

**Submission
No 58**

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

Organisation: Ambrose Centre for Religious Liberty

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AMBROSE CENTRE FOR RELIGIOUS LIBERTY

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

By Rocco Mimmo LLB, LLM. on behalf of:

Ambrose Centre for Religious Liberty

**JOINT SELECT COMMITTEE
ON THE ANTI-DISCRIMINATION
AMENDMENT (RELIGIOUS FREEDOMS AND EQUALITY)
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On behalf of the Ambrose Centre for Religious Liberty, I am pleased to accept the Hon. Gabrielle Upton MP's invitation to make a submission to the Enquiry

BACKGROUND

I am the founder and chairman of the Ambrose Centre for Religious Liberty (Ambrose Centre). I hold an LLB and practice as a sole practitioner. I also hold a Master of Laws in International Laws from UNSW.

The Ambrose Centre is a human rights oriented organisation; it is not, nor does it pretend to be a religious organisation. It is incorporated as a 'Not for Profit' organisation and engages in public activities of promoting, bringing awareness to and address meetings and engage in political activity when existing or intending laws have a detrimental bearing on the fundamental human right of manifesting religious beliefs.

The Ambrose Centre has made several submissions to Parliamentary and associated Inquiries over the years. Where appropriate, the Ambrose Centre seek leave of the court to appear as Amicus Curiae in relevant cases.

TERMS OF REFERENCE

- (a) Existing Rights and Legal Protections contained in the *Anti-Discrimination Act 1977 (NSW)* and other relevant NSW Commonwealth Legislation;
- (b) The recommendations relevant to NSW from the Expert Panel Report: Religious Freedom Review (2018);
- (c) The interaction between the 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 to the Framework of Religious Exemptions in Anti-Discrimination Legislations

SUBMISSION:

1. THE BILL

- 1.1 The Principles of the Act in the Bill are a worthy attempt to introduce into NSW law protections for the manifestation of religious beliefs and or religious activities.
- 1.2 The Principles of the Act relies upon the authorities to have fundamental regard to three International Instruments, namely:
 - (a) The International Covenant on Civil and Political Rights (the Covenant),
 - (b) The UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, proclaimed by the UN General Assembly on 25 November 1981; and
 - (c) The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights.
- 1.3 The Principles of the Act at sub-section (2) and (3) goes on to lay down the requirements of Article 18 (3) of the Covenant and require that all provisions of the Act (the Bill) to be interpreted in a way that is compatible with the International Instruments as stated at 1.2 above.
- 1.4 The Bill provides definitions for Religious Beliefs, Religious Activities and Religious Ethos Organisations at section 22k.
- 1.5 Within the Religious Beliefs definition, it includes religious convictions and opinions.
- 1.6 It is my submission that a conviction or opinion are ambiguous and lack cogency and substance in terms of comprising a genuine and sincerely held belief which drives a person to perform a religious mission regularly¹.
- 1.7 It is difficult to ascertain whether a conviction or opinion are lasting or momentarily held and therefore to protect a belief on this characteristic is fanciful.
- 1.8 Furthermore, it is questionable whether State authorities can enforce or entertain at law provisions of International Covenants not presently legislated into domestic law.
- 1.9 States have no constitutional rights when it comes to International Covenants, Treaties or Declarations unless such Instruments have been legislated into domestic law.
- 2.0 Section 51 (xxix) of the Commonwealth Constitution grants to the Australian Parliament power to make laws with respect to external affairs; State have no such rights.

¹ Lord Nichols' Judgement in *Regina v Secretary of the State for Education and Employment and others (Respondents) ex parte Williamson (Appellant) and Others*. [2005] UKHL 15 at para 23.

