

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

**Organisation:** The Church of Jesus Christ of Latter-day Saints

**Date Received:** 21 August 2020

**Submission on behalf of The Church of Jesus Christ of Latter-day Saints (“Church”)** in response to an invitation to submit comments dated 14 July 2020 from The Hon. Gabrielle Upton MP, Committee Chair of the **JOINT SELECT COMMITTEE ON THE ANTI-DISCRIMINATION AMENDMENT (RELIGIOUS FREEDOMS AND EQUALITY) BILL 2020**

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## Introduction and Brief Church History in Australia

1. The Church of Jesus Christ of Latter-day Saints in Australia (Church) accepts the invitation to make a submission to the Joint Select Committee on the *Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020* (NSW) (the Bill) and makes that submission in support of the Bill. The terms of reference for the Committee and further detail on the points of support in this submission are included in the attached Appendix.
2. The Church thanks the drafters of the Bill for their strong efforts to help reconcile and harmonise *all* fundamental human rights, including the right to believe and live as one chooses. Australians are brought up on the ethos that we all deserve a “fair go.” As a nation, we are getting better at doing that, though we have some way to go. As an Australian church community, we declare that as children of God – regardless of our gender, ethnicity, sexuality or belief system – we all deserve a “fair go.” We see this Bill as respecting all citizens of New South Wales with the right to a fair go. Thank you. In that same spirit, we wish to offer some thoughts from around the world where parliaments, courts and other bodies have wrestled with the same question: *“How can we ensure through law and practice that all citizens can live peacefully and with dignity according to their core beliefs?”*
3. The first missionary of the Church to Australia was William Barratt, a 17-year-old English convert who arrived in 1840. He was followed a year later by Andrew Anderson from Scotland, who organized the first branch (a small congregation) in 1844. American missionaries John Murdock and Charles Wandell arrived in Sydney on October 31, 1851. A small branch was organized in Sydney early in 1852 with a handful of members and in September of that year a branch was organized in Melbourne. Many early converts emigrated to the United States, including Joseph Ridges, who was an organ builder. He later built the organ that was used in the historic Tabernacle on Temple Square in Salt Lake City. This pattern — baptism followed by emigration — was one of the factors that held Church growth in Australia in check for many years.
4. In the mid-1950s, the Church in Australia experienced an unprecedented surge in membership that has continued ever since to its current membership of over 150,000 members gathering in over 300 congregations present in every State and Territory of Australia. This surge resulted from a number of factors, including a decline in emigration of Australian members to Utah, much-improved social acceptance of the Church, the start of an intensive chapel-building program, growing numbers of local leaders and an emphasis on missionary work. The permanence of the Church in Australia is evidenced not only by its members but by the hundreds of meetinghouses and the construction of five of its 160 temples worldwide in Australia.

## Purpose and Organization of the Submission

5. This submission is made in support of the Bill. In expressing this support, the submission focuses on the following four points:

**I – Freedom of religion and belief and the protection of the exercise of that freedom is a fundamental human right and stands as a bulwark against unlimited governmental power.**

**II - The force and effect given by the Bill to relevant international human rights law by insisting on the internationally embraced “necessity” rather than the “reasonableness” test of limitations on religious freedom is of critical importance.**

**III - The tests for religious belief in the Bill that give religious organizations the right to determine the scope and interpretation of their own doctrine in judicial proceedings, rather than the courts is a best practice.**

**IV – Differentiation of treatment is not necessarily unlawful discrimination, as in the case of religious requirements for employment. This exception approach in the Bill recognises a growing consensus that ‘general limitations’ clauses enable balance between human rights when they overlap.**

