

15 May 2024

Mr Clayton Barr MP  
Chair, Legislative Assembly Committee on Community Services  
c/o Rohan Tyler  
By email only: [communityservices@parliament.nsw.gov.au](mailto:communityservices@parliament.nsw.gov.au)

Dear Mr Barr and Committee Members,

**Inquiry into the *Equality Legislation Amendment (LGBTIQA+) Bill 2023* – question on notice**

We refer to the inquiry by the Legislative Assembly Committee on Community Services ('the Committee') into the Equality Legislation Amendment (LGBTIQA+) Bill 2023 ('the Equality Bill'). We apologise to the Committee and Ms Donna Davis MP for the delayed response.

**Answer to question on notice: Article 23.1 of the International Covenant on Civil and Political Rights**

Kingsford Legal Centre thanks Ms Donna Davis, MP for the opportunity to respond to the question on notice regarding what is the International Covenant on Civil and Political Rights ('ICCPR') and its jurisdictional application in New South Wales.<sup>1</sup>

**a) *Does the ICCPR have standing in NSW?***

Australia ratified the International Covenant on Civil and Political Rights ('ICCPR') on 13 August 1980. When a State ratifies an international treaty such as the ICCPR, it voluntarily undertakes to be bound by the treaty under international law. This includes an obligation on the State party to ensure its domestic legislation at the federal, state and territory level, complies with the provisions of the treaty. If Australia does not comply with the ICCPR, it is therefore in breach of its obligations under international law.

Australia has a dualist rather than monist system of law. This means that the international treaty must be incorporated into domestic law for it to be binding, i.e. enforceable in Australia courts. Australia stated in its 2016 report to the United Nations Human Rights Committee<sup>2</sup> that its existing institutions and domestic laws, including common law and statute law, adequately implemented the ICCPR at the domestic level. However, this position is disputed by international and Australian human rights experts.<sup>3</sup>

<sup>1</sup> Legislative Assembly Committee on Community Services, *Uncorrected transcript (Tuesday 30 April 2024)*, p.22: "I note that several submissions, including from the Australian Association of Christian Schools, Faith NSW and Better Balanced Futures, refer to the bill being in violation of article 23.1 of the International Covenant on Civil and Political Rights. This may be a question you want to take on notice, but I wanted to know from your perspectives what this particular covenant is and whether it does actually have any standing in our legal jurisdiction."

<sup>2</sup> The Human Rights Committee is the body of independent experts that monitors implementation of the International Covenant on Civil and Political Rights by its States parties.

<sup>3</sup> Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding observations of the Human Rights Committee*, 95th sess, UN Doc CCPR/C/AUS/CO/5 (7 May 2009), [8]; and Heyns, C, Viljoen, F & Murray, R. (2024). *The Impact of the United Nations Human Rights*

## **b) What is the impact of the ICCPR?**

The Australian Association of Christian Schools and Christian Schools Australia, Freedom for Faith, and Faith NSW and Better-Balanced Futures made submissions to this inquiry that refer to the ICCPR.<sup>4</sup> In particular, they reference articles 18(4), 23(1) and 24(1) and state that the rights in these articles would be diminished or violated by the Equality Bill. The Australian Association of Christian Schools and Christian Schools Australia also describe article 18(4) of the ICCPR as “a fundamental and absolute right in the ICCPR, yet it would be profoundly diminished by the proposals in Schedule 1 of the [Equality Bill]”.

This characterisation of article 18(4) of the ICCPR as an “absolute” right is incorrect. Under international human rights law, an absolute right is a right that cannot be limited for any reason, even during a declared state of emergency. Only a very limited set of rights are absolute, for example freedom from torture under article 7 of the ICCPR.<sup>5</sup> Article 18(3) sets out in what circumstances freedom of religion can be limited:

“Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others”

One such fundamental right and freedom is the right to equality and non-discrimination. International human rights law prohibits discrimination against LGBTIQ+ people on the bases of sexual orientation, gender identity or sex characteristics; in the same way as race, sex, colour, or religion, they are not permissible reasons for making distinctions.<sup>6</sup> Differences in treatment based on prohibited grounds are considered discriminatory, unless a State can show that there is a justification for the difference in treatment that is reasonable, objective, necessary and proportionate, and if the difference in treatment is otherwise compatible with international human rights law.<sup>7</sup>

The current exceptions in the *Anti-Discrimination Act 1977* (NSW) permitting discrimination in educational settings against LGBTIQ+ students and teachers in religious schools do not satisfy these requirements, and violate Australia’s obligations under international human rights law, for example article 26 of the ICCPR and article 2(2) of the International Covenant on Economic, Social and Cultural Rights (‘ICESCR’).

