Submission No 1

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

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

The attached Submission responds to the Joint Select Committee's invitation to provide comments on the *Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020* (NSW).

Summary

In summary, the proposed legislation is unnecessary, is at odds with the state's anti-discrimination regime and inconsistent with Australia's obligations under international human rights frameworks.

If adopted by the New South Wales Parliament it is highly likely to result in inappropriate litigation, foster disharmony and attract adverse comparisons with other jurisdictions that do not unduly privilege the exercise of religious faith over other human rights.

Basis

The submission is made by Dr Bruce Baer Arnold, Dr Wendy Bonython and Dr Richard Matthews.

It reflects their teaching, research and publication. It also reflects cited contributions to a range of law reform commission and other inquiries, alongside invited testimony to parliamentary inquiries.

The submission is independent of any political body and does not represent what would be reasonably construed as a conflict of interest.

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

The following paragraphs offer an overall assessment of the *Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020* (NSW) before addressing the Committee's specific terms of reference and commenting on core provisions of that Bill.

Summary

In summary, the proposed legislation is unnecessary. It is at odds with the state's anti-discrimination regime, providing exemptions that recent history indicates will be abused. It is inconsistent with Australia's obligations under international human rights frameworks.

If adopted by the New South Wales Parliament it is highly likely to –

- result in inappropriate litigation,
- foster disharmony,
- determine government policy, and
- attract adverse comparisons with other jurisdictions that do not unduly privilege the exercise of religious faith over other human rights.

Assessment

In the aftermath of the Second World War Australia committed to the Universal Declaration of Human Rights (UDHR), an international agreement that has been recognised in a range of enactments and that is at odds with the Bill discussed in this submission.[1] The UDHR characterises human rights as universal, in other words everyone has human rights on the basis that they are people. The UDHR characterises human rights holistically. In other words rights are interrelated and non-separable. Particular rights, such as the expression of religious belief, do not have a higher status than the other rights. They do not trump or supersede other rights and do not enshrine religious adherence as establishing a class of 'citizens plus', giving faith-based institutions and believers a privileged status that is unavailable to secular peers.

The Bill seeks to elevate religious belief above other human rights and at the expense of those other rights, giving special protections to activity by entities with a religious affiliation and by individual adherents that are likely to:

- harm believers and non-believers alike;
- foster disharmony,
- result in administrative confusion, and
- conflict with NSW enactments that are recognised as legitimate by people across the state and internationally.

In particular we note the inequity of legislating a right of religious ethos organizations to discriminate while denying any other organisations the right to do the same.

[1] The Commonwealth, state and territory statutes drawing on the UDHR and subsidiary international agreements such the Convention on the Rights of the Child and the International Covenant on Civil & Political Rights have not been successfully challenged in the High Court of Australia.

In the absence of a compelling reason for privileging religious belief over other rights there is no basis for the Committee to endorse the Bill. More broadly, it would be premature for the NSW Parliament to pass the Bill until the Commonwealth Religious Freedoms Bills have been passed and the Australian Law Reform Commission (ALRC) has subsequently reported on matters relevant to the Bill discussed in this submission. (Comments on the ALRC inquiry are provided at the end of this submission.)

We respectfully suggest that the Committee should instead note the importance of a coherent and progressive human rights regime. Such a regime fosters the wellbeing of individuals and the community at large. It should receive bipartisan support. It is consistent with positioning of Sydney and the state as destinations for investment and tourism from overseas.

NSW and Commonwealth law must ensure that in a pluralist liberal democracy:

- everyone has the right to be free from discrimination on the basis of religious belief, and that
- no belief (religious or otherwise) should override the right of an individual to learn, work, associate and otherwise live without denigration, fear, hatred and discrimination.

Contrary to its title the Bill will not result in equality. Instead it seeks to provide religious adherents alone with a freedom to discriminate and a freedom to harm, including a freedom to engage in vilification that will be shielded through reference to religious authority that is often subjective. It will exacerbate disharmony and ultimately foster harms directed at many of Australia's most vulnerable people, whose vulnerability is evident in a succession of law reform reports and other studies.