## Key Points of Support

### Part I - Freedom of religion and belief is a fundamental human right.

6. Freedom of religion and belief and the protection of the exercise of that freedom is a fundamental human right. For members of The Church of Jesus Christ of Latter-day Saints, that right grows out of our belief that *“Each of us is a beloved spirit son or daughter of heavenly parents, and as such, each has a divine nature and destiny.”*<sup>1</sup> That divine origin requires that all persons should treat each other with dignity, especially when their individual rights overlap. Our man-made political and civil institutions should make laws that afford each person dignity.
7. As eloquently stated in the 8<sup>th</sup> Article of the recent *Punta Del Este Declaration on Human Dignity for Everyone Everywhere*, *“Recognition of human dignity for everyone everywhere is an important constitutional and legal principle for reconciling and adjudicating competing human rights claims, as well as claims between human rights and other important national and societal interests...When mutual vindication of rights is not possible, dignity for all can help us to delineate the scope of rights, to set the boundaries of permissible restrictions on the exercise of rights and freedoms, and to seek to bring into fair balance competing rights claims.”*<sup>2</sup>
8. In battles over whether “my right is superior to yours”, we observe that “freedom of religion stands as a bulwark against unlimited government power,” and yet “freedom of religion is fragile” and can “quickly be swept aside in the name of protecting other society interests”.<sup>3</sup> (T)he “just powers” of government exist most fundamentally to secure the

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<sup>1</sup> *The Family, A Proclamation to the World* (1995) [A Proclamation](#) by the First Presidency and Quorum of the Twelve Apostles of The Church of Jesus Christ of Latter-day Saints issued September 1995, at Salt Lake City, Utah USA.

<sup>2</sup> *Declaration on Human Dignity for Everyone Everywhere*, reaffirming the 1948 Universal Declaration on Human Rights adopted at a conference convened in Punta del Este, Uruguay from December 2-4, 2018, shortly before the formal 70th anniversary of the UDHR (December 10, 2018), see <https://www.dignityforeveryone.org/>

<sup>3</sup> *“And When He Came to Himself (Luke 15:17),”* an address given by Elder David A. Bednar of the Quorum of Twelve Apostles, at the digital only 2020 BYU Law School Religious Freedom Annual Review, 17 June 2020.

God-given and inalienable rights of life and liberty. Recognition and respect for those rights by governments and the judiciary enable each person to exercise moral agency—the ability “to act for [ourselves] and not to be acted upon.”<sup>4</sup> Thus nothing government does is more important than fostering conditions where the free exercise of religion can flourish.<sup>5</sup>

9. Sadly, today religious freedom has many opponents who read religious freedom as code for a request for special treatment. As elaborated in the Appendix to this submission, we do not think defense of religious freedom is a veiled request for special treatment – rather it is a request for a “fair go” where individual religious identity and dignity are respected as are other ways in which human beings identify themselves. In our view, the proposed Bill goes a long way to achieving these objectives. (see Appendix ¶¶ 2 - 7)

## Part II - The “Necessity” test in International Law is an important part of the Bill

### NSW will benefit from importation of accepted international law and jurisprudence

10. The *International Covenant on Civil and Political Rights* (ICCPR) was entered into force on 23 March 1976. It was ratified by Australia in 1980. Over 40 years of accepted international law has accrued since its adoption. The importation of the requirements of accepted international law is a key component of the Bill’s approach to protecting religious freedom. International law provides a valuable touchstone for the appropriate balancing of the demands of religious freedom with other rights, and in fashioning consensus between competing worldviews. By expressly importing international law for resolution of competing demands among human rights, the Bill cannot be said to be giving special privileges to one group over another. Rather, the Bill merely seeks to accurately reflect the international consensus. The fact that no Australian anti-discrimination law to date has reflected this consensus is not an indictment of the Bill. Rather, it is a cautionary warning of a gap in existing Australian law. Religious freedom should be harmonized and, when necessary, balanced with other rights in a way that maximises their joint enjoyment.
11. The touchstone for the appropriate balancing of religious freedom and other rights under international law is the imposition of strict conditions for placing limitations on religious belief and conduct. By the Bill’s addition of a new Section 3 entitled “Principles of Act’ to the Anti-Discrimination Act 1977, that touchstone for balancing competing rights from international law becomes an integral part of the law of New South Wales. (see Appendix ¶¶ 8 - 10)
12. The Bill’s requirement that ‘fundamental regard’ be given to the relevant principles in international law calls for binding heed to be given to the recommendations of both
  - 1) the 2017 Australian Commonwealth Parliament Human Rights Sub-Committee Joint Standing Committee on Foreign Affairs, Defence and Trade Inquiry into the Status of the Human Right of Freedom of Religion or Belief (Commonwealth Sub-Committee)<sup>6</sup> and

