Submission No 2

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

Name: Professor Michael Quinlan and Professor A. Keith Thompson

Date Received: 30 July 2020

Submission of Professor Michael Quinlan and Professor A. Keith Thompson to the Joint Select Committee on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020

We refer to the email dated 10 July 2020 which Professor Quinlan received from The Honourable Gabrielle Upton MLC, Committee Chair of the Joint Select Committee on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 (the Committee) inviting him to make a submission to the inquiry. Please accept this joint submission from Professor Quinlan and Professor Thompson as a response to that invitation. Professor Quinlan is the Dean of the School of Law, Sydney of The University of Notre Dame Australia (Notre Dame). He is a board member of Freedom For Faith (FFF), on the advisory board of the Catholic Archdiocese of Sydney's Anti-Slavery Taskforce (the Taskforce), a Vice President of the St Thomas More Society (the Society) and a member of the Wilberforce Foundation (the Foundation). Professor Quinlan holds Bachelor of Laws, Bachelor of Arts and Master of Laws degrees from the University of New South Wales and a Master of Arts (Theological Studies) (with High Distinction) degree from Notre Dame. This submission is made by Professor Quinlan in his personal capacity and not as a representative of Notre Dame, FFF, the Taskforce, the Society or the Foundation.

Porfessor Quinlan has written extensively in relation to law and religion. His papers include "How the law in Australia is used and can be used to promote or to harm the Catholic faith",[1] "Religion, Law and Social Stability in Australia,"[2] "Marriage, Tradition, Multiculturalism and the Accommodation of Difference in Australia,"[3] "When the State requires doctors to act against their conscience: the religious implications of the referral and the direction obligations of health practitioners in Victoria and New South Wales,"[4] "Such is Life" Euthanasia and capital punishment in Australia: consistency or contradiction?,"[5] "A great nation? The changing place of religion in law and society in colonial and contemporary Australia: reflections on Murray in an Australian context"[6] and "The 21st century Catholic lawyer."[7] My book chapters include:
"Taking The Right Way Back: The Truth In An Era Of Challenges to Freedom Of Religion in Australia,"[8] and "Sacrificing Dignity to Protect Dignity: Human Dignity and Exclusion Zones in

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[1] *Catholics and Law Congress*, Turon, Poland, November, 2013 accessible at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2970833

[2] *22nd Annual International Law and Religion Symposium*, Brigham Young University, Provo, Utah, USA, October 2015 accessible at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2970897

[3] (2017) *The University of Notre Dame Australia Law Review*: Vol. 18 , Article 3. accessible at: http://researchonline.nd.edu.au/undalr/vol18/iss1/3

[4] (2016) *Brigham Young University Law Review* 1237 (2017) accessible at: http://digitalcommons.law.byu.edu/lawreview/vol2016/iss4/7

[5] (2016) *Solidarity: The Journal of Catholic Social Thought and Secular Ethics*: Vol. 6: Iss.1, Article 6. accessible at: http://researchonline.nd.edu.au/solidarity/vol6/iss1/6

[6] *St Marks' Review* [forthcoming July 2020]

[7] 16 *Ave Maria Law Review* (2018) 36 accessible at: https://heinonline.org/HOL/LandingPage?handle=hein.journals/avemar16&div=5&id=&page

[8] *Forgotten Freedom No More Protecting Religious Liberty in Australia* (ed Robert Forsyth and Peter Kurti) Connor Court, 2020.

Australia. ”[9] The submission begins with an executive summary followed by a discussion on religious freedom. This submission then specifically addresses the questions raised by the Terms of Reference.

Profesor Thompson is the Associate Dean of Notre Dame’s School of Law, Sydney. He is the Secretary of SEIROS, a public company limited by guarantee to supervise independent research into the Economic Impact of Religion on Society, a member of the Wilberforce Foundation and a Senior Fellow of the International Center for Law and Religion Studies (the ICLRS) at the J Reuben Clark Law School at Brigham Young University in the United States. Professor Thompson holds Bachelor of Laws (Hons) and Master of Jurisprudence degrees from The University of Auckland and a Doctor of Philosophy degree from Murdoch University. This submission is made in Dr Thompson’s personal capacity and not as a representative of Notre Dame, SEIROS, the Foundation, or the ICLRS.