As our oral evidence to the Committee outlined, the interpretation of international human rights law requires a balancing exercise of competing human rights, meaning that the right to freedom of religion or belief must always be balanced against the right

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*Treaties on the Domestic Level: Twenty Years On* 2<sup>nd</sup>, Leiden: Brill, p.61. Other human rights treaties have been largely incorporated into Australian domestic law, in particular the Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

<sup>4</sup> See submissions 13, 27 and 28.

<sup>5</sup> Article 18 of the ICCPR is a “non-derogable” right, meaning it cannot be derogated from in time of public emergency

<sup>6</sup> See, for example: the Universal Declaration of Human Rights, arts 2 and 7; ICCPR, arts 2(1) and 26; the International Covenant on Economic, Social and Cultural Rights, art 2(2); Human Rights Committee, General Comment No. 18, 1989, para. 7; Committee on Economic, Social and Cultural Rights, General Comment No. 20 (E/C.12/GC/20), 2009, para. 7. See also: the Convention on the Rights of the Child, art 2(1); the International Convention on the Elimination of All Forms of Racial Discrimination, art. 1; the Convention on the Elimination of All Forms of Discrimination against Women, art. 1; the Convention on the Rights of Persons with Disabilities, art. 2.

<sup>7</sup> See for example, Committee on Economic, Social and Cultural Rights, General Comment No. 20 (E/C.12/GC/20), 2009, para. 13; Human Rights Committee, General Comment No. 18, 1989, para. 13

to non-discrimination. This is why it is incorrect to consider rights on freedom of religion, such as article 18(4) of the ICCPR, in isolation. In balancing these rights, the United Nations mechanisms responsible for monitoring the implementation and interpretation of international human rights law have considered that LGBTIQ+ people have the right to be free of discrimination in education settings. For example, the Committee on Economic Social and Cultural Rights<sup>8</sup> in its general comment No.23 (2016) on the right to just and favourable conditions of work (article 7 of ICESCR) stated that:<sup>9</sup>

“The reference to equal opportunity requires that hiring, promotion and termination not be discriminatory. This is highly relevant for women and other workers, such as workers with disabilities, workers from certain ethnic, national and other minorities, lesbian, gay, bisexual, transgender and intersex workers, older workers and indigenous workers.”

This understanding and approach to international human rights law is also outlined in the recent Australian Law Reform Commission (‘ALRC’) Inquiry into Religious Institutions and Anti-Discrimination Laws.<sup>10</sup> The ALRC noted:

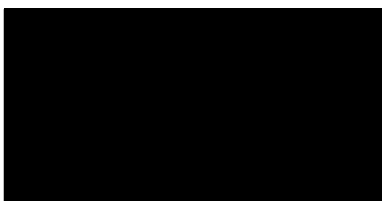
“A tension between some of these rights may be suggested if each is viewed in isolation. However, human rights are ‘indivisible and interdependent and interrelated’. Human rights must be considered in parallel with each other and in a mutually enriching manner. Only a small number of human rights are absolute. Most rights can be limited, strictly, to promote other objectives, including other human rights.”

The ALRC Report highlights the principle of proportionality in relation to intersecting rights. The findings of the Report are directly relevant to this Bill and Inquiry.<sup>11</sup>

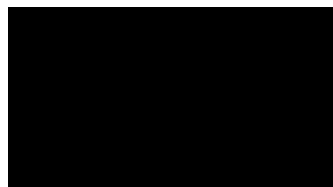
## Conclusion

Consistent with our submission and the evidence provided to the Committee we see the Equality Bill as critical to Australia meeting its international human rights obligations, including under ICCPR. We thank the Committee for their time.

Yours sincerely,  
KINGSFORD LEGAL CENTRE



Emma Golledge  
Director



Anna Lochhead-Spurling  
Law Reform Solicitor

<sup>8</sup> The Committee on Economic, Social and Cultural Rights (CESCR) is the body of 18 independent experts that monitors implementation of the International Covenant on Economic, Social and Cultural Rights by its State parties.

<sup>9</sup> Paragraph 31.

<sup>10</sup> Australian Law Reform Commission, *Summary Report Maximising The Realisation of Human Rights; Religious Educational Institutions and Anti-Discrimination Laws*, ALRC Report 142 December 2023, at 12: <<https://www.alrc.gov.au/wp-content/uploads/2024/03/ALRC-ADI-Summary-Report-142.pdf>>.

<sup>11</sup> Ibid at 12.