

**Submission  
No 10**

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

**Organisation:** FamilyVoice Australia (NSW)

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# Submission

on the

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

to the

### Joint Select Committee

Parliament House

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# 1. Introduction

The terms of reference for the inquiry into the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 are:

1. *A Joint Select Committee, to be known as the Joint Select Committee on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020, be appointed.*
2. *That the Committee inquire and report into the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020, including whether the objectives of the bill are valid and (if so) whether the terms of the bill are appropriate for securing its objectives.*
3. *That the Committee, in undertaking (2), have to regard to:*
  - a. *Existing rights and legal protections contained in the Anti-Discrimination Act 1977 (NSW) and other relevant NSW and Commonwealth legislation;*
  - b. *The recommendations relevant to NSW from the Expert Panel Report: Religious Freedom Review (2018);*
  - c. *The interaction between Commonwealth and NSW anti-discrimination laws and the desirability of consistency between those laws, including consideration of*
    - i. *The draft Religious Discrimination Bill 2019 (Cth) which has been released for public consultation, and*
    - ii. *The Australian Law Reform Commission's reference into the Framework of Religious Exemptions in Anti-discrimination Legislation.*
4. *The Committee will consult with key stakeholders as required.*

FamilyVoice Australia is a national Christian advocacy group – promoting family, freedom, and faith values for the benefit of all Australians. Our vision is to see strong families at the heart of a healthy society: where marriage is honoured, human life is respected, families flourish, Australia's Christian heritage is valued, and fundamental freedoms are enjoyed.

The closing date for the submissions is **Friday, 21 August 2020**.

## 2. Freedom of Religion

The concept of freedom of religion arises from the capacity of humans to order their lives by thought, belief and reason, rather than by instinct or compulsion. The first recorded reference to the terms is found in the writings of Tertullian, a Christian writer around AD 200:

*It is a fundamental human right, a privilege of nature, that every man should worship according to his own convictions.<sup>1</sup>*

Governments acknowledging the humanity of their citizens will recognise their inalienable right to freedom of thought, belief, and opinion, including the right to change religion or belief. As Augusto Zimmerman, a senior law lecturer at Murdoch University, has stated:

*...religion is not an isolated component of life, because religion has broad, holistic implications for the lives of its adherents as a worldview that shapes the way individuals think and act.<sup>2</sup>*

Princeton University Professor of Law Robert P. George has described the broad nature of religious freedom in this way:

*The US Commission on International Religious Freedom has stood for religious freedom in its most robust sense. It has recognized that the right to religious freedom is far more than a mere “right to worship.” It is a right that pertains not only to what the believer does in the synagogue, church, or mosque, or in the home at mealtimes or before bed; it is the right to express one’s faith in the public as well as private sphere and to act on one’s religiously informed convictions about justice and the common good in carrying out the duties of citizenship. Moreover, the right to religious freedom by its very nature includes the right to leave a religious community whose convictions one no longer shares and the right to join a different community of faith, if that is where one’s conscience leads. And respect for the right strictly excludes the use of civil authority to punish or impose civic disabilities on those who leave a faith or change faiths.<sup>3</sup>*

Freedom of religion includes three distinct elements:

- the freedom to form, hold and change opinions and beliefs without government interference;
- the freedom to manifest those beliefs and opinions in public or private through speech and actions;
- the freedom of parents to raise their children in accordance with their opinions, beliefs, and practices.

The ICCPR recognises these rights in Article 18:

1. *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 belief in worship, observance, practice and teaching.*
2. *No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.*
3. *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.*
4. *The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.*

The High Court of Australia has confirmed in its judgement on the “Scientology case” that the legal definition of religion involves both belief and conduct.<sup>4</sup> Justices Mason and Brennan held that “for the purposes of the law, the criteria of religion are twofold: first, belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief...”<sup>5</sup> Consequently, freedom of religion in Australia involves both freedom of belief and freedom of conduct giving effect to that belief.

