

**Submission  
No 32**

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

**Organisation:** Australian Christian Higher Education Alliance - ACHEA

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# **ACHEA**

Australian Christian Higher Education Alliance

SUBMISSION TO THE JOINT SELECT  
COMMITTEE ON THE ANTI-  
DISCRIMINATION AMENDMENT  
(RELIGIOUS FREEDOMS AND EQUALITY)  
BILL 2020

21<sup>ST</sup> AUGUST 2020

1. The Australian Christian Higher Education Alliance (ACHEA) is a national association of faith-based educational institutions who are involved in discussions internally and with Government about the developing needs and service requirements of Christian Higher Education.
2. ACHEA's members are all multi-disciplinary Christian higher education institutions and include Alphacrucis College (NSW), Avondale University College (NSW), Christian Heritage College (QLD), Eastern College Australia (VIC), Excelsia College (NSW), Morling Theological College (NSW), Sheridan College (WA) and Tabor College of Higher Education (SA).
3. ACHEA welcomes the opportunity to provide comment on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020, and thanks the committee member for their consideration of this important issue.

## Religious freedom is vital for faith-based higher educational institutions

4. Faith-based higher education institutions (FBHEI) make up an important section of the rich diversity across tertiary education in Australia. It is an industry which engages over 56,000 students and 2,000 staff each year, with a rapidly expanding international market.
5. ACHEA members offer unique forms of education within NSW and Australia. Historically, universities were founded as close communities of religious instruction, demonstrating a pattern of life conducive to higher learning of the earthly and the divine. The monastic model of scholarship was particularly influential in the development of such institutions where a devoted heart, virtue-led character and purity of life were developed alongside the expansion of intellect. Likewise, ACHEA institutions are not only places of learning, but are also communities which educate in the context of nurturing spiritual life and formation. The emphasis upon communal growth, servant leadership, innovative wisdom, holistic teaching, and a continuance of historical tradition - all within a Judeo-Christian framework.
6. ACHEA holds that enabling different beliefs and views to be held and practiced across various educational institutions and that allowing those beliefs to be honestly followed is an important part of what makes Australian education so successful in a multicultural society. For minority and marginalised groups, religion is often intermeshed with ethnic and cultural roots and provides strong cultural diversity that is an asset in liberal democracies. This diversity requires the ability to not only teach from convictions and beliefs, but also to have the freedom to shape community and institutional life according to those beliefs.

7. FBHEI provide significant contributions to the wellbeing and economic resilience of the social fabric in times of crisis, such as COVID19. There is considerable evidence of the relationship between faith/religious commitment, philanthropy and charitable organisations that provide support and aid. FBHEI form a central part of this support through equipping students with resilience skills, professional integration of virtue, civic responsibility, and readiness for events that affect the social, psychological, spiritual and economic health of the society. FBEHI strong communal networks also allow them to assist churches and religious organisations in providing tangible responses to welfare and community needs.<sup>1</sup>
8. There are however unique challenges for FBHEI in the sphere of higher education, many of which are directly impacted by the degree of religious freedom available. These challenges are a result of characteristics such as:
  - a. the specific underlying religious ethos of FBHEI which define the mission and impacts the teaching focus of all academic disciplines and student engagement;
  - b. the strong emphasis in FBHEI on the formation of positive communal relationships between executives, academics, staff and students;
  - c. the pastoral focus on vocational support and mentoring in FBHEI with greater resources dedicated to the development of character, service and faith;
  - d. the expectation on community service and learning programs, as well as involvement in strong civic networks (e.g. churches, mosques, temples);
  - e. the voluntary nature of adult education and the freedom for HE students to choose an institution which reflects their values and beliefs;
  - f. the relationships with professional qualification bodies required for student career aspirations which can be affected by religious teaching in FBHEI;
  - g. the provision of adult residential arrangements in FBHEI's based on sex and relational status;
  - h. the inherent connection between freedom of speech in universities and student's personal religious beliefs;
  - i. the multiple opportunities for higher education student association through student unions, clubs, religious groups and activist organisations; and
  - j. the necessity for broader freedom of thought and expression in higher education due to the high intellectual nature of courses studied.

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<sup>1</sup> Evidence for these claims can be found in Oslington, P. 2020 *The Economic Benefits of Australian Theological Education*, and *Building the Economy and the Common Good: The National Impact of Christian Higher Education in the United States*, CCCU, 2018.