Professor Thompson has written extensively in relation to law and religion. His papers include “The Liberties of the Church and the City of London in the Magna Carta”,[10] “Freedom of Religion and Freedom of Speech – The United States, Australia and Singapore compared”,[11] “The under-theorisation of religious freedom in Polynesia – Two Case Studies”,[12] “Maintaining Religious Identity in Hiring in Faith-based Schools: A Comparative Analysis of Australia and the United States”,[13] ““Should Religious Confession Privilege be Abolished in Child Abuse Cases? Do Child Abusers Confess their Sins?”,[14] “The Persistence of Religious Confession Privilege”,[15] “A Commonwealth Religious Discrimination Act for Australia?”,[16] “Maintaining Religious Identity in Hiring in Faith-Based Schools: A Comparative Analysis of Australia and New Zealand”,[17] and “Ethos schools in Australia and the ‘New Australian Religious Discrimination Act 2020’”.[18] Dr Thompson’s book chapters include: “The Economic Impact of Volunteering and Donation”,[19] “Religious Freedom under the *Australian Constitution* and recommendations that Religious Confession Privilege should be abolished”.[20]

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[9] *The Inherence of Human Dignity Volume II: Dignity, Law and Religious Liberty* (ed Barry Bussey, Angus Mengue) Anthem Press, 2020 (forthcoming).
[10] (2016) *Ecclesiastical Law Journal*, 18 (3), 271-290.
[11] *Journal of Law and Social Sciences* (2017) Vol. 6, No.1
[12] 17 *Macquarie Law Journal* (2017) 83.
[13] (Co-written with Professor Charles Russo) 21 *International Journal of Law & Education*, 2017, 56.
[14] 8 *Western Australian Jurist*, October 2017.
[15] In *Research Handbook on Law and Religion*, Rex Ahdar (ed.), Edward Elgar Publishing, Cheltenham, UK, 2018.
[16] *Solidarity, The Journal of Catholic Social Thought and Secular Ethics*, Volume 7, Issue 1 (2017).
[17] 22 *International Journal of Law & Education*, 2019, 32.
[18] 23 *International Journal of Law & Education* (2020) 23-36.
[19] In *Religious Freedom in Australia – a new Terra Nullius?* (Iain T. Benson, Michael Quinlan and A. Keith Thompson eds) Shepherd Street Press, Redland Bay, Queensland, 2019.
[20] In *Religious Freedom in Australia – A new Terra Nullius?* (Iain T. Benson, Michael Quinlan and A. Keith Thompson eds) Shepherd Street Press, Redland Bay, Queensland, 2019.

Executive Summary

1. Religious freedom is a fundamental human right which is recognised by international law.
2. It protects the rights of individual religious believers and religious institutions.
3. Commonwealth and NSW anti-discrimination laws are presently defective because they fail to include religious belief as a protected characteristic.
4. The Ruddock Religious Freedom Review recommended the inclusion of religious belief as a protected category in Commonwealth and NSW anti-discrimination law.
5. The Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 seeks to remedy a long-standing gap in NSW law. The passage of the Bill should not be delayed pending any progress by the Commonwealth in its own response to the Ruddock Religious Freedom Review.

I. Religious Freedom generally

Australian Courts have made numerous statements recognising the importance of religious freedom. It has been described as "the paradigm freedom of conscience,"[21] "the essence of a free society,"[22] "a fundamental concern to the people of Australia,"[23] "a fundamental freedom"[24] and as "a fundamental right because our society tolerates pluralism and diversity and because of the value of religion to a person whose faith is a central tenet of their identity."[25] Australian Courts have recognised "the importance of the freedom of people to adhere to the religion of their choice and the beliefs of their choice and to manifest their religion or beliefs in worship, observance, practice and teaching."[26] The inclusion of a religious freedom provision in the *Australian Constitution* itself demonstrates that this freedom was considered one of particular moment in Australia at Federation. Whilst the *Australian Constitution* gives the Commonwealth powers in "what may be broadly described as public economic or financial subjects" [27] and protects or confers very few rights on individuals, s116 contains a proscription on the Commonwealth establishing a State religion or imposing any religious test for the holding of any Commonwealth office. It also prevents the Commonwealth from prohibiting the free exercise of religion.[28] There have only been a few cases which have considered this section[29] and no religious believer