### **3. Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020**

The object of the *Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020* is to amend the Anti-Discrimination Act 1977 (the Act):

- (a) *to establish principles of the Act for the purpose of reconciling conflicting human rights and anti-discrimination provisions, using international conventions and other instruments,*
- (b) *to define religious beliefs and activities in a comprehensive and contemporary way, making religious freedoms and the fair treatment of believers and non-believers possible,*

- (c) *to prohibit discrimination on the ground of a person's religious beliefs or religious activities in work and other areas, so that religion has protections equal to other forms of discrimination in NSW,*
- (d) *to prohibit discrimination against people who do not have any religious conviction, belief, opinion or affiliation,*
- (e) *to provide that a religious ethos organisation is taken not to discriminate on the ground of religious beliefs or religious activities by engaging in certain conduct because of the doctrines, tenets, beliefs or teachings of the religion of the organisation, so as to recognise that religion is integral to the existence and purpose of these organisations; and that religious and associational freedoms are fundamental to a free and democratic society.*
- (f) *to make it unlawful for an employer, qualifying body or educational authority to restrict, limit, prohibit or otherwise prevent people from engaging in a protected activity, or to punish or sanction them for doing so, or for their associates doing so,*
- (g) *to ensure the provisions of the Bill extend to discrimination concerning applicants and employees, commission agents, contract workers, partnerships, industrial organisations, qualifying bodies, employment agencies, education, goods and services, accommodation, registered clubs and State laws and programs, and*
- (h) *to limit exceptions to this part of the Act to those specified, such as for religious ethos organisations and genuine occupational qualifications, rather than encouraging tribunal activism.*

Australian society is becoming increasingly hostile to people of faith and religious freedom protections, which have been promised by the Federal Government but not yet delivered, are long overdue.

FamilyVoice stresses the following key points:

- In NSW, a person could be denied service in a shop or a contractor sacked because of their religious beliefs, and not have any legal remedy;
- People of faith don't need special rights, but it is only fair that their rights are respected equally with other rights. The current Act is skewed and unfair because it protects some rights, but does not protect religious belief;
- FamilyVoice is of the view that religious schools, hospitals and charities should be able to operate according to their religious beliefs, and should be able to preference the employment of staff who share the religious faith of that organisation;
- FamilyVoice is of the view that an employer should not be able to dictate how an employee expresses their religious views in his or her own time (e.g. on social media);
- FamilyVoice is of the view that the State should be neutral towards religion, and not be able to discriminate against people or religious organisation on the basis of religious belief when it comes to funding contracts or access to government programs.

NSW is out of step with most other States and Territories as it does not protect its citizens against religious discrimination. One of the recommendations of the Ruddock Review was that NSW should include religious belief and activity as a protected attribute, and this should be implemented as a matter of priority

FamilyVoice Australia broadly supports the legislation but notes there is room for amendments in several areas.

### **Section 3 – Siracusa Principles**

Section 3 provides that regard should be had to, *inter alia*, the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights.

This inclusion provides a more balanced approach with respect to religious freedom when it comes in conflict with competing claims, as subsection (2) makes clear:

*(2) In particular, in interpreting the requirement of the International Covenant on Civil and Political Rights, Article 18(3), that limitations upon a person’s right to manifest their religion or belief must only be made where such are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others, the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights provide that limitations must, amongst other matters—*

*(a) be prescribed by law,*

*(b) respond to a pressing public or social need,*

*(c) pursue a legitimate aim and be proportionate to that aim, and*

*(d) be applied using no more restrictive means than are required for the achievement of the purpose of the limitation.*

#### ***Recommendation 1***

***The insertion of the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights into section 3 should be supported.***

### **22K Definitions**

The Bill provides protection for “religious ethos organisation[s]” which it defines in section 22K as:

*a) a private educational authority that is conducted in accordance with the doctrines, tenets, beliefs, or teachings of a particular religion, or*

*b) a charity registered with the Australian Charities and Not-for-profits Commission under the Australian Charities and Not-for-profits Commission Act 2012 of the Commonwealth that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion, or*