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<sup>4</sup> [2 Nephi 2:26](#), Book of Mormon: Another Testament of Jesus Christ -

<https://www.churchofjesuschrist.org/study/scriptures/bofm/2-ne/2.26?lang=eng&clang=eng#p26>

<sup>5</sup> Id., Bednar

<sup>6</sup> Joint Standing Committee on Foreign Affairs, Defence and Trade Inquiry into the Status of the Human Right to Freedom of Religion or Belief, *Interim Report* (2017) (Commonwealth Sub-Committee),

2) the Expert Panel on Religious Freedom, a 2018 inquiry conducted by the Australian Senate Legal and Constitutional Affairs Committee (Expert Panel) (see Appendix ¶¶ 11 - 13).

13. In respect of the latter, **the Expert Panel recommended a repositioning of anti-discrimination law to appropriately reflect the equal status of both religious freedom and principles of anti-discrimination.** To that end, the new Section 3 of the Bill reflects the Expert Panel's concern to recognise:

the importance of ensuring that the right to religious freedom is given appropriate weight in situations where it is in tension with other public policy considerations, including other human rights.<sup>7</sup>

This is a central means by which the Bill responds to growing assertions that religious freedom has come to be treated as a secondary right, rather than the paramount right it is (see Appendix ¶¶ 14 - 22).

14. ICCPR Article 18(3) requires that "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." As Babie, Rochow and Scharffs have recently recognised, under international law, the "grounds for legitimate limitation" in Article 18(3) of the *International Covenant on Civil and Political Rights* (ICCPR) place specific limits on how far governments can go in limiting religious freedom, limits that are 'seldom recognised by those advocating freedom and governments implementing them'.<sup>8</sup> In support of the Bill's importation of and reliance upon international law in this area, the Appendix discusses ICCPR Article 18 – considering first the scope of the protection, then turning to the application of permissible limitations that may be placed on the manifestation of religious belief, pursuant to ICCPR Article 18(3).

15. In respect of the scope of the ICCPR Article 18 protections, the Bill is concordant with the following aspects of international law:

- a. The kinds of activities that comprise 'religious activities' (see Appendix ¶¶ 23 - 34)
- b. The right to refuse to perform acts that seek to coerce religious adherents to engage in activities that are contrary to religious teaching (see Appendix ¶¶ 31-32); and
- c. The right to refuse a requirement to affirm propositions that breach one's religious convictions (see Appendix ¶¶ 33 - 34).

16. While international law has long recognised that limitations may be placed upon religious manifestation, that law has developed a strict regime that must be satisfied before any limitations may be imposed on religious freedom due to recognition of the foundational position religious freedom holds in guaranteeing a free society. The Appendix contains an extensive outline of the requirements in international law for the imposition of limitations. We hope this will assist the Committee in its deliberations, and in particular,

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<sup>7</sup> Expert Panel on Religious Freedom, *Religious Freedom Review* (2018), 1.154.

<sup>8</sup> Paul T. Babie, Neville G. Rochow and Brett G. Scharffs, 'Creating and conserving constitutional space' in Paul T. Babie, Neville G. Rochow and Brett G. Scharffs (ed), *Freedom of Religion or Belief: Creating the Constitutional Space for Fundamental Freedoms* (Edward Elgar Publishing Limited, 2020), 2.

in its task of considering how New South Wales law may best give effect to these foundational international law principles (see Appendix ¶¶ 35 - 44).