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[21] *Church of the New Faith v Commissioner of Pay-Roll Tax (Vict)* 154 CLR 120 [1982-1983] 130 per Mason ACJ and Brennan J and *Aboriginal Legal Rights Movement Inc v State of South Australia and Iris Eliza Stevens* (1995) 64 SASR 551, 557

[22] *Church of the New Faith v Commissioner of Pay-Roll Tax (Vict)* 154 CLR 120 [1982-1983] 150 per Murphy J

[23] *Canterbury Municipal Council v Moslem Alawy Society Ltd* (1985) 1 NSWLR 525, 543

[24] *Aboriginal Legal Rights Movement Inc v State of South Australia and Iris Eliza Stevens* (1995) 64 SASR 551, 552 and 555

[25] *Christian Youth Camps Ltd v Cobaw Community Health Services Limited* [2014]] VSCA 75 [560] per Redlich JA.

[26] *Evans v New South Wales* 168 FCR 576 [2008], 580

[27] *Russell v Russell* [1976] 134 CLR 495, 546 (*Russell v Russell*).

[28] Section 116 of the *Australian Constitution* provides that "The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth."

[29] *Krygger v Williams* (1912) 15 CLR 366;*Adelaide Company of Jehovah's Witnesses v Commonwealth* (1943) 67 CLR 116; *Attorney-General (Vic); Ex Rel Black v Commonwealth* (1981) 146 CLR 559; *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120; *Williams v Commonwealth* (2012) 288 ALR 410. See discussion in Denise Meyerson, *The Protection of Religious Rights Under Australian Law*, 2009 BYU L.Rev.529 (2009), 538-540. *available a*t http://difitalcommons.law.byu.edu/lawreview/vol2009/iss3/3 and Paul Babie

has yet been afforded relief from Commonwealth legislation relying on s116. Whilst the Commonwealth and NSW have both passed anti-discrimination legislation protecting persons with a range of characteristics from discrimination there is currently no over-arching Commonwealth or NSW law protecting religious freedom or proscribing religious discrimination in NSW or by the Commonwealth. It as an important principle both in Australian and international law.

Australia is party to a number of international agreements which recognise the right to freedom of religion. For example, Article 18 of the 1948 *Universal Declaration of Human Rights* provides that:

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 18(1) of the *International Covenant on Civil and Political Rights* (ICCPR), which Australia has been a party to since 1980, provides that:

> Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private to manifest his religion or beliefs in worship, observance, practice and teaching.

The United Nations Human Rights Committee, established under Article 29 of the ICCPR, has recognised that:

> The freedom to manifest religion or belief may be exercised "either individually or in community with others and in public or private". The freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts …[30]

Under Article 2 of the ICCPR, Australia undertook to respect and ensure that everyone within Australia and subject to Australian jurisdiction, recognises the rights in the ICCPR. Article 9 of the *European Convention on Human Rights* (ECHR), which recognises the right to freedom of thought, conscience and religion, is in substantially the same terms as Article 18(1) of the ICCPR.

Australia is a pluralist, multi-faith, multi-racial society.[31] Whilst the religious landscape of Australia is a constantly evolving one and identification with the Christian faith traditions has been falling, in Australia more people continue to identify as Christian than with other religions or with no religion.[32] According to self-identification with religion revealed in the

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and Neville Rochow, *Feels Like Déjà vu: An Australian Bill of Rights and Religious Freedom,* 2010 BYU.L.Rev.821 (2010*),* 829-832 *available a*t http://digitalcommons.law.byu.edu/lawreview/vol2010/iss3/8

[30] General comment no 22 [4])

[31] Australian Bureau of Statistics, *Report 2071.0 - Reflecting a Nation: Stories from the 2011 Census, 2012–2013 available at* http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2071.0main+features902012-2013 accessed 26 October 2015. Roy Williams, *Post God Nation?* (ABC Books, 2015) at 113-114. This has been recognised by a number of Australian Courts see e.g. *Canterbury Municipal Council v Moslem Alawy Society* (1985) I NSWLR 525 at 543 [E] and *Christian Youth Camps Ltd v Cobaw Community Health Service Ltd* [2014] VSCA 75 at [560] per Redlich JA.