NSW law, along with that at the Commonwealth level and in other states/territories, features substantial accommodations (aka privileges) for religious institutions, affiliated bodies and individuals. There is no compelling reason to extend those accommodations. Any proposal to radically extend existing privileges in ways that conflict with human rights, employment and other laws needs a persuasive justification. That justification is not provided by the Hon Mark Latham's 2nd Reading Speech or other documentation. As US scholar Andrew Koppelman recently commented, 'Any religious accommodation rests in part on a bet that it will not be invoked so often as to defeat the purpose of the law'. The Bill appears likely to result in that invocation and should be rejected in the interest of the NSW community.

We consider that the harms referred to above are readily discernible through consideration of the proposed sections 22M and 22N. This submission accordingly discusses those sections before addressing the Committee's Terms of Reference.

<u>22M: Inappropriate Extension to Affiliates</u>

The Bill should be rejected because it is inequitable, seeking to give a statutory authorisation for an unjust distribution of power.

The proposed section 22M offers an inappropriate blanket exemption for every religious ethos organisation, including health, welfare and other entities that may receive substantial government funding and deliver services for government. In practice some of those organisations serve as the sole service provider within the local area. They may gain substantial revenue and employ large numbers of people, rather than simply relying on volunteers. They may have tax advantages in competition with entities that are independent of faith.

Under s 22M the organisation is taken not to discriminate if it engages in conduct that is:

- required because of the religious susceptibilities of the adherents of the religion, or
- consistent with, or furthers or aids the organisation in acting in accordance with, the doctrines, tenets, beliefs or teachings of the religion (for example, giving preference to persons of the same religion as the religion of the organisation).

The Explanatory Notes state that 'when a religious institution acts in accordance with its beliefs, this is not discrimination'. There is no requirement for that action or expression of religious belief by religious ethos organisations and individuals to be reasonable.

The preparedness of religious entities to engage in welfare activity is commendable and is, in our view, endorsed by most Australians. However the proposed amendment licences discrimination on the basis of susceptibilities and in many workplaces. Under 22M that conduct encompasses –

- the refusal of services, including the provision of advice and intervention regarding fertility
- the stigmatisation of people who may or may not have an identity that is at odds with the doctrine espoused by a particular religious authority
- the refusal or termination of employment on the basis that an individual's identity is at odds with the doctrine espoused by a particular religious authority
- preferential contracting between entities on the basis of a substantive/perceived religious affinity.[2]

We have chosen neutral language in referring to 'authority' because sacred texts and doctrine are often interpreted differently on a denominational basis. Some of that interpretation has been strongly expressed and highly negative about other faiths, about women, about people with a different ethnicity, and about people whose identity was deemed to be contrary to religious teaching (for example those with a same sex affinity, those who were divorced, those who associate with family members who had apostasised or have other faiths). That expression is contrary to the respect for every person that is the foundation of human rights. On occasion it results in deep distress, alienation and even self-harm. It is contrary to individual and community wellbeing. It should not be reiterated and reinforced by a religious ethos organisation, in particular any organisation receiving government support (for example through grants, service funding and the tax system).

<u>Section 22N: An individual's faith should not override all law</u>

The Second Reading Speech notes instances where figures such as elite athlete Israel Folau have used their privileged status as employees to recurrently condemn people who do not share their faith and fellow-believers who in some way are deemed to be sinful. That condemnation has been public, rather than a matter of a private conversation or a statement only accessible by fellow adherents. It has often been visceral. Absent reference to a religious text it would be understood as hate-speech, in other words an expression that is an opinion that seeks to condemn, isolate, frighten and legitimate hostility to the target of that vilification. It has been condemned by clergy, other religious adherents and people without a faith and disowned by employers ... something that has led the figures to assert they are being silenced because speaking the word of God.

[2] Saliently, the Bill seeks to authorise that discrimination **by** adherents yet prohibit discrimination by non-adherents.