- 2.1 Under this grant of power, the Australian Parliament is able to ratify and subsequently make laws on International Treaties and Conventions.
- 2.2 The International Covenant on Civil and Political Rights was approved by the United Nations General Assembly in December 1966; formally adopted as an International Covenant and entered into force on 23 March 1976. Australia signed the Covenant in December 1972 and ratified it in November 1980.
- 2.3 By failing to bring Article 18 into domestic law, religious houses and individual believers are dependent on the application of State based discrimination and equal opportunity laws for the exercise of religious beliefs.
- 2.4 The Bill assumes at least two matters:
- (i) That no Commonwealth Legislation on Religious Discrimination will interfere, contradict, or limit the Bill² and
 - (ii) That the three International Instruments mentioned at 1.2 above will be enforceable or even persuasive for Tribunals or the State based law authorities, see points 2.0 to 2.3 above.
- 2.5 To further emphasise this submission's consideration doubt towards supporting the International Instruments to be enforceable or persuasive, Declarations have no legal force on any Nation which ratifies them and in Australia, the covenant has no domestic legal force unless it is legislated into domestic law by the Commonwealth Parliament.
- 2.6 As to the Draft Religious Discrimination Bill 2019 (Cth) it is arguable if that Bill or any Bill will come before the Commonwealth Parliament in the foreseeable future.
- 2.7 In addition to the many examples of religious discrimination mentioned in the Explanatory Notes to the Bill, it should not be underestimated the weight of antagonism of legal opinion towards elevating religion to entitlements above other groups.
- 2.8 The concern is well founded; in a submission to the Consolidation of Commonwealth Anti-Discrimination Laws Inquiry, a prominent group of Legal Academics and legal experts recommended:

We believe that the religious exceptions for religious organisations should be removed because we do not accept that religious rights should prevail over the rights of individuals to be treated in a non-discrimination way in public sphere activities³.

- 2.9 Writing in the Harvard International Law Journal, prominent legal academics [Professor] Carolyn Evans (Dean of Law, Melbourne University) and Beth Gaze wrote:

On the one side, some religious groups and scholars make a case for strong autonomy: religion should be given a wide scope over the full range of their activities whether publicly or privately funded and no

² See s60 of the Draft Religious Discrimination Bill 2019 (Cth)

³ Submission made 13 December 2011, p16

matter how economically or socially significant their scope. On the other side, there is an increasingly powerful movement to subject religions to the full scope of discrimination laws, with some scholars now suggesting that even core religious practices (such as the ordination of clergy) can be regulated in the name of equality.⁴

- 3.0 For the above reasons, the Bill is worthy of support albeit with some changes prior to a final draft for the consideration of Parliament.

WHY RELIGION SHOULD BE ACKNOWLEDGED AS A FUNDAMENTAL RIGHT

- 3.1 The 2016 Census shows that religious adherents are declining. The largest single block is that of people with no faith, 30%.
- 3.2 The census also shows that the largest religious tradition is the Catholic Church with approximately 22%. Yet the attendance of people at weekly Mass has fallen dramatically since 1960 to the present from 57% to 12%⁵.
- 3.3 From these figures it would not be unreasonable to argue that religion should not enjoy any special privileges. To adopt such a course would be a great disservice to the many people who have a deep and sincere belief in God or other such deity.
- 3.4 The sincere belief held by many people that it is wrong to offend their God by performing an act which they believe is against their conscience or teaching of their faith or Church Leaders.
- 3.5 The State should not act as a coercive agent or instrument to make unlawful a sincere and genuinely held belief that they should not wrong their God; this principle of non-coercion is at the heart of religious liberty.
- 3.6 Furthermore, it is acknowledged by the Ruddock Expert Panel that NSW does not recognise religion as an attribute which is protected from discrimination.

WHY THE BILL SHOULD INCLUDE RELIGION AS AN ATTRIBUTE

- 3.7 As noted above, Religion is not mentioned in the NSW Anti-Discrimination Act 1977 as a protected attribute.
- 3.8 To attempt a justificatory argument as why religion is important, various judicial comments follow starting with judicial views on the meaning of religion.

⁴ Harvard ILJ Online, vol 49 April 21, 2008 p 41. In support of this comment, the authors refer to- Pru Goward, Address at the Ordination of Catholic Women Annual Conference, Melbourne: Women, Human rights and Religion (Nov. 5-6, 2005) available at <https://www.ocw.webcentral.com.au/articles.htm> Cass R Sunstein, *On the Tension between Sex, Equality and Religious Freedom*, PUBLIC LAW AND LEGAL THEORY WORKING PAPER NO. 167 (2007), available at <http://www.ssrn.com/abstract.id=995325>;
(f.Reid Mortensen, *Rendering to God and Caesar: Religion in Australian Discrimination Law*, 18, Queensland L.J. 208, 219 (1994-1995)

⁵ Sydney Morning Herald, 12 February 2018, p 9.