[32] A detailed examination of the influence of Christianity is well beyond the scope of this submission but a good survey can be found in Williams ibid 1-141. Between 2001 and 2011 the proportion of the Australian

last census, NSW is the most religious state in Australia with 65.3% of the population identifying themselves as belonging to a religion (Christian 55.2%/Other religions 10.1%) and 25.5% of the NSW population identifying with no religion.[33] Those statistics reveal an increasing diversity of belief systems within the NSW population. The European Court of Human Rights (ECHR) has observed that the maintenance of pluralism is dependent on maintaining freedom of religion.[34] In *Sindicatul "Pastorul Cel Bun" v Romania* (2014) 58 EHHR 10 the Grand Chamber of the European Court of Human Rights stated that:

> [136] The autonomous existence of religious communities is indispensable for pluralism in a democratic society and is an issue at the very heart of the protection which Article 9 affords. It directly concerns not only the organisation of these communities as such but also the effective enjoyment of the right to freedom of religion by all their active members. **Were the organisational life of the community not protected by Article 9, all other aspects of the individual's freedom of religion would become vulnerable**[35] **[emphasis added]**

Prior to Australia ratifying the ICCPR, there have been cases in Australia in which the Courts have not honoured this "autonomous existence of religious communities," For example, in *Wylde v Attorney-General for NSW* (1948) 77 CLR 224, it was alleged that the Anglican Bishop of the Diocese and the Church of England Property trust for the Diocese of Bathurst had breached their trusts by conducting services other than in accordance with the order of the Sacrament of Holy Communion as set out in the Book of Common Prayer of 1662. It was argued that this was using the church other than for or for the use benefit or purposes of the Church of England in NSW. Latham CJ, quoted Lord Davey from the *Free Church case* in 1904 in the UK and confirmed what would later be called the "autonomous existence of religious communities" when he said

> I disclaim altogether any right to discuss the truth or reasonableness of any of the doctrines of this or any other religious association or to say whether any of them are or are not based on a just interpretation of the language of Scripture or whether the contradictions or antimonies between different statements of doctrine are or are not real of apparent only....The more humble but not useless function of the civil court is to determine whether the trusts imposed upon property by the founders of the trust are being duly observed.[36]

Having endorsed that statement, he then found that in the absence of ecclesiastical courts in NSW he would need to determine the doctrinal questions which arose himself.[37] With the majority he then dismissed the appeal by considering a mixed issue of trust and

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population identifying with a Christian faith tradition fell from 68% in 2001 to 61% in 2011 and this trend was also evident in the two most commonly reported denominations: Catholicism and Anglicanism. In 2001, 27% of the population reported an affiliation to Catholicism and this had fallen to 25% of the population in 2011: Australian Bureau of Statistics above n20.

[33] Australian Bureau of Statistics, "2071.0 - Census of Population and Housing: Reflecting Australia - Stories from the Census, 2016." https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/2071.0~2016~Main%20Features~Religion%20Data%20Summary~70

[34] *Case of Eweida And Ors v The United Kingdom* ECHR 48428/10,59842/10,51671/10 and 36516/10 15 January 2013 (*Eweida*) 30 [79]

[35] *Sindicatul "Pastorul Cel Bun" v Romania* (2014) 58 EHHR 10 [136] as quoted in *Iliafi v Church of Jesus Christ Of Latter Day Saints Australia* (2014**)** 311 ALR 354 (*Iliafi*) [77]

[36] *Wylde v Attorney-General for NSW* (1948) 77 CLR 22423 [19]

[37] Ibid [41]

doctrine.[38] Dixon J would have respected the independence of the Church of England and allowed the appeal on the ground that:

> this decree goes beyond and outside the administration of the charitable trusts and undertakes the completely different function of determining questions of ritual and ecclesiastical practice, of correcting the bishop for a failure or supposed failure to observe the liturgy of the Church and of enforcing its observance in the future [39]

With respect to Chief Justice Latham, Justice Dixon's approach was the correct approach and one that ought to be followed by this Commission and by Australian Courts. In other countries, including Germany, the right of religions to govern their internal affairs has been more fully respected. For example, the Federal Constitutional Court has held that:

> what is meant by the Church's own affairs is determined particularly by how the Church itself views its own affairs, although competence to take final decisions on the basis of the Basic Law is still reserved for the State Courts[40]

The nature of the right to freedom of religion in Australia, was considered by Kenny, Greenwood and Logan JJ of the Federal Court of Australia in *Iliafi.* This case concerned the rights of a church to determine the language to be used in its religious services. As the Court there noted:

> The right to freedom of religion is a complex right regarding religious beliefs and practices of worship. In *Metropolitan Church of Bessarabia v Moldova* (2002) 35 EHHR 13 (*Church of Bessarabia*), the European Court of Human Rights described religious freedom in the following way (at [114] and [117]):
>
> > [114] While religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to "manifest [one's] religion" alone and in private or in community with others, in public and within the circle of those whose faith one shares. *Bearing witness in words and deeds is bound up with the existence of religious convictions.* That freedom entails, inter alia, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion … Article 9 lists a number of forms which manifestation of one's religion or belief may take, namely worship, teaching, practice and observance. Nevertheless, Article 9 does not protect every act motivated or inspired by a religion or belief …
> >
> > [117] [I]n principle the right to freedom of religion for the purposes of the Convention excludes assessment by the State of the legitimacy of religious beliefs *or the ways in which those beliefs are expressed.* [Citations omitted; emphasis added.] [41]

The European Commission and the European Court of Human Rights have both recognised that the freedom of religion guaranteed by ECHR Article 9 is a right enjoyed both by individuals and by churches on their behalf.[42] As the Court in *Iliafi* further noted:

> the European Commission of Human Rights [has recognized] that the right to freedom of worship required protection of both the possibility to worship alone and in community with others: see, for example, *X v United Kingdom* (1982) 4 EHHR 126 at [5]."[43]

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[38] Ibid [39] – he considered whether these infringements of the order of service prescribed in the Prayer Book of 1662 constitute breaches of trust or whether they are matters for internal regulation by local church authorities

[39] Ibid [9]

[40] Gerhard Robbers, *State and Church in Germany,* in *State and Church in the European Union,* (2nd ed., Gerhard Robbers ed., Nomos, 2005) 77, 79

[41] *Iliafi* [74]

[42] Ibid [76]

This is explained by the nature of a church. A church is, as the European Commission stated, in *Prussner v Germany* (1984) 8 EHRR 45 at 79 (*Prussner*), "an organised religious community based on identical or at least substantially similar views" and is "itself protected in its right to manifest its religion, to organise and carry out worship, teaching practice and observance, and *it is free to enforce unanimity in these matters*" (emphasis added). In *Church of Bessarabia*at [118], the European Court expressly linked individual religious freedom to the protection of the autonomy of the collective church, stating that:

> [118] [S]ince religious communities traditionally exist in the form of organised structures, Article 9 must be interpreted in the light of Article 11 of the Convention, which safeguards associative life against unjustified State interference … **Indeed the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Articles 9 affords …** [Citation omitted; emphasis added.]

The European Court of Human Rights has repeatedly affirmed this statement: see, for example, [78] below; see also J Rivers, "Religious Liberty as a Collective Right" (2001) 4 *Law and Religion: Current Legal Issues* 227.

II. The need for the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 (the Bill)

The Articles of the ICCPR, the Universal Declaration of Human Rights and other potentially relevant international instruments[44] have not been domesticated in Australia or in NSW. Rather than introducing over-arching protections of freedom of religion of the type contemplated by the ICCPR and other international instruments, Australia and NSW have instead provided some protections in specific legislation in designated areas.[45] These are some of very few good Australian examples of the accommodation of religious freedom and belief. This approach is to be contrasted with the approach that the Commonwealth and NSW have each taken towards protecting other characteristics via anti-discrimination law.