Vilification is not justified merely through reference to religious doctrine or as a matter of the figure's religious faith.[3] It is situated in a world where expression has led to violence rather than merely disharmony, and where much of the most acerbic speech has been directed by one sect at another (something, along with abhorrent practice such as institutional indifference to sexual abuse by clergy, which has arguably accelerated disengagement by many Australians from organised religion). It has been appropriately condemned through Australian law such as the *Racial & Religious Tolerance Act 2001* (Vic) and judgments such as *Catch the Fire Ministries v Islamic Council of Victoria*[4] and *Chief of the Defence Force v Gaynor*.[5]

We respectfully disagree with claims in the 2nd Reading Speech to a pernicious chill within the NSW public sector. The state government has a policy of non-discrimination, consistent with NSW and Commonwealth statute law such as the *Anti-Discrimination Act 1977* (NSW)[6] and with private sector expectations regarding corporate best practice. Neither case law nor representations by bodies such as unions demonstrate that there is a substantive problem.

Australian law at the national and state/territory levels expressly prohibits discrimination in employment on the ground of faith. That prohibition is consistent with the international human rights agreements to which Australia is a signatory. The prohibition has a substantial carve-out that privileges religious institutions. That exemption has been invoked by major institutions. Rather than faith being punished, it has been accorded a special status in law.

That special status is, however, not exhaustive. Religious doctrine and religious adherence do not override all law. Preaching in private places is typically unhindered, in part reflecting long-standing recognition that law should hesitate to erode the private sphere through disproportionate intervention in bedrooms, confessionals and other personal locales. Preaching in public places may be restricted,[7] as may protests in the immediate vicinity of some locations.[8] Those restrictions are consistent with the implied freedom of political communication, sometimes misunderstood as an unrestricted freedom of expression.[9]

In a pluralist society where

- there is no official religion,
- many people are non-believers,
- few people meet the standards of particular sects, and
- many people trace their ancestry to places other than England

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[3] Pertinent judgments include *Burns v Smith* [2019] NSWCATAD 56; *Sunol v Collier (No 2)* [2012] NSWCA 44; *Passas v Comensoli* [2019] NSWCATAP 298, and *Thurston v Anti-Discrimination Tribunal (No 2)* [2018] TASSC 48.

[4] *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc* [2006] VSCA 284.

[5] *Chief of the Defence Force v Gaynor* [2016] FCA 311 and *Chief of the Defence Force v Gaynor* [2017] FCAFC 41. Note also *Gaynor v Chief of the Defence Force* [2017] HCATrans 162.

[6] Examples outside NSW include the *Discrimination Act 1997* (ACT), *Anti-Discrimination Act 1997* (Qld), *Anti-Discrimination Act 1998* (Tas) and *Equal Opportunity Act 2010* (Vic). That legislation has not been overturned by the High Court and is consistent with the Siracusa Principles discussed in this submission.

[7] Notably *The Corporation of the City of Adelaide v Corneloup & Ors* [2011] SASFC 84; and *Attorney-General for the State of South Australia v Corporation of the City of Adelaide & Ors* [2013] HCA 3.

[8] See for example *Kathleen Clubb v Alyce Edwards and Anor; John Graham Preston v Elizabeth Avery and Anor* [2019] HCA 11; *Brown v Tasmania* [2017] HCA 43; and statutory restrictions under for example *Public Health & Wellbeing Act 2008* (Vic) s 185D; *Reproductive Health (Access to Terminations) Act 2013* (Tas) s 9(2) or *Workplaces (Protection from Protesters) Act 2014* (Tas).

[9] See for example *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; and *Nationwide News Pty Ltd v* Wills (1992) 177 CLR 1

there are proportionate and reasonable restrictions on expression *within* the workplace.[10] Adherents are thus reasonably restricted from denigrating other faiths, people without a religious adherence or people that an adherent considers to be inferior on the basis of gender, matrimonial status, sexual affinity, or choice not to have children.