*c) any other body that is conducted in accordance with the doctrines, tenets, beliefs, or teachings of a particular religion.*

While the intent of the protection of “religious ethos organisations” is welcome, the reality is that anti-discrimination tribunals have an unflattering record when determining such things as “doctrines, tenets, beliefs or teachings” of a religion. These are matters which are more theological than judicial and that may be understood by adherents but not carefully defined in writing. Courts, tribunals and judges are ill-equipped to determine such matters, as Justice Nettle observed in his *Catch the Fire* judgement: “In my view it was calculated to lead to error for a secular tribunal to attempt to assess the theological propriety of what was asserted at the Seminar.”<sup>6</sup>

In the *Catch the Fire* case in the Victorian Court of Appeal, Justice Nettle determined that the Victorian Civil and Administrative Tribunal had erred in nineteen findings.<sup>7</sup> In the *OV & OW v Wesley Mission* case, the NSW Supreme Court found that the NSW Anti-discrimination Tribunal had wrongly identified

the “religion”, wrongly determined the question of “doctrinal conformity” and was wrong about “religious susceptibilities”.<sup>8</sup>

A Commonwealth example also highlights the problem with inviting tribunals and courts to make determinations about religious matters. In 1998 the Catholic Education Office (CEO) of the Archdiocese of Sydney refused an applicant’s classification as a teacher because of her “high profile as a co-convenor of the Gay and Lesbian Teachers and Students Association and her public statements on lesbian lifestyles”.<sup>9</sup>

The CEO claimed a religious exemption under the *Sex Discrimination Act 1984* on the basis that homosexual behaviour ran contrary the “doctrines, tenets, beliefs and teachings of the Church”, which a teacher would be required to uphold. The matter was decided by the Australian Human Rights Commission (at that time the Human Rights and Equal Opportunity Commission).

The AHRC found against the CEO, not only acting as arbiter of what constituted Catholic teaching, but ruling that Catholic beliefs ran in favour of the complainant, Jacqui Griffin. In its ruling, the AHRC went so far as to say:

*If the employment of Ms Griffin would injure the religious susceptibilities of these students and their parents, the injury would be founded on a misconception. Indeed it would be not an injury to their religious susceptibilities but an injury to their prejudices.*<sup>10</sup>

These cases demonstrate the dangers of tribunals and courts being arbiters of “doctrines, tenets, beliefs or teachings”.

### **Recommendation 2**

***The definition of “religious ethos organisation” be reworked to overcome problems which religious organisations have encountered with courts and tribunals in the past regarding the “doctrines, tenets, beliefs or teachings” test, as well as in other sections of the legislation 22M & 22Z.***

### **22M Religious ethos organisations taken not to discriminate in certain circumstances**

Section 22M of the Bill provides that a religious ethos organisation is taken not to discriminate against another person on the ground of the person’s religious beliefs or religious activities by engaging in conduct which is consistent with the religion.

This is an important point as it is necessary that religious institutions be allowed to pursue their religious purposes by preferencing those who share the same religion in employment and in certain other contexts, and the proposed section 22M does this very well.

It also overcomes the problem that when religious organisations are merely permitted an exemption they are perceived negatively as discriminatory organisations. This provision highlights that religious organisations are not doing anything wrong but simply living out their faith.

Further, the provision makes NSW law consistent with international practice in this regard, namely Comment 18 of the of the United Nations Human Rights Committee which recognises that under the International Convention on Civil and Political Rights “not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate”.



### **Recommendation 3**

***The principle in section 22M of the Bill which provides that a religious organisation is taken not to discriminate against another person on the ground of the person's religious beliefs or religious activities by engaging in conduct which is consistent with the religion should be supported.***

### **22N Discrimination against applicants and employees**

Section 22N not only makes it unlawful for employers to discriminate against applicants and employees on the ground of religious beliefs or activities, but it also provides protection against employers infringing religious freedom outside the workplace.