3.9 Many jurisdictions over the years have given comments and observations on what is religion. However, the difficulty of such an exercise should not be underestimated.

3.10 Notwithstanding such difficulty, it is helpful to reflect on how different jurisdictions have attempted to give meaning to the word ‘religion’.

3.11 In *Jehovah’s Witness Case*, Latham CJ, said:

*“It would be difficult, if not impossible, to devise a definition of religion which would satisfy the adherents of all the many and various religions which exist, or have existed in the world”*⁶.

3.12 Iacobucci J, writing for the majority in the Supreme Court of Canada judgment in the matter of *Syndicat Northcrest v Amselem*, said:

*“In order to define religious freedom, we must first ask ourselves what we mean by “religion”. While it is perhaps not possible to define religion precisely, some outer definition is useful since only beliefs, convictions and practices rooted in religion, as opposed to those that are secular, to those that are socially based or conscientiously held, are protected by the guarantee of freedom of religion. Defined broadly, religion typically involves a particular and comprehensive system of faith and worship. Religion also tends to involve the belief in a divine, superhuman or controlling power. In essence religion is about freely and deeply held personal convictions or beliefs connected to an individual’s spiritual faith and integrally linked to one’s self-definition and spiritual fulfilment, the practices which allow individuals to foster a connection with the divine or with the subject or object of that spiritual belief”*⁷.

3.13 At a later stage of the judgment, His Honour, linking the spiritual faith with practices associated with that belief, said:

*“Over the course of a lifetime, individuals change and so can their belief. Religious beliefs, by their very nature, are fluid and are rarely static. A person’s connection to or relationship with the divine or with the subject or object of his or her spiritual faith, or his or her perception of religious obligation emanating from such a relationship may well change and evolve overtime”*⁸.

3.14 From a different viewpoint, Justice Sachs, of the Constitutional Court of South Africa, in the matter of *Christian Education South Africa v Minister of Education* linked religious freedom to religion. His Honour said:

*“yet freedom of religion goes beyond protecting the inviolability of the individual conscience. For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth”*⁹.

⁶ *Adelaide Company of Jehovah’s Witnesses Incorporated v The Commonwealth* [1943] 17 ALJ 134

⁷ [2004] 2 S.G.R. 551, 2004 SCC at para 39

⁸ *Ibid*, para 53

⁹ Case CCT 4/100-18 August 2000 at para 36

3.15 The High Court of Australia also examined the substance and meaning of religion in the case of the *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)*¹⁰ (*Scientology case*). This case required the High Court to determine if Scientology would qualify as a religion for purposes of receiving special exemptions from Pay-Roll taxation.

3.16 In the joint judgment of Mason ACJ and Brennan J, religion was defined thus:

“..we would therefore hold 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 a canons of conduct in order to give effect to that belief, 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”¹¹.

3.17 While all judgments mentioned connect belief with conduct, only the judgment of their Honours Mason and Brennan referred to the protection of religious inspired conduct must be within the ordinary law. This point is essential to grasp and make known. No religious belief, doctrine or injunction can be acted on if its practice offends the law. Thus, physical punishment for apostasy, non-belief, adultery, practices of genital mutilation, child brides, polygamy and domestic violence when acted upon under the guise of a religious teaching, customs or practice, cannot be protected as they are outside the ordinary laws.

3.18 To emphasise the point on the depth of religious beliefs, the Economist magazine in 2007 published a special report on religion and public life¹². Mirosław Volf, director of Yale University Centre for Faith and Culture is quoted as saying:

“It used to be said that workers hung their religion on a coat rack alongside their coats. At home their religion mattered, at work it was idle. That is no longer the case. For many people religion has something to say about all aspects of life, work included”¹³.

3.19 I submit that it is necessary to reflect upon the true meaning and depth of religion and religious beliefs. It is my submission that it is insufficient to stop at that point. It requires additional reflections on the many good works that religious organisations and individuals perform as a contribution to societal development, care and growth in the interest of all.