Employers may legitimately impose restrictions on expression *outside* the workplace that is perceived by reasonable people as a representation of the employer's values or policy. That restriction has two bases. The first is the reality of the employment relationship: people are not required to work for a particular employer or indeed to work in a particular field. In choosing to work for the employer they have agreed to comply with what law construes as reasonable requirements.[11]

The professions are similarly authorised under Australian law to sanction health practitioners and other professionals who engage in vilification, in other words expression that both stigmatises the targets of that hate speech and implies to the community at large that vilification is acceptable behaviour.[12]

That reasonableness includes restrictions on statements that would result in harm within the workplace, for example denigration of female, gay or intersex colleagues and customers. It includes accommodations for religious adherence, for example scope for observance of religious festivals that are not public holidays. Reasonableness also includes restrictions on the behaviour of employees outside the workplace, with for example penalties under contract law for abuse of women, criminal offences and expression that brings a brand/employer into disrepute.[13] That restriction encompasses both officials, evident in the High Court's decision regarding *Banerji,*[14] and private sector employees.[15] It is not superseded by a freedom of religious communication analogous to the implied freedom of political communication that derives from liberal democracy.

In introducing the Bill its three proponents appear to be seeking to enshrine the expression of faith (including expression that vilifies people who do not share that faith) ahead of other

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[10] We note that there are restrictions on expression within parliamentary chambers, on occasion substantiated through suspension from parliamentary proceeding, and increasingly through disendorsement of MPs for vilification about peers in email and other communication outside those proceedings.

[11] See *Vosper v Solibrooke Pty Ltd T/A Angie's Cake Emporium* [2016] FWC 1168; *Fitzgerald v Dianna Smith* [2010] FWA 7358; and *Stutsel v Linfox Pty Ltd* [2011] FWA 8444.

[12] In *Kok v Medical Board of Australia (Review and Regulation)* [2020] VCAT 405 the Medical Board of Australia's sanctions were for example endorsed with the comment that a health practitioner has 'obligations to his profession which he must take seriously. He does not simply drop his profession each time he enters the playground of social media engagement. A registered medical practitioner cannot go online and shout to all who care to read his posts (or have the misfortune of coming across his posts) without care as to the potential consequences of his actions'. He is not entitled to 'denigrate, demean and slur medical practitioners who provide termination of pregnancies, recognise and treat gender dysphoria (in a manner that is in accordance with accepted medical practice) and recognise that people who identify as transgender are not suffering from a mental health condition' or to 'endorse or call for violence and/or genocide towards racial and religious groups and endorse calls for capital punishment for members of the profession who provide termination of pregnancy services'. Practitioners by virtue of the profession are 'required to abide by a Code of Conduct which requires respect and compassion'. The Bill under consideration by the Committee proposes to override that Code and the associated National Law.

[13] *O'Keefe v Williams Muir's Pty Ltd* [2011] FWA 5311; *Fitzgerald v Dianna Smith trading as Escape Hair Design* [2010] FWA 7358; *Rose v Telstra Corporation Limited* (1998) AIRC 1592; and *Pearson v Linfox Australia Pty Ltd* [2014] FWC 446

[14] *Comcare v Banerji* [2019] HCA 23; and *Starr v Department of Human Services* [2016] FWC 1460.

[15] *Ridd v James Cook University* [2019] FCCA 997; *Pearson v Linfox Australia Pty Ltd* [2014] FWC 446; *Rumble v The Partnership trading as HWL Ebsworth Lawyers* [2019] FCA 1409; and *Little v Credit Corp Group Limited t/as Credit Corp Group* [2013] FWC 9642.

rights and ahead of the contractual relationship. Such prioritisation of faith is not founded on the Australian Constitution; the national constitutional framework does not give superior authority to any church or faith but instead clearly indicates that there is to be no established church (aka state religion). The same privileging of religion is contrary to the international human rights frameworks to which Australia has acceded.

Section 22N and follow-up sections are unnecessary. It is legitimate for organisations to use corporate codes of conduct tied to contract law to require employees to refrain from engaging in hate-speech, incitement of violence, disregard of law or other harms. That restriction is permissible if there has been deception and the employee has access to guidance and a grievance mechanism for resolution of disputes regarding abhorrent expression. An employee who for reasons of faith is unable to comply with the restriction should choose to cease employment with the particular employer or recognise that termination of employment for breach of contract is a likely outcome. That employee might accordingly seek to express religious belief as a self-employed person, an unemployed person or an employee of an entity that shares that person's faith. Ultimately, the expression of faith is a matter of choice. Employers are not required to provide an employee with a megaphone or a pulpit.