17. Support for the application of the principles of international law and jurisprudence protecting religious freedom as provided in the Bill is available to the Committee because the Commonwealth of Australia has ratified the ICCPR and is bound by the First Optional Protocol to the ICCPR. Article 50 of the ICCPR provides that *'[t]he provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.'* This means that New South Wales has obligations under the ICCPR, and further that the Commonwealth has obligations to ensure that New South Wales law complies with the ICCPR. Under the First Optional Protocol, individuals and organisations may make complaints to the United Nations Human Rights Committee (UNHRC) if they feel Australian legislation, including legislation of individual States and Territories pursuant to ICCPR Article 50, does not align with the protections offered by the ICCPR (see Appendix ¶¶ 59 - 62).

*The "necessity" test for proposed limitations will help balance competing demands*

18. Central to the international law's strict regime to justify limitations on religious freedom is the mandate that **only 'necessary' limitations are permitted.**<sup>9</sup> One element of this mandate is to ensure that any limitations are **'proportionate'** to the outcome sought, and employ means that are **'no more restrictive than are required'**. This 'proportionate' approach to finding the appropriate boundary between competing rights calls for a careful investigation of how to accommodate competing rights without unduly burdening the right to religious freedom. In particular, the use of the internationally regarded *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (Siracusa Principles)* at Article 3 of the Bill also gives effect to the recommendations of both the Australian Commonwealth Committee and the Expert Panel as well (see Appendix ¶ 48). An outline of how the Bill proposes to import this 'necessity' test into New South Wales law is provided at Appendix ¶¶ 45-47 & 49 - 54.
19. It is widely recognised, by both Australian and international courts, that a standard of 'necessity' imposes a higher obligation than a standard of 'reasonableness'. By enshrining the ICCPR and other international legal and jurisprudential protections against discrimination on the basis of religious belief and activity, the Bill gives effect to the ICCPR Article 26's protection of equality in a way that meshes with the protections granted to the freedom of religion and belief expressed at ICCPR Article 18. This integration is contemplated by the ICCPR.
20. If a test to find indirect discrimination in domestic law allows a limitation to be placed upon the manifestation of religious belief on the grounds that the limitation is 'reasonable', Article 18 may be breached. This is because Article 18 permits limitations to be placed upon religious manifestation only where it is 'necessary' to do so. That is, a finding that detrimental conduct is not technical discrimination under domestic law on the basis it is 'reasonable' on the basis of domestic prohibitions on indirect discrimination may operate to place a limitation on the manifestation of religious belief that is not 'necessary' and does not satisfy the associated requirements of ICCPR Article 18. The

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<sup>9</sup> ICCPR Article 18(3)



principles in Article 3 of the Bill avoids this inconsistent outcome in the protection of religious freedom by requiring that such claims be resolved according to the “necessary” test in ICCPR Article 18. To our knowledge, this is the first attempt to provide a balancing that aligns with the international standard within Australian anti-discrimination law (see Appendix ¶¶ 55 - 58).

21. Various examples within the Explanatory Notes to the Bill clarify that references to ‘person’ within the Bill includes incorporated and unincorporated bodies. This expanded definition of ‘person’ finds support in international law. (see Appendix ¶¶ 63 - 66).
22. Given the importance to this Committee’s work of understanding the extensive body of international law that has developed over the past several decades on the subject of protecting religious freedom, we have taken the liberty of providing an Appendix containing further specific details and sources as a reference for the Committee members and staff of the scope of protections granted to religious belief and activity under accepted international law.

### Part III – The test of religious belief should be decided by the religion, not the courts.

23. The Bill introduces specific tests for Courts to apply when taking evidence of religious belief. These tests seek to ensure that Courts recognise the sincere self-conception of a religious institution/believer, and that the arbiter of a religion’s doctrine, tenets, beliefs and teachings is to be determined in the first instance by the religion itself, not the Courts. The drafters clarify that requiring judicial decision-makers to consider ‘genuine beliefs’ will not grant an ability for a purported religious believer to simply write themselves into legal protection by merely attesting to a ‘sincere’ belief. Rather, the intent of the test is to avoid imposing on the Courts the obligation to leave the domain of the law and decide matters of religious doctrine. The Appendix demonstrates how these tests are supported by judicial opinion, both internationally and within Australia (see Appendix ¶¶ 67 - 72).