3.20 These acts are primarily inspired by the religious teaching of good works, prayer and charitable expressions that are necessary to enter the afterlife. Religious beliefs and canons of conduct consistent with those beliefs are an essential pathway for the salvation of the soul.

¹⁰ 1983] HCA 40; (1983) 154 CLR 120

¹¹ Ibid para 17.

¹² The Economist Special Report on Religion and Public Life, 3 November 2007

¹³ Ibid, para 10.

3.21 International Human Rights Courts have recognised the depth of religion. In *Sahin v Turkey*¹⁴, the Grand Chamber of the European Court of Human Rights, held:

“the Court reiterates that, as enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a ‘democratic society’ within the meaning of the convention. This freedom is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism in dissociable from a democratic society, which has been clearly won over the centuries, depends on it. That freedom entails, inter alia, freedom to hold or not to hold religious beliefs and to practise or not to practice a religion...¹⁵.*

3.22 Not recognising religion as an attribute in its own right, does a disservice to all people who consider they are religious believers and object to performing an act within an employment setting or engaging in the delivery of a service which offends their religious belief.

3.23 Neither the impugned act nor delivery of the service need be offensive to a non-religious believer but held by the believer to be offensive to the religious deity of their belief.

3.24 I further submit that the word ‘future’ in section 22KB is not particularly helpful when the wise comments of Iacobucci J as found at para 3.12 above are considered.

3.25 I submit that a definition of religion can be inserted in the Bill at section 22K and could read:

“religion is twofold: first belief in a Supernatural Being, Thing or Principle; and second, the acceptance of a canons of conduct in order to give effect to that belief, though canons of conduct which offend against the ordinary laws of NSW are not protected.”

3.26 I submit if religion is accepted as an attribute against which another cannot discriminate, it would reinforce protection for a person of religion against unjust treatment.

3.27 I submit that a person having a sincere and genuine belief, albeit not religious belief, is entitled to the same protection as a person with a religion, provided the belief is cogent, substantial and makes sense.

3.28 In an English Employment case, a dismissed employee with a strong belief that *man-made climate change was real*, this belief somehow clashed with work obligations which resulted in dismissal and a sequent application to the Employment Tribunal followed.

¹⁴ (2005) 41 EHRR 8.

*Article 9 of the European Convention on Human Rights, This is the equivalent to Article 18 of the ICCPR.

¹⁵ Ibid, para 104.

- 3.29 In *Grainger plc & ors v Nicholson*¹⁶ the Tribunal undertook an investigation to find a legal test for a philosophical belief, the legal test stated:
the belief must:
*be genuinely held
*be a belief and not an opinion or viewpoint based on the present state of information available
*be a belief as to a weighty and substantial aspect of human life and behaviour
*attain a certain level of cogency, seriousness, cohesion and importance, and
*be worthy of respect in a democratic society and not incompatible with human dignity or in conflict with the fundamental rights of others.
- 3.30 It is my submission that this legal test is appropriate to give protection to a person holding a genuine non-religious belief where that person clearly demonstrates a commitment to that belief; this test should be applied where appropriate in the Bill.

IN CONCLUSION

- 3.31 The Bill is worthy of support as there is an absence of protection for a person believing in religion.
- 3.32 In it my submission that the reliance on the three International Instruments is ill considered as there is no evidence to support the view that a State can incorporate into law an international instrument in whole.
- 3.33 Victoria and the ACT have adopted Human Rights Charters but have been selective in recognising some articles of the Covenant, in other words neither the Covenant nor a substantial part of the Covenant.
- 3.34 I also have reservations on using the word ‘opinion’ and also protecting a person’s ‘future belief’; both lack certainty and are in my opinion, vague and difficult to determine in law as weighty beliefs worthy of protection.
- 3.35 If a religious belief can be defined based on an opinion, then the person without a religious belief holding an opinion or a future belief is entitled to the same protection from discrimination as is the person with a religious belief.
- 3.36 I would support the Bill but recommend that consideration be given to making some changes before final presentation to Parliament.

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¹⁶ EAT/0219/09