

**Submission
No 30**

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

Organisation: ILGA Oceania

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	<p>ILGA OCEANIA SUBMISSION</p> <p>to the</p> <p>Joint Select Committee on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 (NSW)</p> <p>Friday, 21 August 2020</p>	
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GENERAL

I. ILGA

ILGA World [www.ilgaoceania.life] (established 1978) is the oldest United Nations (UN) Non-governmental Organisation (NGO) for LGBTIQ+ people, representing 1,614 LGBTIQ+ organisations from 158 countries and territories, including those from the sovereign countries of Australia, New Zealand and Pacific Islands (based on the South Pacific Forum) through its ILGA Oceania region [www.ilga.org]. ILGA Oceania was registered in 2014 in NSW (Australia) and provides a much-needed voice and visibility to LGBTIQ+ human rights issues across the Oceania region and at the United Nations.

The current ILGA Oceania co-convenors, Vanessa Lee – Ah Mat (Australia) [Indigenous Australian] and Fia'ailetoa Ken Moala (Samoa) [Indigenous Samoan] represent ILGA Oceania on the ILGA World board. The ILGA Oceania board has a majority indigenous composition, a significant majority of the LGBTIQ+ member organisations that ILGA Oceania represents are indigenous, and ILGA Oceania's biennial regional conferences have a strong indigenous focus, with a majority of indigenous delegates.

II. OVERVIEW

This submission focuses on the proposed Bill by Mark Latham and its impact on “*existing rights and legal protections contained in the Anti-Discrimination Act 1977 (NSW) and other relevant NSW and Commonwealth legislation*” [Committee Terms of Reference, 3(a)].

ILGA Oceania believes that this latest proposed Bill, whilst confined to the NSW jurisdiction, is a regressive move for Australia, comparable to the 2004 same-sex marriage ban. This proposed Bill, or any such religious discrimination provision, could have significant regressive impact on Australia's progress in LGBTIQ+ rights.

The laws in Australia should equally protect us all. This Bill supports the rights of various institutions and people but fails to support the rights of vulnerable populations including LGBTIQ+, indigenous people and the CALD population of colour. For that reason, we oppose this Bill.

Considerable concern has already been raised over this Bill [“NSW Religion Bill Fact Sheet: People Of Faith”, Equality Australia <www.equalityaustralia.org.au/resources/onbpeopleoffaith>]. However, as a UN NGO on LGBTI rights it is important to present our own organisation's concerns on the social and legal aspects.

ILGA Oceania is concerned for the Bill's social impact on LGBTIQ+ people, but also the intersection of those LGBTI issues with those of indigenous, multicultural and faith-based communities.

We also have some legal concerns about the Bill which can be broken down into the following:-

I. UNEQUAL PROTECTION – The proposed changes ignore and exacerbate the already unequal balance between the treatment LGBTIQ+ people compared to conservative religious interests.

II. OPINIONS AS AN INHERENT CHARACTERISTICS – The proposed Bill's treatment of religious opinions as inherent characteristics goes beyond the anti-discrimination legislation's current scope, to impinge on Australia's freedom of speech.

III. COPORATIONS WITH PERSONAL RIGHTS – The proposed Bill incongruously extends traditionally personal rights to religious corporations, corporations which are already adequately protected under NSW law.

SOCIAL IMPACT

III. EFFECTS ON THE LGBTIQ+ COMMUNITY

At a time when the reality is that Covid-19 is essentially here for a while yet, we find it difficult to grapple with why the NSW Government would allow such a discriminative Bill to be put forward. This proposed Bill [*Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 (NSW)*] impacts on our human rights as LGBTIQ+ (Lesbian, Gay, Bisexual, Transgender, Intersex & Queer) people, indigenous, CALD (Culturally & Linguistically Diverse) people of colour and people of faith. We see this Bill as divisive, harmful, and discriminatory, as it serves to benefit the rights of a few above the general good of our wider community. Good laws protect us equally, not divide us. This Bill elevates religious belief above other human rights, giving special protections to religious activities that may ordinarily breach laws and harm others.

The *proposed bill* affects, among others, LGBTIQ+ people, divorced and unmarried people, and women from Multi-Cultural Communities. [Annie Lewis, “Concerns Surrounds Mark Latham’s Religious Discrimination Bill” Star Observer (27 July 2020). <www.starobserver.com.au/news/concerns-surround-mark-lathams-religious-discrimination-Bill/196785>] It also has significant colonialist-style impacts on Aboriginal and Torres Strait Islander peoples.