9. With these characteristics in mind, there is a risk of religious freedom legislation failing to accommodate the complexities of FBHEI. This in turn could have unintended consequences which impact the function and the ability of FBHEI to practise their central doctrines, tenets, beliefs, and ethos.
10. Appropriate religious freedoms are therefore fundamental for FBHEI to be able to achieve their purposes. It is a central plank within freedom of inquiry which allows higher education institutions to push the boundaries of knowledge and technology, enable individual development and vocational identity, and provide broader contributions to civil society through economic stimulus and leadership in reasoned debate.

## There are increasing challenges of religious freedom facing faith-based higher educational institutions and students

11. There are a number of domestic and international legal cases and legislation in Western democracies which have arisen over the last decade and demonstrate the increasing importance of well-defined religious freedom for Australian students and FBHEI. They include:
  - a. The withdrawal of accreditation of FBHEI and their graduates due to perceived 'harm' to community standards. The most prominent cases are **Trinity Western University v Law Society of Upper Canada** and **Gordon College v New England Association of Schools and Colleges (NEASC)**.<sup>2</sup>
  - b. The withholding by public universities of funding, access or registration of faith-based groups who hold doctrinal requirements for leaders. The main events include the recent attempt by

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<sup>2</sup> A helpful critique of the case can be found by Associate Professor Neil Foster from the University of Newcastle - <https://lawandreligionaustralia.blog/2018/06/18/trinity-western-university-loses-before-supreme-court-of-canada/>

the **Sydney University Union on the Sydney Evangelical Union**<sup>3</sup>, **Intervarsity v University of Iowa**<sup>4</sup> and **Intervarsity v Wayne State**;<sup>5</sup>

- c. The expulsion or disciplinary action against students from public universities for privately sharing their beliefs on campus or through social media. The most famous case being **Felix Ngole v Sheffield University** who won his case on appeal,<sup>6</sup> but there have also been Australian examples including **Joshua Lawless** in South Australia who was suspended for sharing his Christian faith with a fellow student.<sup>7</sup>
- d. The expulsion or disciplinary action of students who refuse to participate in practices against their religious beliefs. A case was reported recently of **Julia Rynkiewicz** in the UK who is a midwifery student who was banned from her hospital placement due to her pro-life views.<sup>8</sup>
- e. Attempts by students to sue FBHEI for disciplinary action taken around breaches of community standards and statements of faith that all students agree to prior as a condition of study. A case involving **Fuller Seminary** in California is currently before the courts.<sup>9</sup>
- f. State policy which denies public grants to students attending FBHEI. In 2016 Californian State **Senator Ricardo Lara** introduced legislation which denied public grants to students attending religious institutions with Title IX exemptions (similar to Australia's Sex Discrimination Act exemptions).<sup>10</sup> Even though HE funding is currently a Federal matter in Australia, there are concerns that proposed State legislation might have similar impacts.<sup>11</sup>
- g. University staff disrupting, ridiculing, defacing property and obstructing lawfully-expressed activities (and encouraging their classes to do likewise) of religious student organisations. The most prominent case was **Professor Gregory Thatcher of Fresno State University** who made incorrect claims that pro-life students could only chalk in a non-existent 'free-speech' zone and joined in the removal.<sup>12</sup>

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<sup>3</sup> <https://www.dailytelegraph.com.au/newslocal/city-east/sydney-university-backflips-on-threat-to-deregister-evangelical-christian-group-over-faith-declaration-requirement/news-story/ad5ec528e545a3fe0ec9baa274d4d1a0>

<sup>4</sup> <https://www.thegazette.com/subject/news/education/federal-judge-in-intervarsity-case-says-university-of-iowa-cant-selectively-deregister-student-orgs-blinc-20190930>

<sup>5</sup> <https://www.documentcloud.org/documents/6423584-INTERVARSITY-CHRISTIAN-FELLOWSHIP-v-Wayne-State.html>

<sup>6</sup> <https://www.judiciary.uk/wp-content/uploads/2019/07/ngole-v-sheffield-university-judgment.pdf>

<sup>7</sup> [https://www.acl.org.au/josh\\_story](https://www.acl.org.au/josh_story)

<sup>8</sup> <https://www.telegraph.co.uk/news/2020/01/17/midwifery-student-banned-work-placement-pro-life-views-demands/>

<sup>9</sup> <https://www.christianpost.com/news/lesbian-in-same-sex-marriage-sues-fuller-seminary-over-expulsion-cites-title-ix.html>

<sup>10</sup> <https://edsource.org/2016/california-bills-take-aim-at-religious-colleges-that-seek-to-bar-transgender-students/564869>

<sup>11</sup> <https://www.theaustralian.com.au/nation/politics/fiona-patten-defends-antivilification-bill/news-story/590cca0772e2f411d596b3421f3f7f29>