Before addressing the Committee's Terms of Reference we note than an irony underlies the Bill.

Religious institutions for many years have sought to intervene in the private lives of employees, on occasion dismissing employees on the basis that those individuals express values contrary to doctrine and without regard for the ability of the employee. The proposed legislation would appear to continue and indeed extend that ability for religious entities (including ethos organisations) to discriminate. At the same time the legislation would prohibit other employers from penalising or terminating employees whose expression – however idiosyncratic, hurtful and contrary to the employer's emphasis on inclusiveness – was made on a public basis and characterised by the individual as a matter of faith.

Existing rights and legal protections contained in the *Anti-Discrimination Act 1977* (NSW) and other relevant NSW and Commonwealth legislation;

As noted above, Australia is a signatory to the key international human rights agreements, in particular the Universal Declaration of Human Rights (UDHR). Those agreements are high level statements of rights and formal Conventions under the UDHR have been developed over time and implemented in Australia through enactments in order to provide greater specificity. That specificity is important for administration and also important because rights are holistic, with one right not trumping another. In Australia we have accordingly seen progressive development at the Commonwealth, state and territory levels that has resulted in a patchwork of enactments that address discrimination regarding specific matters such as gender, age, disability, marital status and sexual affinity. It has been axiomatic that Australia is a secular state (ie different to a theocratic state such as Iran), with there being no religious tests (eg a requirement to adhere to a particular faith or denomination as a condition for election or employment) and no requirement to express a religious faith through a formal statement of belief, membership of a religious entity and so forth. Many Australians identify as having no religious faith; most Australians do not regularly attend church or other religious services. People are free to have no faith or to have a succession of faiths. They are not free to impose their doctrines on others.

Religious institutions are respected under Australian law and enjoy a range of privileges, for example favourable tax status. They are subject to contract, tort, taxation, trusts, charity and other law. Subject to compliance with that law they are free to operate as they please, reflecting Australia's recognition that faith is important for the wellbeing of some individuals and that many religious institutions – directly or through what the Bill characterises as ethos

organisations – make a contribution to the community. That freedom encompasses pastoral support for members and action to propagate the specific faith, something that often involves condemnation of other faiths and condemnation of people whose lives are contrary to the doctrine of that faith. Such condemnation is often contrary to the values of many Australians. Few people for example adhere rigorously to the prohibitions in Leviticus and many people are unfussed about the expression of a same sex affinity (something that as we note below has been both decriminalised in all Australian jurisdictions and recognised through anti-discrimination law). Consistent with both the international human rights framework and contemporary values law has progressively sought to recognise the dignity of all people even where that may be contrary to the doctrine of some faiths. Law for example does not regard women as necessarily subordinate and does not condemn people whose marriage lasts less than a lifetime.

As we note in the following paragraphs, the Bill seeks to give faith a special status that overrides other human rights and disregards a range of anti-discrimination law. Granting faith a special status is contrary to human rights principles, is not expected by most Australians (the silent majority) and will result in disharmony. Any move to erode the anti-discrimination law that has been established across Australia over the past thirty years must be scrutinised and cannot be based on unsubstantiated claims regarding a need for special recognition of religious entities and adherents.

The recommendations relevant to NSW from the Expert Panel Report: Religious Freedom Review (2018)

The 2018 Expert Panel Report (aka Ruddock Report) features a range of recommendations relevant to NSW in its 136 pages. Regrettably, many of those recommendations are contradictory and their basis remains contentious rather than providing a coherent statement of principle as the basis for community support. In this section of the submission we address specific recommendations. Our comments should be read in conjunction with the analysis regarding the Committee's other Terms of Reference and provisions in the Bill.

Review

Recommendation 1 of the Report calls on jurisdictions that retain exceptions or exemptions in their anti-discrimination laws for religious bodies with respect to race, disability, pregnancy or intersex status should review them, having regard to community expectations.