As LGBTIQ+ people, we feel stripped of our dignity and by this proposed bill which is an infringement on our human rights. However, it is important to emphasis the intersectional of this LGBTI right attack with those of the indigenous, multicultural, and faith-based communities.

IV. EFFECTS ON INDIGENOUS & MULTI-CULTURAL COMMUNITIES

As Indigenous & CALD people of colour, we would like to state how this Bill vilifies us and the impact this Bill has on the Multicultural Community, and Aboriginal and Torres Strait People.

The First Nations People, care for the land, developing sophisticated systems of culture, governance, environmental management and spirituality. Since 1788 Indigenous Australians have been treated harshly by non-Indigenous arrivals. Indeed, the report of the Royal Commission into Aboriginal Deaths in Custody (1987–1991) detailed the immediate violence inflicted towards Indigenous Australians by the British from the arrival of the First Fleet.

Indigenous Australians, having been dispossessed of their land, forcibly removed from their families and subjected to various forms of discrimination, are today still subjected to racial discrimination and continue to be denied their rightful place in society. [Edmund Rice Centre website: www.erc.org.au]

Now the Last Nations People, immigrants, refugees and multi-cultural communities are enduring similar discrimination and are facing similar real challenges. They are often the scapegoat of these challenges and practically blamed for the country’s woes and ills, including even the Covid-19 Pandemic, by some politicians and some sections of the media.

We are witnessing this with this proposed Bill, with Mark Latham of the One Nations political party disseminating fear and hate into the community. The Bill does not extend existing vilification provisions that protect ethno-religious groups.

Generally, alterations to the anti-discrimination legislation are a serious thing, considering that this legislation prohibits discrimination and vilification based on ethno-religious origin.

V. EFFECTS ON PEOPLE OF FAITH

As people of faith, we feel quite ashamed and concerned that this Bill does not support the diversity of people of faith equally. This Bill will allow faith-based organisations to impose their views on others.

This Bill is argued to prohibit discrimination based on religious beliefs or activity (or not having a belief) in certain areas, such as employment, education and the provision of goods and services in NSW. The Bill is argued to protect genuine religious belief, and any activity motivated by such beliefs, provided those activities are not punishable by imprisonment.

However, the impact that this Bill has on religious expression in the workplace is of great concern. The proposed law allows employers to prohibit the wearing of religious symbols and clothing during working hours where this is reasonable, having regard to workplace safety, productivity, communications and customer service requirements and industry standards. The proposed law will also make it much harder for employers, educational institutions and qualifying bodies (which regulate or confer professional, trade or occupational qualifications or licences) to respond to inappropriate, offensive or discriminatory conduct by their employees, students or members, when that conduct is motivated by religious belief and occurs outside of occupational and educational settings.

VI. IN SUMMARY

ILGA Oceania is committed to social justice, regardless of any individual or group characteristics, including sex, gender, gender identity, gender expression, sexual orientation, sex characteristics, race, age, disability, ability, socio-economic status, national origin, religion, ethnicity, and historical, cultural and geographic experiences, nonetheless recognizing the unique challenges faced by individuals with each of these characteristics and by those with intersecting identities. The proposed Bill is not aligned with our commitments, and therefore ILGA Oceania opposes this Bill.

LEGAL IMPACT

VII. BACKGROUND

Australia often prides itself on human rights, however, the progress on basic human rights for LGBTIQ+ people has been slow.

We should all recall that just 23 years ago the Australia state of Tasmania had a prison sentence of 21 years for homosexuality (until 1997), and many years before that there was the death penalty (until 1867). Tasmania had the highest rate of imprisonment for homosexuality in the world, the harshest prison sentence, and was the last to abolish both its imprisonment and death penalty sanctions in Australia.

More recently, Australia banned same-sex marriage (2004). Australia was one of the last developed countries of the western world to legalise same-sex marriage. This reform was only possible at the federal level [Marriage Amendment (Definition and Religious Freedoms) Act 2017] after a rarely used national plebiscite (2017).

These developments, and many others, have often been met with opposition from the conservative elements of Australia's religious communities, which often dominate Australian political discourse. However, despite this opposition and the sluggish in the pace for reform in Australia, this country generally heads in the right direction for human rights for LGBTIQ+ people.