<sup>12</sup> <https://www.thecollegefix.com/professor-told-class-erase-pro-life-chalking-pays-17000-settle-lawsuit/>

- h. The abuse, theft and violence on Australian university campuses towards legitimate protest rallies primarily involving students of a religious faith. This was evident during the same-sex marriage plebiscite at **Sydney University**.<sup>13</sup>
- i. Attempts to remove academics who hold religiously informed positions on law, gender, marriage and sexuality. The highest profile campaign was against Australian Catholic and Oxford **Professor John Finnis**, where students attempted to pressure University officials to remove him from his position for his philosophical writings.<sup>14</sup>
- j. Anecdotal reports of Australian public university lecturers humiliating, threatening, blocking class involvement, and refusing to mark assignments from students of faith who hold a traditional and religious positions on marriage and gender identity.
- k. Public university codes of conduct which have the potential to restrict freedom of speech through imprecise language around student well-being and appeals to 'reputational damage'. Some of these were criticized in the review into University Freedom of Speech by the Hon Robert French AC.<sup>15</sup> Many of these codes of conduct apply to all on-campus and off-campus expression by students including all online expression regardless of whether there is any connection between the communication and the student's enrolment at the university.<sup>16</sup>
- l. **The Rachel Colvin** case in Victoria where a small school was at the receiving end of a draining lawsuit (subsequently settled), by a teacher unwilling to teach the students in accordance with known and policy-declared longstanding Christian principles on marriage.<sup>17</sup>

12. A recently released work by Professor Jonathan Fox of Bar-Ilan University, *Thou Shalt Have No Other Gods Before Me: Why Governments Discriminate against Minorities*, provides the most thorough and comprehensive data set on the topic of religious discrimination ever compiled. He indicates growing

<sup>13</sup> <https://www.smh.com.au/education/police-called-as-hundreds-of-protesters-surround-sydney-university-vote-no-rally-20170914-gyhca1.html>

<sup>14</sup> <https://thefederalist.com/2019/01/11/oxford-students-want-worlds-top-natural-law-scholar-fired-catholic/>

<sup>15</sup> [https://docs.education.gov.au/system/files/doc/other/report\\_of\\_the\\_independent\\_review\\_of\\_freedom\\_of\\_speech\\_in\\_australian\\_higher\\_education\\_providers\\_march\\_2019.pdf](https://docs.education.gov.au/system/files/doc/other/report_of_the_independent_review_of_freedom_of_speech_in_australian_higher_education_providers_march_2019.pdf), page 151-2.

<sup>16</sup> An example is the Monash University Student Use Procedures -

*When using social media in the context of education or research training, and when making identifiable personal use of social media, students must not:*

- make any comment or post material that is, or might be construed to be, racial or sexual harassment, offensive, obscene (including pornography), defamatory, discriminatory towards any person, or inciting hate;
- make any comment or post material that creates, or might be construed to create, a risk to the health or safety of a student, contractor, staff member or other person, including material that amounts to bullying, psychological or emotional violence, coercion, harassment, sexual harassment, aggressive or abusive comments or behaviour, and/or unreasonable demands or undue pressure;

<sup>17</sup> <https://www.eternitynews.com.au/australia/ballarat-case-highlights-school-staffing-issues-in-religious-discrimination-bill-debate/>



religious discrimination worldwide, particularly among the governments of Western democracies, and singles out Australia as a clear example of the recent rise of 'socially-based' discrimination against religious minorities in Western democracies.<sup>18</sup>

13. ACHEA recognises that there are necessarily limits to the freedom of ethos-based organisations to *protect public safety, order, health or morals or the fundamental rights and freedoms of others*.<sup>19</sup> However, these 'limitations' need to be carefully considered to avoid unduly burdening the organisation and undermining the integrity of its identity and mission.

## The Anti-Discrimination Act 1977 (NSW) does not adequately protect religious freedom for faith-based higher education institutions

14. ACHEA views the requirements for the free expression of FBHEI as including:
- a. The freedom to teach doctrine and beliefs around metaphysics, epistemology, human identity, morality, spirituality, sexuality, social structure, and legal and political theory.
  - b. The freedom to require commitments from staff and students to community codes of public and private moral conduct around behaviour, character traits, communication, relationships and substance use.
  - c. The freedom to provide counselling or discipline for students or staff who are intentionally undermining the beliefs and character of the institution.
  - d. The freedom to resolve moral and ethical decisions which detrimentally affect the community within itself with reference to its sacred teachings and texts.
15. In its current form, ACHEA holds that the NSW Anti-Discrimination Act 1977 does not ensure these required protections due to:
- a. The treatment of religious bodies as 'exemptions' to anti-discrimination, rather than as organisations holding attributes that require protection from discrimination;
  - b. A lack of definition around 'religion, 'religious belief', and 'religious activities'.