### Part IV – Differentiation in treatment is not always unlawful discrimination and supports a ‘general limitations clause’ approach

24. The exception from proposed Part 2B of the Bill granted to religious ethos organisations at clause 22M of the Bill recognizes the foundational importance of associational freedom in securing the religious freedom of religious bodies, faith-based charities and religious educational institutions, including through their staffing and volunteering. The Appendix outlines how clause 22M gives effect to relevant international law at Appendix ¶¶ 73 - 83. Clause 22M also adopts, with slight modification, the existing framework for testing anti-discrimination law exemptions to better accommodate the practices of religious institutions (see Appendix ¶¶ 84 - 85).
25. Finally, we note that in substance, clause 22M of the Bill provides that when a religious institution acts in accordance with its beliefs, this is not unlawful discrimination. This amendment will bring NSW law into line with international practice. This protection is necessary to ensure that religious institutions can hire people who adhere to the tenets of their faith and is necessary to recognize institutional freedom of religion and belief it does not represent an exemption from either human rights or anti-discrimination law. In part, General Comment 18 of the United Nations Human Rights Committee recognises

that “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” under the ICCPR.

26. Clause 22M of the Bill introduces a ‘general limitations clause’ – a provision that acknowledges that certain legitimate forms of differentiation in treatment are not unlawful as discrimination. In applying this principle to religious bodies, the clause recognises that the freedom of a religious body to ensure that its employees sincerely believe and act consistently with its beliefs, is not discrimination, but a legitimate facet of an open and free democratic society. Sometimes this is obvious, as when a Church hires a minister of their own denomination even though this could be viewed strictly as discrimination. Sometimes this is less obvious, as when a religious organization requires employees to adhere to faith and conduct requirements as a condition of employment. These examples should not be viewed as discrimination; rather, they should be viewed as allowing the religious community to live out its faith. The notion of a general limitations clause has received wide ranging and distinguished support, including from the Expert Panel, and the Australian Law Reform Commission (ALRC) in its 2016 Freedoms Inquiry Report (see Appendix ¶¶ 86 - 87).

## Conclusion

27. We thank the Committee for the opportunity to make submissions to this Inquiry. We support the Bill because of the way it responds to Australia’s obligations under international law to recognize and give protection to freedom of religion and belief. New South Wales has an opportunity to lead out and set an example for all of Australia by recognizing and treating religious freedom as the fundamental human right that it is.
28. Enshrining this *‘important constitutional and legal principle for reconciling and adjudicating competing human rights claims, as well as claims between human rights and other important national and societal interests’* firmly in the law of New South Wales will help to ensure that religious freedom will not be trumped or demoted when mutual vindication of rights is not possible. It will make use of the touchstone of international law that protects religious freedom - the imposition of strict conditions for placing limitations on religious belief and conduct. Doing so will foster the appropriate balancing of the demands of religious freedom with other rights, and the fashioning of consensus between competing worldviews.
29. In concluding we recall the emphasis of the *Punta Del Este Declaration on Human Dignity for Everyone Everywhere* that opened this submission - all human beings are spirit offspring of God and by virtue of that reality owe a duty of dignity to others and can expect the same in return in the exercise of religious freedom.

## Appendix– Substantive Support for the Submission

1. The terms of reference for the Committee 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.

### Part I - Freedom of religion and belief is a fundamental human right.

2. Freedom of religion and belief and the protection of the exercise of that freedom is a fundamental human right. For members of the Church of Jesus Christ of Latter-day Saints, the commitment to freedom of religion and belief is based upon a conviction that all human beings are spirit children of God, which necessarily results in the sisterhood and brotherhood of mankind. The First Presidency and Quorum of the Twelve Apostles of The Church of Jesus Christ of Latter-day Saints have stated that “*Each of us is a beloved spirit son or daughter of heavenly parents, and as such, each has a divine nature and destiny.*”<sup>10</sup> For Latter-day Saints, that divine origin requires that all persons should treat one another with dignity, especially when their individual rights overlap. Our man-made political and civil institutions should make laws that afford each person dignity. That dignity is a divine endowment of the human experience.
3. We endorse the *Declaration on Human Dignity for Everyone Everywhere*<sup>11</sup> the 8<sup>th</sup> Article which states in part that, “*Recognition of human dignity for everyone everywhere is an important constitutional and legal principle for reconciling and*