VIII. UNBALANCED PROTECTION

1) BILL PROBLEMS

i) UNEQUAL EMPHASIS - Emphasis on religious protections, above and beyond the protections given to LGBTIQ+ people, i.e., only limiting the type of legitimate state interest that can impinge on religious beliefs [Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020, [1] – (2)] etc.

ii) CRIMINAL CONDUCT EXCLUSION – Whilst the proposed Bill does attempt to exclude protection of anything constituting an offence punishable by imprisonment under NSW and Commonwealth law, what is potentially unlawful is always open for debate. Quoting from the Bible about killing gay men has often been argued by some not to be an illegal act, but mere expression of a freedom of speech, despite both murder [Crimes Act 1900 (NSW), s19A] and even threats on the ground of sexuality being unlawful [Crimes Act 1900 (NSW), s93Z].

2) IMPACT

ILGA Oceania would like to express deep concern on the impact this proposed Bill would have on the existing rights balance between the interests of the LGBTIQ+ community and that of the religious community with respect the totality of the legislative scheme in NSW, in both state and federal laws.

i) CURRENT RELIGIOUS RIGHTS

There are many provisions currently under the law which protect against discriminatory attacks on the grounds of a person's religious belief. It is currently an offence to publicly threaten or incite violence on grounds of either religion or sexual orientation [*Crimes Act 1900* (NSW), s93Z(2)(b)].

Religions can have special burdens due to their treatment of vulnerable people, e.g. such as those precautions against sexual abuse [*Crimes Act 1900* (NSW), s73(3)(c)]. However, such onuses are few and far between, and reforms to increase those onuses are often met with opposition from sections of the church [**Tasmania:** Emily Baker, "Catholic Church in Tasmania Won't Follow New Confession Laws" ABC News (12 September 2019) <www.abc.net.au/news/2019-09-12/catholic-church-in-tasmania-to-snob-mandatory-sex-abuse-laws/11503024>; **Queensland:** "Brisbane Archbishop Mark Coleridge Rejects Proposed Queensland Laws to Report Child Abusers who Confess" ABC News (16 January 2020) <www.abc.net.au/news/2020-01-16/child-sex-abuse-catholic-church-confession-mark-coleridge/11872452>].

It is the many allowances provided to religion which need taken into consideration. Generally, there are many provisions currently under the law for facilitating religious observance, these include numerous exemptions for religious organisations, i.e. Commonwealth law allows conscientious objection to officiating same-sex marriages [*Marriage Act 1961* (NSW), s47], state law allows a religiously inclined medical practitioner's conscientious non-compliance to an abortion procedure (with only the onus of a referral to another medical practitioner who doesn't have that objection) [*Abortion Law Reform Act 2019* (NSW), s9], and there are even religious exemptions in state laws outlawing serious animal cruelty [*Crimes Act 1900* (NSW), s530] etc.

In summary, religious interests are well catered for under the current legal system in NSW, often at the expense of LGBTI rights and interests, and these religious interests do not need additional protection.

ii) UNEQUAL ANTI-DISCRIMINATION MEASURES

The measures against discrimination need to be applied evenly, however, this proposed Bill neglects this. This proposed Bill would give a broad immunity to religious opinion, personally, regardless of whether the person was a practitioner of the religion, or an organisation (regardless of whether that organisation was religiously based). In contrast this proposed Bill also does not address the already existing wide exemptions for discrimination against the LGBTIQ+ community, a community that tends to be the target of religiously conservative elements of society.

An example of this protection disparity is in employment. The proposed Bill prohibits the loss of employment by some based on religious views, but ignores the fact that those from the LGBTIQ+ community currently often have no such protection. Under NSW state law [*Anti-Discrimination Act 1977* (NSW), s49Z0] (reflected in Commonwealth law [*Sex Discrimination Act 1984* (Cth), s37(1)(d)]) it is still permitted for a student to be expelled (an inequality not yet addressed, despite the pledges to do so [Paul Karp, Scott Morrison will change the law to ban religious schools expelling gay students (13 October 2018) <www.theguardian.com/australia-news/2018/oct/13/morrison-caves-to-labor-on-gay-students-in-discrimination-law-reform-push>] and it is still permitted for teachers to lose their employment in NSW private schools for LGBTIQ+ reasons. The majority of private schools are religious institutions. Commentators have stated "*instead of protecting LGBT students and teachers at religious schools against discrimination, the Commonwealth Sex Discrimination Act 1984 authorises their mistreatment (a pattern that ... is sadly replicated in most states and territories)*". [Alastair Lawrie, "Back to School, Back to Discrimination for LGBT Students and Teachers" (30 January 2017) <www.alastairlawrie.net/2017/01/30/back-to-school-back-to-discrimination-for-lgbt-students-and-teachers>].