We note that the NSW Government has not tasked the NSW Law Reform Commission with such an overarching review. The Bill under consideration by the Committee implies that there is a need for a review but, importantly, does **not** signify that there is a community consensus in favour of privileging the expression of religion over other rights. In thinking about Recommendation 1 we note that it is exclusive rather than inclusive and thus does not address attributes such as gender and sexual affinity. Those attributes are salient for the flourishing of many Australians. They remain bases for both abhorrent discrimination and vilification. The NSW anti-vilification regime is important for community and individual wellbeing.[16] The regime will be eroded through adoption of the Bill.

Siracusa Principles

Recommendation 2 refers to all governments having regard to the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil & Political Rights

[16] As noted in recent testimony to the Victorian Legislative Assembly Legal & Social Issues Committee by Dr Arnold and Dr Bonython, the *Racial and Religious Tolerance Act 2001* (Vic) should be updated to emulate the NSW anti-vilification regime and thereby give greater substance to Victoria's 2006 *Charter of Human Rights & Responsibilities*.

(ICCPR) when drafting laws that would limit the right to freedom of religion.

That recommendation refers to being conscious of both the Siracusa Principles and the ICCPR. It does not require that the NSW government displace other human rights – including those outlined in the ICCPR – by privileging religious expression.

The Siracusa Principles are not international law. They have not been adopted by Australia through an international agreement implemented through a Commonwealth statute. They do not privilege religious belief, practice and expression by overriding other human rights or superseding law. Instead the Principles state that restrictions on human rights under the ICCPR must meet standards of

- proportionality,
- legality,
- evidence-based necessity, and
- gradualism.

Rights under the UDHR and under the interpretation of the ICCPR through the Siracusa Principles are holistic. Limitations on rights respond to a pressing public or social need in proportionately pursuing a legitimate aim through the least restrictive means required for achieving the purpose of the limitations. Any limitation must be neither discriminatory nor arbitrary and must be carried out in accordance with the law. The burden of justifying a limitation upon a right lies with the state seeking to impose the limitation.[17]

Objects/Purpose Clauses

Recommendation 3 in the Report is that Commonwealth, State and Territory governments should consider the use of objects, purposes or other interpretive clauses in anti-discrimination legislation to reflect the equal status in international law of all human rights, including freedom of religion.
That recommendation is at odds with the Bill, given that the proposed amendment would the expression of religious adherence as superior to and over-riding other human rights

Employment and Enrolment in religious schools

The Report's recommendations are confusing and at odds with the UDHR and subsidiary agreements such as the ICCPR. Although they may be politically opportune they are inconsistent, privilege religious expression at the expense of other human rights, and will permit vilification as discussed above. They will undermine human rights generally.

Recommendation 6 is that jurisdictions should abolish any exceptions to anti-discrimination laws that provide for discrimination by religious schools in employment on the basis of race, disability, pregnancy or intersex status. That recommendation is consistent with the overall body of Australian human rights law and more subtly reflects the significant support provided by governments to parochial schools. However Recommendation 5 calls for amendment by the Commonwealth of the *Sex Discrimination Act 1984* (Cth) to enable religious schools to lawfully discriminate on the basis of sexual orientation, gender identity or relationship status if that discrimination is founded in the precepts of the religion and there is compliance with administrative requirements. The effect of the two recommendations is for NSW and the other

[17] United Nations Economic and Social Council UN Sub-Commission on Prevention of Discrimination and Protection of Minorities. The Siracusa Principles on the limitation and derogation provisions in the International Covenant on Civil and Political Rights, Section I.A.12 UN Doc. E/CN.4/1985/4, Annex. (UNHCR, 1985).

states/territories to weaken their anti-discrimination regimes in favour of the narrower Commonwealth regime that disregards particular attributes. It will more broadly further entrench oppression/marginalization , contrary to the values of most Australians who have endorsed NSW law's respect for LGBTQI family members and friends.