As the Honourable Mark Latham MLC explained in his Second Reading speech:

*A recent concern is the growth of employment contracts linked to vague notions of employee obligation, such as their impact on corporate image and diversity. These contracts are being used by companies to limit the religious freedom of employees well away from the workplace, most notably in the Folau case.*

*The principle is clear: Bosses do not own the private lives of staff, their beliefs, faith, and religious activities. We are not a feudal society operating with the indentures of serfdom. Workers must be free to live a life separate to their obligations in the workplace. In an era of corporate political activism, this has become a fundamental requirement of the rights of labour. Thus the bill defines a breach: for an employer to restrict, punish or sanction an employee engaging in religious activity outside of work hours, away from the physical workplace, that does not directly criticise, attack and cause direct and material financial detriment to the employer. Such detriment does not include withdrawal of third-party sponsorship, contracts, and other forms of financial, corporate support.*

Section 22N provides better protection for religious freedom outside of work than the attempt made by the Federal Government's draft *Religious Discrimination Bill 2019* (RDB) and subsequent second draft (RDB2) which swung the pendulum further in the favour of employers (than the first draft) being able to limit employee activities outside work time.

The Federal Government's draft *RDB2* provided a limited protection for persons making a statement of belief in their own time and not on behalf of their employer due to the exception for an employer if it would cause "unjustifiable financial hardship". That meant that a sponsor could control the religious freedom rights of employees of another organisation, and on the face of it, it appeared that an Israel Folau-type situation, where an employee quotes the Bible, would not be protected by the legislation.

Further, the protection only applied to companies with an annual turnover of \$50 million or more, meaning a person of faith in smaller to medium companies would have been without protection.

### **Recommendation 4**

***Section 22N which provides religious freedom protection for employees within and outside the workplace should be supported.***

## 22S Qualifying bodies

Article 23 of the Universal Declaration of Human Rights states that<sup>11</sup>:

*(1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.*

*(2) Everyone, without any discrimination, has the right to equal pay for equal work.*

*(3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.*

*(4) Everyone has the right to form and to join trade unions for the protection of his interests*

Given that qualifying bodies are the gateway for many people of faith to be able to earn a living, it is important that these bodies are prohibited from discriminating on the grounds of religious belief.

Section 22S also mirrors some of the protections in section 22N, which protect the private lives of workers and extends them to the rights of professional people so that qualifying bodies cannot restrict private religious practice.

### **Recommendation 5**

***Section 22S, which prevents qualifying bodies from discriminating against people on the grounds of religion and restricts their ability to curtail private religious activity should be supported.***

## 22V Education

Section 22V addresses a Felix Ngole-type situation. As FamilyVoice has previously reported on the case:

*Felix was expelled in 2016 from his social work course at the University of Sheffield after quoting Bible verses on Facebook that were deemed critical of homosexuality.*

*In 2015, he had entered into a discussion on Facebook over the imprisonment of Kim Davies, the Kentucky marriage registrar jailed for refusing to issue marriage licenses to same-sex couples. During a vigorous online political debate, many views were exchanged on the Christian faith. A devout Christian, Felix quoted Bible verses affirming the traditional Christian opposition to same-sex marriage and of the sinful nature of homosexual activity.*

*Some months later, Felix was reported anonymously to the University of Sheffield by a fellow student and was subsequently disciplined in a Fitness to Practice hearing. He was informed that he had brought the social work profession into disrepute and was then expelled from the course, losing the career he had worked so hard for.<sup>12</sup>*

In the landmark judgment, the Court of Appeal overturned a lower High Court decision to uphold Felix's expulsion from Sheffield University. While Ngole was victorious in court, he should not have had to endure a legal process for daring to live out his faith.

Section 22V protects the rights of students to privately practice their religion and guards against a person of faith having to endure a lengthy legal battle like Felix Ngole.

***Recommendation 6***

***Section 22V which protects the rights of students to privately practice their religion should be supported***

**22Z State laws and programs**

Section 22Z prevents the State from discriminating on the basis of religion. The state should be neutral towards religion and should not be able to impose conditions in funding contracts that exclude some religious bodies from the receipt of funding, or else force them to act inconsistently with their religious ethos.