iii) IMPACT TO OTHER LEGISLATION

ILGA Oceania is also concerned about the implication for legislation prohibiting religious discrimination and vilification outside of the Anti-Discrimination legislation if this proposed Bill is passed into law, i.e. laws prohibiting religious propaganda could be affected, e.g. the prohibition of religious propaganda at the Anzac memorial [*Anzac Memorial (Building) Act 1923* (NSW), s8] and laws prohibiting religious discrimination at religious universities [*Australian Catholic University Act 1990* (NSW), s7] etc.

Currently, some legislation treats religious belief on the same footing as LGBTIQ+ status. For example, the Ageing and Disability Commissioner is mandated to consider the adult disabled person's sexual orientation and religious beliefs [*Ageing and Disability Commissioner Act 2019* (NSW), s4(2)] and the discrimination they would suffer based on those criteria [*Ageing and Disability Commissioner Act 2019* (NSW), s4(3)]. If this proposed Bill is passed, ILGA Oceania is concerned that it could lead to an alteration of such considerations, resulting unequal emphasis towards religious belief.

IX. OPINION AS AN INHERENT CHARACTERISTIC

1) BILL PROBLEMS

a) CHARACTERISTIC POSSESSION - Whilst, the proposed Bill does make some provision to exclude non-sincere belief [*Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020* (NSW), [2] – (22K – Genuinely believes)], in a later section it is made clear that this “genuine belief” is a subjective assessment, and could even include actions that conflict with that the tenets of that belief system [*Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020* (NSW), [1] – (22KA)].

b) CHARACTERISTIC SCOPE - Unlike any other inherent characteristic, the broad ambit goes beyond the “actual or presumed” possession of an inherent trait, as is the case with homosexuality discrimination [*Anti-Discrimination Act 1977* (NSW), 49ZF]. This proposed Bill goes further to protect “past” and “future” religious belief or activity [*Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020* (NSW), [1] – 22KB].

2) IMPACT

i) INHERENT V CHOSEN CHARACTERISTICS

There is a current protection against discrimination based on having an inherent characteristic. This reflects the long-held view that people should not be judged on inherent characteristics irrelevant to their capacities. There are currently no protections for simply having an opinion. It could be well-argued that there should not be such protection. This is because there is a presumptive assumption that your opinions are your own and can be easily changed.

In employment, whilst discrimination due to inherent physical characteristics is appropriately forbidden, as it is irrelevant to your capacity to do the work, there is no reason why people should not be assessed or rejected for employment based on their aptitude, as your personal opinion (including religious belief) should not prevent you from doing your job. This is because employees are expected to do their job to the best of their abilities (constrained by inviolable physical characteristics), and if an employee decides, based on their personal opinions (such a religious belief), not to do the job, it undermines the reason for their employment. Simply put, an employee can easily not voice their opinion whilst being employed, or not apply for a job if they are not willing to perform the tasks that this job entails, these choices are not available to a person if an inherent characteristic is an employment prerequisite.

ii) FREEDOM OF SPEECH

For an equitable society there should generally be a balance between points of view, regardless of the inherent characteristics of each individual. The anti-discrimination legislation protects inherent characteristics, i.e. those inviolable characteristic which are often related to physical attributes like gender, sexuality, disability etc, which are either impossible to change, or where a change would result in harm to the person who has them.

Religious views are opinions. An individual is not born with a faith, but instead choses a faith, either by family indoctrination through child rearing, or later in life when the individual choses membership of a faith of their own volition. People often change religions. Indeed, religions structurally are geared up to proselytise new members into their organisation. Whilst individuals often create a lifestyle consistent with beliefs that are strongly held, but those beliefs are just chosen opinions.