Whilst law cannot resolve every conflict, it does have an important role to play in identifying what is important to people and to a society. Where a society creates rights and protects people with certain characteristics without recognising those of others, it is sending a

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[43] Ibid [75]

[44] Such as *the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based On Religion or Belief*, G.A.Res. 36/55, U.N.GAOR, 36th See Supp. No.51, U.N. Doc. A/RES/36/55 (Nov 25, 1981) [*Religion Declaration*]

[45] For example, although voting is compulsory in Australia if an elector has a religious belief that it is his or her religious duty to abstain from voting this will constitute a reasonable excuse under s 245(14) of the *Electoral Act* and s 45(13A) of the *Referendum Act see* Australian Electoral Commission, *Electoral Backgrounder: Compulsory voting* [41] *available at* http://www.aec.gov.au/About_AEC/Publications/backgrounders/compulsory-voting.htm. Exemptions are provided to religious bodies from a range of discrimination provisions to enable them to operate schools and to comply with their own doctrines in managing their own operations (e.g. *Sex Discrimination Act, 1984* (Cth) ss 5, 5A,14,21(3),23(3)(b), 37(1)(a),37(1)(d),37(2) and 38, *Age Discrimination Act 2004* (Cth) s35, the *Anti-Discrimination Act, 1977* (NSW) ss 8, 38S(2)(c), 49ZT(2)(c), 49ZXB(2)(c),49ZYB,49Y and 56()) and the *Equal Opportunity Act, 2010* (Vic) ss 83(1)-(2). For a summary of the exemptions from various discrimination provisions which are afforded to religious (and other) schools in Australia see Greg Walsh*, Religious Schools And Discrimination Law* (Central Press,2015) 1-11.

message to its citizens and to those visiting or examining that society about what is important to it. As the Australian Bahai Community noted in their Submission to Australian Human Rights Commission, *Inquiry Into Freedom of religion and Belief in 21st Century Australia* in 2011 "[T]here is a tendency to treat the right to freedom of religion or belief as less important than certain other civil and political rights and this right is often treated as a 'second class citizen' in the sphere of human rights.'[46] The situation that they accurately described in 2011 has certainly not improved since. The *Anti-Discrimination Act 1977* (NSW) (*the Act*) was passed at a time of less religious diversity and less conflict between belief systems than there is today and it betrays a failure to respect religious believers. As Laycock and Berg have observed:

> [C]ommitted religious believers argue that some aspects of human identity are so fundamental that they should be left to each individual, free of all nonessential regulation, even when manifested in conduct. For religious believers, the conduct at issue is to live and act consistently with the demands of the Being that they believe made us all and holds the whole world together.[47]
>
> No religious believer can change his understanding of divine command by any act of will…Religious beliefs can change over time…But these things do not change because government says they must, or because the individual decides they should … [T]he religious believer cannot change God's mind.[48]

Since religious belief is such an integral part of a person, a religious person can only flourish when they are freely able to worship and live their faith. As Anthony Lester has observed:

> Reconciling equality and religious freedom is particularly difficult. In a plural democratic society, cultural differences should be accorded equality for respect unless they are abusive or repressive. What to one group is praiseworthy to another group may seem anti-social; for example, wearing a niqab from head to toe.[49]

Amending *the Act* to include religious beliefs in the characteristics protected from discrimination by *the Act* is an obvious step which ought to have been taken long ago. It is regrettable that protections of persons with this attribute were not included in the Act when it was passed by the Wran government in 1977 and that despite recommendations from the Ruddock Religious Freedom Review in 2018 and many other inquiries which have identified the manifest deficiencies in protection for religious freedom in this country and State reform of this nature has not already been progressed.

