

**Submission  
No 44**

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

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# Plunkett Centre for Ethics

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21.8.20

The Hon Gabrielle Upton MP  
Committee Chair

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

Email: [ReligiousFreedomBill@parliament.nsw.gov.au](mailto:ReligiousFreedomBill@parliament.nsw.gov.au)

Dear Committee Chair

I write in reply to your email of 10<sup>th</sup> July 2020 in which you invite me to make a submission to the Inquiry into the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020.

I understand that the Terms of Reference of the Inquiry include whether the objectives of the bill are valid and (if so) whether the terms of the bill are appropriate for securing its objectives; and that the review should 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); and (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.

Of course, no law can, in and of itself, protect a human right. But laws certainly have an educative effect. And so the whole community, people of religious belief and people of no religious belief, have reason to welcome the passing of this Bill. For, if passed, it will at a very minimum, serve as a reminder that the right to freedom of belief, and (within reasonable constraints) the freedom to act on that belief is a fundamental human right which a decent community recognizes and protects.

- 1 The objectives of the Bill, that is, to amend NSW Anti-Discrimination law so as 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, are valid.**
  - a. By adding a section to the Anti-Discrimination Act 1977 which gives religious freedom equal standing with other human rights, the Bill brings NSW Anti-Discrimination law into good order.
  - b. The Bill thus corrects an 'objective imbalance' (or gap) in the State's protections of its citizens from discrimination. It does not do away with existing protections against discrimination on the basis of race, sex, age, disability. It simply adds another 'protected attribute', ie religious belief or activity.
  - c. The Bill's conception of the right to religious freedom, a wide conception that reflects international human rights law, emphasizes the fact that recognition of the right to freedom of thought, conscience and religion protects religious people and non-religious people alike.
  - d. By giving religious freedom equal standing with other human rights, the Bill fulfils a gap in the laws governing conduct between citizens which was identified and recommended for rectification by the Wran government, supported by the Carr government's review, and recently recommended once again by the Ruddock Religious Freedom Review.
  - e. The Bill has the value of recognizing the advantage to the society of institutions which have a religious ethos, and rightly protects them from claims of discrimination if they engage in conduct (under certain conditions) which is consistent with their doctrines, tenets, beliefs or teachings.
- 2 The terms of the Bill are appropriate for securing its objectives.**
  - a. By adopting the conventional definition of discrimination as 'treating someone less favourably than another', the Bill makes it clear that when a religious institution acts in accordance with its beliefs, this is *not*, per se, 'treating someone less favourably than another', that is to say it is *not* discrimination as that is understood in international law (such as the General Comment 18 of the United Nations Human Rights Committee).

- b. By doing away with the notion of religious rights as exemptions from anti-discrimination obligations, the Bill treats religious rights as worthy of protection in exactly the same way as are other human rights. Treating them as exemptions to anti-discrimination law implies that acting on them involves doing something wrong or immoral or unethical which the society will put up with or to which it will turn a blind eye. By setting out reasonable criteria (essentially those found in international law, and in particular in the Siracusa principles) which must be satisfied *before* a limitation can be imposed on freedom of religious belief and activity, the Bill gets things the right way round: it recognizes that genuine human rights (such as the right to freedom of religious belief or activity) can conflict with other genuine human rights, and it supplies a reliable mechanism for the principled resolution of such conflict.
  
- c. By extending the protection from discrimination claims, under certain conditions, to 'religious ethos organizations' the Bill recognizes the value, to the society itself as well as to organizations themselves, of freedom of belief and conduct of individuals and of organizations.
  
- d. However the relevant wording of the Bill needs to be such as to protect an organization from having what is in accordance with its 'doctrines, tenets, beliefs or teachings' being determined by a judge. The Bill should be written in such a way that a NSW judge would not and could not hold herself out as a theological authority. For this reason I recommend that the Bill define a religious ethos organization as one that is 'conducted in accordance with, or for the furthering/furtherance/development of, the doctrines, tenets, beliefs or teachings of a particular religion'.

**3 Consistency with rights and legal protections in the Anti-Discrimination Act 1977 (NSW) and other relevant NSW and Commonwealth legislation**

- a. I understand that the Bill does not exclude or limit the operation of any relevant NSW or Commonwealth legislation.

**4 Consistency with the recommendations relevant to NSW from the Expert Panel Report: Religious Freedom Review (2018).**

- a. The Bill is not only consistent with the recommendations of the Expert Panel; it was precisely what Expert Panel recommended.

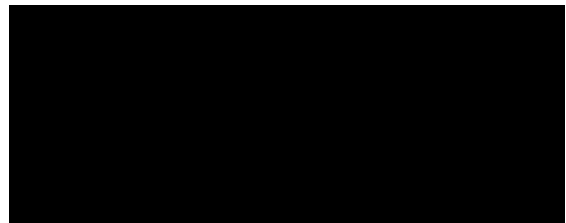
**5 Interaction between Commonwealth and NSW anti-discrimination laws and the desirability of consistency between those laws, including consideration of (i) the draft Religious Discrimination Bill 2019 (Cth) which has been released**

**for public consultation, and (ii) the Australian Law Reform Commission's reference into the Framework of Religious Exemptions in Anti-discrimination Legislation.**

- a. I understand that the Bill is not inconsistent with Commonwealth Anti-Discrimination law, and that it is the intention of the Commonwealth Religious Discrimination Bill 2019 (depending on its final provisions which are currently a matter on which the Commonwealth is still consulting the community) that Commonwealth and State laws will both operate in this area.
  
- b. I assume that, since the ALRC has been asked to review *religious exemptions* to prohibitions on discrimination (whilst also guaranteeing the right of religious institutions to conduct their affairs in a way consistent with their religious ethos) and since this Bill contains no such exemptions, it should be consistent with the results of the ALRC review.

I would be very happy to assist the Committee in its review of this Bill in any way which the Committee would find useful.

Yours sincerely



Bernadette Tobin, PhD, AO  
Director