The protection of inherent characteristics promotes a healthy debate on issues, where people opinions are canvassed. Opinions can often change, and in a democratic country opinion are open to a diverse range of perspectives and stances, each of which can be challenge in respectful debate. In order for a debate to be fair, each side of the argument and each opinion is given an equal opportunity to be voiced.

This proposed Bill dramatically changes the purpose scope of the legislation from a piece of legislation that protects inherent characteristics, to one that attempts to pre-emptively settle debate by providing protection to only one set of opinions, i.e. a religious viewpoint.

X. COPORATION HUMAN RIGHTS

1) BILL PROBLEMS

a) PROPOSED LEGISLATION – The protection [*Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020* (NSW), [1] – 22N(9)] of “religious ethos” organisations, and those organisations established to propagate a religion, is problematic.

2) IMPACT

This proposed Bill intends to give the same protections previously given to individuals to organisations (regardless of whether those organisations are closely associated with that belief). The High Court has been sceptical as to whether human rights are applicable to corporations, as demonstrated in their reluctance to approve of a corporation’s right of privacy [*ABC v Lenah Game Meats Pty Ltd* [2001] HCA 63; *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* [1937] HCA 45; (1937) 58 CLR 479].

The question should be asked whether religious corporations need this added personal human rights protection. The current assistance given to religious bodies to run their organisation is considerable. This can be in the form of taxation exemptions, i.e. the exemption to religious institutions from land tax [*Land Tax Management Act 1956* (NSW), s10], to state-based criminal sanctions, i.e. those obstructing a member of the clergy from conducting their duties face criminal sanctions [*Crimes Act 1900* (NSW), 56].

Most secular organisations, including all LGBTIQ+ advocacy bodies handle incorporation issues via the generic legislation [*Associations Incorporation Act 2009* (NSW)]. This legislation redresses wrongs to the

organisation via civil means, not criminal sanctions. In contrast, religious organisations often have individual legislation specifically tailored to their church incorporation and special legislation protecting their organisational and financial interests, placing these organisations in a favoured position. An example of this is the Anglican church, which has a piece of legislation organising its incorporation [*Anglican Church of Australia (Bodies Corporate) Act 1938 (NSW)*], one piece of legislation protecting its general property, finances and trust property [*Anglican Church of Australia Trust Property Act 1917 (NSW)*] and another piece of legislation protecting its activities [*Anglican Church of Australia Act 1976 (NSW)*] with even criminal sanctions, e.g. for an inappropriate use of the association's name or falsely claiming to be associated with the organisation [*Anglican Church of Australia Act 1976 (NSW), s6*].

XI. IN SUMMARY

ILGA Oceania is not convinced of the need for any protections against religious discrimination in the current NSW anti-discrimination legislation. Religious bodies and religious practitioners are already amply protected, whilst the LGBTIQ+ community is not. The proposed Bill ignores this disparity and even exacerbate the already unequal treatment between of LGBTIQ+ people and religious interests. The proposed Bill's treatment of religious opinion as inherent characteristics also raises issues of how free speech is going to be affected, especially if laws related to inherent characteristics, such as LGBTIQ+ rights, are going to be debated. Indeed, the sheer breadth of the proposed Bill, i.e. incongruously extending traditionally personal rights to religious corporations (bodies already adequately protected under NSW law) could magnify the problem. ILGA Oceania is concerned that providing protection to already well-protected organisations, known for advocating against LGBTIQ+ rights, could create enough inequality in the 'playing field' to put a stop to the traditionally slow pace of LGBTIQ+ rights reform and could even set Australia's LGBTIQ+ rights progress back many decades.

CONCLUDING SUMMATION

The *Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 (NSW)* is not aligned with ILGA Oceania's commitment to social justice, regardless of any individual or group characteristics, including sex, gender, gender identity, gender expression, sexual orientation, sex characteristics, race, age, disability, ability, socio-economic status, national origin, religion, ethnicity, and historical, cultural and geographic experiences.

Religious bodies and religious practitioners are already amply protected in the NSW state and federal legislation, especially compared to the relatively unprotected LGBTIQ+ community. This proposed Bill exacerbates already unequal treatment. ILGA Oceania raises concerns over how the proposed Bill's treatment of religious opinion as inherent characteristics may impact on freedom of speech. ILGA Oceania is also concerned at the proposed Bill's attempts to extend personal rights to religious corporations.

Therefore, ILGA Oceania opposes this Bill.