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<sup>10</sup> *The Family, A Proclamation to the World* (1995) [A Proclamation](#) by the First Presidency and Quorum of the Twelve Apostles of The Church of Jesus Christ of Latter-day Saints issued September 1995, at Salt Lake City, Utah USA.

<sup>11</sup> *Declaration on Human Dignity for Everyone Everywhere*, reaffirming the 1948 Universal Declaration on Human Rights adopted at a conference convened in Punta del Este, Uruguay from December 2-4, 2018, shortly before the formal 70th anniversary of the UDHR (December 10, 2018), see <https://www.dignityforeveryone.org/>

*adjudicating competing human rights claims, as well as claims between human rights and other important national and societal interests...When mutual vindication of rights is not possible, dignity for all can help us to delineate the scope of rights, to set the boundaries of permissible restrictions on the exercise of rights and freedoms, and to seek to bring into fair balance competing rights claims.”*

4. Amidst the current secular culture wars over whether “my right is superior to yours” in the context of competing human rights, we observe that “freedom of religion stands as a bulwark against unlimited government power,” and yet “freedom of religion is fragile” and can “quickly be swept aside in the name of protecting other society interests”.<sup>12</sup> “Freedom of religion... safeguards the right to think for oneself, to believe what one feels to be true, and to exercise moral agency accordingly. It secures the space necessary to live with faith, integrity, and devotion. It nurtures strong families. It protects communities of faith and the rich and sacred relationships they make possible.”<sup>13</sup>
5. Freedom of religion has been called a first freedom, in part because of the paramount importance of respecting the moral agency of each person.<sup>14</sup> The “just powers” of government cannot be unlimited because they exist most fundamentally to secure the God-given and inalienable rights of life and liberty. Recognition and respect for those rights by secular culture and societal governments enable each of the power and ability to exercise our moral agency—the ability “to act for [ourselves] and not to be acted upon”<sup>15</sup>—and be accountable before God for our choices and actions.” Thus nothing government does is more important than fostering conditions wherein freedom of conscience, including freedom of religion, can flourish.<sup>16</sup>
6. “COVID-19 has alerted us to the importance of defending the borders between personal liberty, constitutional rights, and governmental authority.” The COVID-19 response of the world’s governments are instructive on this point. “In a time of crisis, sensitive tools are necessary to balance the demands of religious liberty with the just interests of society.”<sup>17</sup> “In the name of protecting physical health and security or advancing other social values, government often acted without regard to the importance of protecting spiritual health and security. It often seemed to forget that securing religious freedom is as vital as physical health.”<sup>18</sup> We should not “prioritize secular interests above religious ones. A health crisis should not become an excuse for a religious freedom crisis.”<sup>19</sup>

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<sup>12</sup> “[And When He Came to Himself \(Luke 15:17\)](#),” an address given by Elder David A. Bednar of the Quorum of Twelve Apostles, at the digital only 2020 BYU Law School Religious Freedom Annual Review, 17 June 2020.

<sup>13</sup> Id., Bednar

<sup>14</sup> Id., Bednar

<sup>15</sup> [2 Nephi 2:26](#), Book of Mormon: Another Testament of Jesus Christ -

<https://www.churchofjesuschrist.org/study/scriptures/bofm/2-ne/2.26?lang=eng&clang=eng#p26>

<sup>16</sup> Id., Bednar

<sup>17</sup> Id., Bednar

<sup>18</sup> Id., Bednar

<sup>19</sup> Id., Bednar

7. Sadly, today religious freedom has many opponents who read religious freedom as code for a request for special treatment - to which they say religious believers have no entitlement. As elaborated in this Appendix, we do not think that standing up and speaking up to protect religious freedom is a veiled request for special treatment - rather, it is an effort secure just and fair treatment that respects all persons in their identity and dignity as human beings. Freedom of religion also allows individuals and legitimate faith-based institutions to make differentiations in their choices that are consistent with their doctrine or ethos without being deemed by courts to be unlawfully discriminating against the rights of others. In our view, the proposed Bill goes a long way to achieving these objectives.

