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.' The proposed exemption to any 'conduct' significantly and unjustifiably extends the exemption for religious bodies already available under s.56 of the ADA. Rather than extending the exemptions, the NSW Parliament should consider the extent to which religious organisations should continue to enjoy exemptions under the ADA.<sup>13</sup>

### **Discrimination in work: proposed Division 2**

21. Proposed section 22N would make it unlawful for an employer to discipline or sanction an employee for engaging in a 'protected activity', which is defined in proposed sub-section (4)(a) to include 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.
22. These standards would be extremely difficult to meet and do not reflect the range of harm that can be caused by conduct under the cloak of religious freedom. For example, under this Bill, a prosecutor could not be sanctioned under a code of conduct for expressing a view outside the workplace that violence against women is acceptable according to certain biblical references, despite working for an organisation that prosecutes criminal offences, many of which involve physical and sexual violence against women. Such conduct may not constitute a 'direct criticism of,

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<sup>11</sup> Ahmed Shaheed, *Report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/HRC/43/48 (27 February 2020), [50].

<sup>12</sup> Ahmed Shaheed, *Report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/HRC/34/50 (17 January 2017), [24]; UN Doc A/HRC/43/48 (27 February 2020), [49]; *Religious Freedom Review: Report of the Expert Panel*, 18 May 2018, [1.45].

<sup>13</sup> See *Religious Freedom Review: Report of the Expert Panel*, 18 May 2018, recommendations 5-8.

or attack on', the employer, nor cause 'any direct or material financial detriment' to the employer, but it may nevertheless harm the integrity and reputation of the employer and its stakeholders, as well as damage staff morale and undermine policies designed to foster inclusiveness. Legitimate disciplinary proceedings for breaches of workplace codes of conduct should not be treated as a form of unlawful discrimination in deference to harmful conduct justified by reference to religious beliefs.

23. Changes to workplace practices as a result of the COVID-19 pandemic, including the transition of many employees from working on site to working from home, would also make it difficult to determine whether a person is 'at the employer's place of work' for the purposes of proposed paragraph (a)(ii). The lines between a person's performance of their work duties and the person's personal activities are becoming increasingly blurred.
24. The effect of this provision is particularly alarming when one considers that a religious belief is broadly defined to include any genuine belief, regardless of whether or not it conforms to the doctrines, tenets, beliefs or teachings of a religious organisation. However, even without this broad definition of religious belief, it is conceivable that religious teachings could be used to justify the expression of offensive and harmful views that stigmatise marginalised communities and promote gender stereotypes.
25. For the same reasons, RDVSA is opposed to proposed section 22S in relation to professional and regulatory bodies. These organisations should be able to take disciplinary proceedings against their members for breaches of their professional obligations without falling foul of anti-discrimination legislation for the protection of religious freedom.

### **State laws and programs: proposed section 22Z**

26. Proposed section 22Z(1) makes it unlawful to engage in religious discrimination in the course of performing any function under a State law or for the purposes of a State program. RDVSA believes proposed sub-section 22Z(2) goes too far in extending this protection to 'religious ethos organisations'. As stated above, religious freedom applies to individuals, not organisations. The effect of this provision is that it could make it unlawful for the State to refuse to provide funding for a religious organisation to carry out a program despite that organisation's stated intention to undertake that program in a manner that discriminates against those whose rights are protected under the ADA.

### **Conclusion**

27. In conclusion, RDVSA does not support the Bill. It goes too far in prioritising religious freedom over the right to protection from discrimination based on other attributes such as sex, marital status, sexual orientation and gender identity.

28. We again thank the Committee for the opportunity to make a submission on the *Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020*. RDVSA is content for our submission to be made public.

29. If you have any questions or would like to discuss further, please do not hesitate to contact me on [REDACTED]

Yours faithfully,

**Rape & Domestic Violence Services Australia**

Karen Willis

Executive Officer