III. The Recommendations of the Ruddock Religious Freedom Review in 2018

The Ruddock Religious Freedom Review recommended that:

[46] Submission No 1921

[47] Douglas Laycock and Thomas Berg, S*ame-Sex Marriage and Religious Liberty* 99 VIR. L.REV 1.[2013], 3

[48] Ibid 4.

[49] Anthony Lester, Five Ideas To Fight For(OneWorld, 2016)56.

> Commonwealth, State and Territory governments should have regard to the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights when drafting laws that would limit the right to freedom of religion.[50]
>
> 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.[51]
>
> 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.[52]

IV. The interaction of Commonwealth and NSW anti-discrimination law

The Ruddock Religious Freedom Review recommended that:

> 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, exemptions, including for religious bodies, religious schools and charities.[53]

It is significant that the Ruddock Religious Freedom Review recommended changes to both Commonwealth and to NSW anti-discrimination law. It did not envisage one Commonwealth law in this area over-arching all State and Territory laws. It envisaged amendments to legislation at a Commonwealth and State level with neither being dependent on the other. In response to the above recommendation the Commonwealth has distributed the draft Religious Discrimination Bill 2019 (Cth) for public consultation. The Commonwealth has also referred the Framework of Religious Exemptions in Anti-discrimination legislation to the Australian Law Reform Commission into. However, that reference is on hold pending the finalisation and passage of the passage of the Religious Discrimination Bill 2019 (Cth) which may or may not ever happen. The Commonwealth was not speedy in releasing the Ruddock Religious Freedom Review and it has not been speedy in progressing its recommendations. The COVID-19 pandemic seems to have slowed the slow progress of the response to the Ruddock Religious Freedom Review to a less than glacial place. NSW should not delay its response to the Ruddock Religious Freedom Review in the expectation that the pace of Commonwealth reform will be reinvigorated. The recommendations are independent and NSW and South Australia were singled out because they, unlike other States, have not protected religious believers from discrimination. NSW ought do so.

The Commonwealth could deal with the protection of religious freedom and preventing religious discrimination as a federal matter relying on the external affairs power, in the

[50] Recommendation 2, the Ruddock Religious Freedom Review, 5 https://www.ag.gov.au/sites/default/files/2020-03/religious-freedom-review-expert-panel-report-2018.pdf

[51] Recommendation 3, the Ruddock Religious Freedom Review, 5 https://www.ag.gov.au/sites/default/files/2020-03/religious-freedom-review-expert-panel-report-2018.pdf

[52] Recommendation 16, the Ruddock Religious Freedom Review, 5 https://www.ag.gov.au/sites/default/files/2020-03/religious-freedom-review-expert-panel-report-2018.pdf

[53] Recommendation 15, the Ruddock Religious Freedom Review, 5 https://www.ag.gov.au/sites/default/files/2020-03/religious-freedom-review-expert-panel-report-2018.pdf

Australian Constitution. Appropriately drafted given s109 the Commonwealth could seek to cover the field and override inconsistent State laws. However it is clear from s60 of the draft Religious Discrimination Bill 2019 (Cth) that the intention of the Commonwealth is that Commonwealth and State laws will each operate in this area if the draft Religious Discrimination Bill 2019 (Cth) is in fact ever passed. Section 60 provides that:

> **60 Relationship with State and Territory laws**
> (1) This Act is not intended to exclude or limit the operation of a law of a State or Territory to the extent that the law is capable of operating concurrently with this Act.
> Note: Nothing in this subsection detracts from the operation of Part 4.
> (2) If:
> (a) a law of a State or Territory deals with a matter dealt with by this Act; and
> (b) a person has made a complaint, instituted a proceeding or taken any other action under that law in respect of conduct engaged in and in respect of which the person would, but for this subsection, have been entitled to make a complaint under the *Australian Human Rights Commission Act 1986* alleging that the conduct is unlawful under a provision of this Act;
> the person is not entitled to make a complaint or institute a proceeding under the *Australian Human Rights Commission Act 1986* alleging that the act or omission is unlawful under a provision of this Act.
> (3) If:
> (a) a law of a State or Territory deals with a matter dealt with by this Act; and
> (b) conduct engaged in by a person that constitutes an offence against that law also constitutes an offence against this Act; the person may be prosecuted and convicted either under that law6 of the State or Territory or under this Act.
> (4) Nothing in subsection (3) renders a person liable to be punished more than once in respect of the same conduct.