## Part II - The “Necessity” test in International Law is an important part of the Bill

8. Recently the world marked the seventieth anniversary of the Universal Declaration on Human Rights (UDHR). The *Punta Del Este Declaration on Human Dignity for Everyone Everywhere* adopted on 05 December 2018 celebrated the anniversary by recalling the UDHR’s focus on ‘*the notion of human dignity, its relation to freedom of religion or belief, and the important role it has played in forming, guiding, and sustaining consensus on core human rights values despite tensions in a highly pluralised world.*’<sup>20</sup> Indeed, international law has provided a key touchstone for the appropriate balancing of the demands of religious freedom with other rights, and in fashioning consensus between competing worldviews.
9. The *International Covenant on Civil and Political Rights* (ICCPR) was entered into force on 23 March 1976. It was ratified by Australia in 1980. Over 40 years of accepted international law has accrued since its adoption. The explicit importation of the requirements of international law is a key component of the Bill’s approach to protecting religious freedom. This means that the Bill cannot be said to be giving special privileges to one group over another – it is merely seeking to reflect the mechanisms outlined in international law for the resolution of competing demands. The Bill begins with a proposal to add a new Article 3 to the Anti-Discrimination Act 1977 No 48 as follows:

### 3 Principles of Act

(1) In carrying out functions and making determinations under this Act, the Minister, Board, President, Tribunal and Courts shall have fundamental regard to the following—

- (a) the *International Covenant on Civil and Political Rights*,
- (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*.

(2) In particular, in interpreting the requirement of the *International Covenant on Civil and Political Rights*, Article 18(3), that limitations upon a

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<sup>20</sup> *Punta Del Este Declaration on Human Dignity for Everyone Everywhere*, Introduction available at [www.dignityforeveryone.org/introduction/](http://www.dignityforeveryone.org/introduction/).

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.

(3) So far as it is possible to do so consistently with their purpose, all provisions of this Act must be interpreted in a way that is compatible with the international instruments referred to in subsection (1).

10. Given the pivotal role the Bill proposes to place on the protection of religious freedom under international law, we hope the Committee's deliberations will be assisted by a precise and detailed account of the scope of protections granted to religious belief and activity within that law. Central to these international law standards is a recognition that religious freedom must be balanced with other rights. In formulating the settings of this balancing exercise, international law recognises the fundamental importance that religious freedom plays within a society by imposing strict conditions for the placing of limitations upon religious acts and manifestations .

#### Recent Inquiry Support for the Use of International Law in Domestic Legislation

##### Commonwealth Parliament Human Rights Sub-Committee

11. The Australian Commonwealth Parliament Human Rights Sub-Committee of the Joint Standing Committee on Foreign Affairs, Defence and Trade recently conducted an extensive Inquiry into the Status of the Human Right of Freedom of Religion or Belief. The Inquiry was tasked with investigating whether religious freedom is adequately protected in Australian law. The Sub-Committee recommended that Australian law should look to the jurisprudence developed under the ICCPR. In so doing, the Sub-committee also commented on the risk of reaching a balance that does not reflect the requirements of international law:

Human Rights discourse is well developed internationally, and the further development of Australian human rights law should look to the ICCPR and other instruments for guidance ... Although there is legislative protection for some ICCPR rights, notably the Article 26 right to non-discrimination, religious freedom has very little legislative protection and there is a risk of an imbalanced approach to resolving any conflict between the right to freedom of religion or belief and other rights.<sup>21</sup> ...