As a corollary Recommendation 7 refers to amendment of the *Sex Discrimination Act 1984* (Cth) to enable discrimination on the basis of sexual orientation, gender identity or relationship status if that discrimination is founded in the precepts of the religion, there is compliance with administrative requirements and the school has 'regard to the best interests of the child as the primary consideration in its conduct'. That is at odds with the call in Recommendation 8 for jurisdictions to abolish any exceptions to anti-discrimination laws that provide for discrimination by religious schools with respect to students on the basis of race, disability, pregnancy or intersex status. We assume that fundamentalist institutions will typically consider that it is in the best interests of the child to engage in practices such as 'gay conversion' in accord with that institution's interpretation of religious texts. Most Australians and most clinicians would disagree.

Belief and Non-belief

Those recommendations privilege the expression of religious belief. That privileging, which we have suggested above is inconsistent with the UDHR characterisation of rights as universal and indivisible (ie faith does not have a higher status that trumps other rights) is also inconsistent with Recommendation 16 of the Report, which calls on New South Wales to amend its anti-discrimination laws to prohibit discrimination on the basis of an individual's absence of religious belief or that person's 'religious belief or activity'. The Report attempts to square the circle by stating that 'consideration should be given to providing for the appropriate exceptions and exemptions'. We note that the Recommendation refers to consideration rather than a requirement and is silent on the provision of government funding to religious institutions that in expressing faith (and tacitly maintaining a competitive position) will stigmatise adults and minors on the basis of sexual affinity, marital status and gender.[18]

Susceptibilities

Recommendation 12 refers to exclusions that are 'necessary to avoid injury to the religious susceptibilities of adherents of that religion'. The privileging of the susceptibilities of religious adherents is problematical. the Report does not provide a coherent explanation of why it is imperative to recognise the sensitivities of people with a religious faith and to protect those people from offence, especially as some adherents are likely to seek to be offended. If NSW and the Commonwealth are to protect 'susceptibilities' that should be done on a neutral basis, respecting the godly and ungodly alike. Legislation should not seek to entrench an injustice in the guise of protecting a human right.

Exponents of hate speech such as the Westboro Church should face the same scrutiny and robust criticism that is faced by non-believers who would not be respected under Recommendation 12.[19] It is likewise in the community interest for vigorous and sustained

[18] Our reference here to gender is deliberate, given recognition that fundamentalists within Christianity, Islam, Judaism and other religions have recurrently characterised women as unworthy, deficient and necessarily subservient to male authority.

[19] See for example Sandy Powell, 'Westboro Baptist Church takes aim at Margaret River high school students' *WA Today* (27 March 2014) at https://www.watoday.com.au/national/western-australia/westboro-baptist-church-takes-aim-at-margaret-river-high-school-students-20140327-35kye.html

scrutiny of the approach by faith-based entities to sexual or other abuse by clergy and adherents, irrespective of injury to the religious susceptibilities of adherents.[20]

We note that the proposed legislation will allow religious adherents to vilify other faiths and religious entities. It will allow employees and others to invoke the protection of faith in vilifying non-believers. In privileging faith it will not give the same protection to non-believers. We consider that inequity will result in both litigation at the national level and in disharmony within NSW, with adherents and non-adherents alike in practice looking favourably on the Victorian regime.

A Protection Role

Recommendation 19 of the Report is that the Australian Human Rights Commission (AHRC) should take a leading role in the protection of freedom of religion, centred on enhancing dialogue and within the existing commissioner model.

We consider that measures to foster dialogue are appropriate and note that NSW agencies have indeed encouraged community understanding over the past two decades. It is appropriate that such encouragement should continue and not be left to the Commonwealth. Both the Bill and the 2nd Reading Speech demonstrate that there is a substantive need for deepening community awareness of human rights principles, in particular that the expression of religious doctrine or affinity does not supplant other human rights. The Commonwealth government has been parsimonious about funding the AHRC. Irrespective of whether the Bill is adopted, it is necessary for the NSW government to foster community wellbeing through funding of state human rights, dispute resolution and education agencies.

The interaction between Commonwealth and NSW anti-discrimination laws and the desirability of consistency between those laws

Consistency between the laws of the different Australian jurisdictions (ie the states, territories and Commonwealth) is highly desirable and has accordingly been a recognised priority in policy development over several decades.

That consistency, which typically takes the form of 'harmonising up', reflects the reality of Australians interacting across borders – in person and electronically – and legitimately questioning why law in some places lags behind what is evident in other locations within Australia or in comparable jurisdictions such as Canada and New Zealand that have enshrined human rights in their constitutions.