The possibility that the draft Religious Discrimination Bill 2019 (Cth) may one day become law in some form and that the Australian Law Reform Commission may then at some future time report on the reference made it to it and there may be further law reform as a result should not stymie the NSW parliament from progressing long overview reform in this area.

V. Specific comments on the Bill

3. Principles of the Act

The Bill picks up recommendations 2 and 3 of the Ruddock Religious Freedom Review and appropriately refers to the specific limitations in Article 18(3) of the ICCPR.

22K Definition *religious ethos organisation*

This definition has the disadvantage of requiring a court to determine whether or not a private education authority, charity or other body "is conducted in accordance with the doctrines, tenets, beliefs or teachings or a particular religion." This has the result that Courts may be dragged into making determinations about what a particular religion's doctrines, tenets, beliefs or teachings might be and leaves for a Court the question of determining whether the particular organisation is or is not "conducted" (a question of fact) "in accordance with the doctrines, tenets, beliefs or teachings of a particular religion." A test which relied on what the institution said in its Objects or mission statement or published accessible policies would be clearer and more respectful of that religious autonomy which Dixon J endorsed in the *Wylde* case (1948) and which is referred to above.

Another option would be adopting the form of language of genuine belief which appears in s22M(1).

The definition by reference incorporates the meaning of the term "private education authority" which is defined in *the Act* as follows:

> ***private educational authority*** means a person or body administering a school, college, university or other institution at which education or training is provided, not being—
>
> (a) a school, college, university or other institution established under the *Education Act 1990* (by the Minister administering that Act), the *Technical and Further Education Commission Act 1990* or an Act of incorporation of a university, or
>
> (b) an agricultural college administered by the Minister for Agriculture.

Applying the *Interpretation Act 1987* (NSW) (see s12 extracted below) it would appear that a university established by a Federal, State or Territory Act other than a NSW Act of incorporation of a university would be included within definition (a) but a university established by a NSW Act would be excluded:

> 12 References to New South Wales to be implied
>
> (1) In any Act or instrument—
> (a) a reference to an officer, office or statutory body is a reference to such an officer, office or statutory body in and for New South Wales, and
>
> (b) a reference to a locality, jurisdiction or other matter or thing is a reference to such a locality, jurisdiction or other matter or thing in and of New South Wales.
>
> (2) In any Act or instrument, a reference to a body constituted by or under an Act or instrument need not include the words "New South Wales" or "of New South Wales" merely because those words form part of the body's name or title.

Whilst this would appear to be the correct construction of the definition of "private education authority" it would be preferable for the drafting to be clearer so that universities created by Acts or Parliament are not excluded if they are otherwise a "religious ethos organisation." The intention behind the definition of "private educational authority" is unclear and it seems not to respond to the current Australian environment in which some religious ethos organisations have been created by Acts of State Parliaments (such as Notre Dame which was created by an Act of the Western Australian parliament) and others (such as the Australian Catholic University) have not. [There seems no logical reason why the establishment of a university by an Act ought exclude it from the protections provided if it is otherwise a religious ethos organisation "conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion" given that Parliaments are able to incorporate educational institutions with or without a religious ethos.

22M Religious ethos organisations taken not to discriminate in certain circumstances
The language here is suitably broad but because only "a religious ethos organisation" attracts the protection of the section, the issues raised in relation to that definition in s22K above arise as a threshold question before s22M can apply.

22V Education
It would be preferable for a religious ethos organisation to be expressly exempted by s22V from the whole of s22V rather than having to rely on the general carve out in s22M. As drafted, s22V may impact on some such institutions from religious traditions which wish to enrol only students who share their religious beliefs which would then have to meet the tests in s22M in order to do so.

VI. Conclusion
The Bill is a positive attempt to remedy a long-standing gap in NSW law. The passage of the Bill should not be delayed pending any progress by the Commonwealth in its own response to the Ruddock Religious Freedom Review.

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