As Cardinal George Pell has previously stated:

*Neither the government nor anyone else has the right to say to religious agencies “we like your work with vulnerable women; we just need you to offer them abortion as well” or “we really like your schools, but we can’t allow you to teach that marriage between a man and a woman is better or truer than other expressions of love and sexuality.” Our agencies are there for everyone without discrimination, but provide distinctive teachings and operations. In a wealthy, sophisticated country like Australia, leaving space for religious agencies should not be difficult.<sup>13</sup>*

***Recommendation 7***

***Section 22Z which provides protection for religious organisations against the state using funding arrangements to restrict religious freedom should be supported.***

## **4. Conclusion**

FamilyVoice supports the proposed amendments to the *Anti-Discrimination Bill 1977 (NSW)*, which protect people in our State from discrimination on the basis of their religious beliefs or activities. We make the point that NSW is one of only two states where it remains lawful to sack someone or deny them service because of their religion.

Moves to address this issue at a federal level, through the RDB2 have stalled indefinitely.

Due to this deferral, the *Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 (ADA)* aims to address these matters at a State level. The Bill was drafted on the basis of considerable input from religious leaders including FamilyVoice Australia.

We stress again that NSW is one of only two States that do not protect its citizens against religious discrimination. The proposed amendments implement the recommendation of the Ruddock Review on Religious Freedom and hence NSW should update its discrimination laws to protect people of faith.

Family Voice also expresses its interest and availability to appear before any hearings of the Committee.

## 5. Endnotes

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- <sup>1</sup> “The Edict of Milan” <https://www.holyspirit-al.com/ourpages/auto/2011/7/28/60780317/edict%20of%20milan.pdf>
- <sup>2</sup> Augusto Zimmermann, “The Secular Challenge to Freedom of Belief”, *News Weekly*, 28 February 2015
- <sup>3</sup> Robert P. George, ‘What is religious Freedom?’, *Public Discourse*, Witherspoon institute, July 24, 2013.
- <sup>4</sup> *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* [1983] HCA 40; (1983) 154 CLR 120
- <sup>5</sup> *Ibid.*, para 17; their judgement was qualified by also holding that “though canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion.”
- <sup>6</sup> *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc* [2006] VSCA 284 (14 December 2006), para 36: <http://www.austlii.edu.au/au/cases/vic/VSCA/2006/284.html>
- <sup>7</sup> *Catch the Fire Ministries*, paras 38-61: <http://www.austlii.edu.au/au/cases/vic/VSCA/2006/284.html>
- <sup>8</sup> *OV & OW v Members of the Board of the Wesley Mission Council* [2010] NSWCA 155 (6 July 2010): [http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/nsw/NSWCA/2010/155.html?stem=0&synonyms=0&query=title\(Wesley%20\)](http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/nsw/NSWCA/2010/155.html?stem=0&synonyms=0&query=title(Wesley%20))
- <sup>9</sup> “Report of Inquiry into a Complaint of Discrimination in Employment and Occupation: Discrimination on the ground of sexual preference”, *Human Rights and Equal Opportunity Commission, HRC Report No. 6, 1998*, [http://www.humanrights.gov.au/sites/default/files/content/pdf/human\\_rights/discrimination\\_sexual\\_pref.pdf](http://www.humanrights.gov.au/sites/default/files/content/pdf/human_rights/discrimination_sexual_pref.pdf)
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- <sup>11</sup> Article 23, Universal Declaration of Human Rights, <https://www.un.org/en/universal-declaration-human-rights/>
- <sup>12</sup> “Felix Ngole wins appeal in victory for Christian freedoms”, *FamilyVoice Australia*, 5 July 2019, <https://familyvoice.org.au/news/felix-ngole-wins-appeal-in-victory-for-christian-freedoms>
- <sup>13</sup> George Pell, “The meaning of religious freedom and the future of human rights”, *ABC Religion and Ethics*, 23 Aug 2013, <http://www.abc.net.au/religion/articles/2013/08/23/3832073.htm>