A disregard of consistency results in litigation, particularly where a state is at odds with a Commonwealth power that is invoked through international obligations. One example was *Croome v Tasmania* [1997] HCA 5 regarding Australia's adherence to the International Covenant on Civil & Political Rights (ICCPR). It is also likely to determine major investment decisions and thus affect state revenue. That is significant because most major overseas corporations are influenced by perceptions that a particular jurisdiction is more respectful of diversity and otherwise more progressive than an alternate jurisdiction. NSW has emphasised the state as a destination for investment and has encouraged the migration of skilled people. That emphasis is not a matter of statute but is underpinned by a legal regime in which human rights are valued and in which the employment relationship is coherent.

As noted above we consider that the proposed amendment to the *Anti-Discrimination Act 1977* (NSW) will receive strong criticism from business, civil society bodies and individuals in other Australian jurisdictions on the basis of practicality and principle.

[20] We note the stances adopted by a wide range of denominations and ethos organisations prior to and during the Royal Commission into Institutional Responses to Child Sexual Abuse.

(i) The draft Religious Discrimination Bill 2019 (Cth) which has been released for public consultation

The authors of this submission provided two detailed submissions to the public consultation regarding the 2019 Commonwealth Religious Discrimination Bills. Those submissions are available on request or from the Ruddock report site.

As highlighted above, the Bills represent an effort to 'square the circle'. They do not provide a workable basis for implementation of the NSW Bill. They are at odds with the body of Australian human rights law at the national and state/territory levels. They have been criticised in a succession of fora,[21] with observers being forgiven for concluding that the proposals are as much a matter of 'culture wars' as they are of practical responses to substantive problems regarding human rights.

Our assessment, along with that of other scholars and practitioners, is that the proposed Commonwealth regime is not viable. The Bills are at odds with a range of existing Commonwealth, state and territory law. At a technical level it is difficult to see how the Bills can be successfully implemented. Rather than fostering harmony they will result in division. Our assessment is that they will result in litigation, as stakeholders assert rights, contest administrative interpretation of fuzzy legislation and seek to build coalitions or reinforce institutional legitimacy through action that gains publicity.

Ultimately Australians should be seeking to engage in respectful discourse rather than relying on litigation that is fostered by defective enactments: defective because of inadequate drafting and defective because it invites some stakeholders to privilege their rights – or what they deem to be their rights – at the expense of their peers.

(ii) The Australian Law Reform Commission's reference into the Framework of Religious Exemptions in Anti-discrimination Legislation

We begin by noting that the ALRC report regarding the reference has been deferred into the indefinite future and thus provides no guidance regarding the NSW Bill.[22] One response might be that consideration of the Bill should be deferred until the Commission's report is released.

The ALRC is considering Recommendations 1, 5, 6, 7 and 8 of the Ruddock Review with a view to advising on legislative reforms that would

> limit or remove altogether (if practicable) religious exemptions to prohibitions on discrimination, while also guaranteeing the right of religious institutions to conduct their affairs in a way consistent with their religious ethos.

As of July 2020 the ALRC has received a small number of submissions. It is unclear whether the Commission will receive a large number of further submissions and whether the consultation will meaningfully contribute to community understanding of balances in human rights or otherwise provide the basis for resolution of intractable disagreements regarding special claims on the basis of religious adherence. Given fundamental flaws in the Bill under consideration by the Committee we suggest that the most practical response to the proposed legislation is to reject the Bill outright, with referral of religious privileging to the NSW Law

[21] See for example Senate Legal and Constitutional Affairs Committee, Inquiry into Legislative exemptions that allow faith- based educational institutions to discriminate against students, teachers and staff

[22] In March this year the Commonwealth Attorney-General amended the ALRC's reporting deadline to be 12 months from the date the Religious Discrimination Bills are passed by Parliament. The Bills have not been passed and are unlikely to become law during the height of the COVID-19 pandemic.

Reform Commission once the ALRC has published its report and the NSW Parliament has a better sense of community expectations.

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