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<sup>18</sup> Fox, Jonathan 2020 *Thou Shalt Have No Other Gods Before Me: Why Governments Discriminate against Minorities*, Cambridge University Press 74-75. Also see Australian Professor Nicholas Aroney's review - <https://www.abc.net.au/religion/australias-religious-discrimination-problem-nicholas-aroney/12542800>

<sup>19</sup> As recognised in Article 18 of the International Covenant on Civil and Political Rights [https://treaties.un.org/doc/Treaties/1976/03/19760323%2006-17%20AM/Ch\\_IV\\_04.pdf](https://treaties.un.org/doc/Treaties/1976/03/19760323%2006-17%20AM/Ch_IV_04.pdf)



- c. A lack of recognition and definition around ‘religious ethos organisations’;
- d. A lack of clarity in section 56 around what constitutes a ‘body established to propagate religion’;
- e. Uncertainty around appropriate balancing of conflicting ‘rights’ claims;
- f. A limited recognition of modern boycott and secondary boycott forms of discrimination against religious individuals and religious ethos organisations;
- g. Inadequate protections for religious ethos organisations in regard to qualifying bodies, the awarding of State grants, and provisions of good and services; and
- h. Inadequate protections for individuals or clubs holding religious beliefs within public educational institutions.

## This legislation appropriately secures religious freedom for NSW higher educational institutions

16. ACHEA holds that the proposed Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 provides valid and much needed amendments to NSW legislation. In particular:
- a. The insertion of definitions around ‘religious activities’, ‘religious belief’ and ‘religious ethos organisations’ (22K)
  - b. The inclusion of a section recognising religious belief and activity as a protected attribute (22L)
  - c. Clarity around what is not taken to be discrimination by religious ethos organisations (22M)
  - d. The inclusion of protections from religious discrimination from individuals within public educational authorities (22V); and
  - e. The inclusion of protections for religious ethos organisations against State law that requires the organisation to engage in conduct in a manner that is contrary to the doctrines, tenets, beliefs or teaching (22Z).
17. ACHEA recommends only one change to the proposed amendments, and that is to include protections for religious ethos organisations in section 22S – Qualifying bodies (which currently only protects protected activities of ‘persons’).
18. **Recommendation 1**
- a. **Adapt Section 22S (1) - It is unlawful for an authority or a body which is empowered to confer, renew or extend an authorisation or a qualification that is needed for or facilitates the practice of a profession, the carrying on of a trade or the engaging in of an occupation**

(qualifying body) to discriminate against a person or religious ethos organisation on the ground of religious beliefs or religious activities.

- b. **Insert Section 22S (6) - A qualifying body is taken to discriminate against a religious ethos organisation on the ground of religious beliefs or religious activities if the qualifying body requires a religious ethos organisation to engage in conduct, including use of its property, in a manner which is contrary to the doctrines, tenets, beliefs or teachings of that organisation.**

## NSW should not rely on federal government for its religious freedom

19. ACHEA notes that the freedom and liberty to profess, believe and practice religion is given some limited protection in the Commonwealth Constitution. In the High Court case 'The Church of the New Faith v. Commissioner of Payroll Tax (1983)' religion was defined as 'including the practice of that religion'. This includes codes of moral conduct as a defining feature, and the expression of those codes in a religious institution is therefore protected. It is worth noting, therefore, that the personal lives of staff and conduct of students are legally relevant factors in maintaining a religious culture and values.
20. Although it is worth recognising the positive direction of the Federal Government in regard to the Religious Freedom Review (2018), the draft Religious Discrimination Bill (2019), and the ALRC reference into the Framework of Religious Exemptions in Anti-Discrimination Legislation (2019), there have yet to be enacted any actual advancement of religious freedom since commitments made by Prime Minister Malcolm Turnbull in 2017.
21. In addition to this, ACHEA believes that such issues of religious freedom for FBHEI should not be delegated in their entirety to the Federal Government. This is particularly important considering the Opposition Federal Labor party has yet to commit to supporting religious freedom legislation and furthermore has introduced legislation that would strip away religious freedom from FBHEI.<sup>20</sup>
22. ACHEA contends that the proposed NSW Anti-Discrimination Amendment (Religious Freedom and Equality) Bill 2020 provides appropriate religious freedom protections for FBHEI, even more so than proposed Federal measures. ACHEA is happy to support the legislation and would encourage the committee members to do the same.

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<sup>20</sup> See the Sex Discrimination Amendment (removing discrimination against students) Bill 2018 introduced by Senator Penny Wong.



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