Evidence suggests that these instruments and UN Human Rights Committee comments should provide guidance to how best to implement protection for freedom of religion or belief in Australian law.<sup>22</sup>

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<sup>21</sup> Joint Standing Committee on Foreign Affairs, Defence and Trade Inquiry into the Status of the Human Right to Freedom of Religion or Belief, *Interim Report* (2017), [2.32 to 2.33].

<sup>22</sup> *Ibid* [2.36].



In specifically referencing the relevant international law at Article 3, the Bill seeks to address the 'risk of an imbalanced approach to resolving any conflict between the right to freedom of religion or belief and other rights'. By importing these protections, the Bill demonstrates that it is not setting up special rights for a select group within the community. It is not seeking to preference religious rights over other rights. Rather, the Bill merely seeks to accurately reflect the international consensus. The fact that no Australian anti-discrimination law to date has reflected this consensus is not an indictment of the Bill. Rather, it is a cautionary warning of a gap in existing Australian law. Religious freedom should be harmonized and, when necessary, balanced with other rights in a way that maximises their joint enjoyment.

#### Expert Panel on Religious Freedom

12. The inclusion of Article 3 gives effect to recommendation 3 of the Expert Panel on Religious Freedom, which was framed in the following terms:

Commonwealth, State and Territory governments should consider the use of objects, purposes or other interpretive clauses in anti-discrimination legislation to reflect the equal status in international law of all human rights, including freedom of religion.<sup>23</sup>

13. Article 3 of the Bill is, in effect, an interpretive clause. The following excerpt from the report of the Expert Panel provides the reasoning underpinning the Panel's recommendation:

1.150 ... in drafting laws that do have an impact on rights such as freedom of religion, parliaments should consider the inclusion of express provisions that require the interpretation of laws consistently with those rights so far as it is possible to do so in a way that gives effect to the purpose of the law.

1.151 This could be achieved in a variety of ways. One approach is through the use of objects clauses. Many discrimination laws refer to their purpose or object as being the promotion of the right to equality or equality of opportunity, but make no express reference to other human rights, such as the right to freedom of religion...

1.152 Alternatively, or in addition, appropriate interpretation clauses could be inserted in the relevant legislation or in legislation of general application to ensure that such laws are interpreted in a manner consistent with the equal status of all human rights.

#### Use of International Law is a Means to Ensure Religious Freedom is Not Conceived of as a 'Secondary' Right

14. The above recommendation of the Expert Panel should be read in the context of the concern to which it sought to respond:

Many submissions, particularly by those representing a faith perspective, argued that freedom of religion was a 'poor cousin' to other human rights such as the right to freedom from discrimination. Elsewhere, freedom of religion has been described as a 'forgotten freedom'.<sup>24</sup>

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<sup>23</sup> Expert Panel, above n 7, p 6.

<sup>24</sup> *Ibid*, 1.110.

15. Accordingly, the Expert Panel posed the above recommendation as a means to recalibrate anti-discrimination law to appropriately reflect the equal status of both religious freedom and principles of anti-discrimination. To that end, the recommendation recognised:

the importance of ensuring that the right to religious freedom is given appropriate weight in situations where it is in tension with other public policy considerations, including other human rights.<sup>25</sup>

Article 3 of the Bill achieves this outcome by requiring ‘fundamental regard’ be had to the balancing of the requirements of religious freedom with those of equality as expressed within the relevant international covenants and instruments.

16. The concern that religious freedom has played the role of ‘poor cousin’ to other rights has increasingly featured in academic and judicial treatment of the topic. As noted by Neil Foster (Associate Professor at Newcastle University Law School):

The danger is that in a “secular” Western society where religion is often perceived as archaic and anachronistic, freedom of religion rights will be restrictively construed, ignored or reduced to a merely formal principle and automatically subordinated to other rights and interests.<sup>26</sup>

Perhaps discerning a similar misapprehension of religion as ‘archaic’, former United Nations Special Rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt, has warned against ‘an overly simplistic perception [that] religions per se constitute obstacles to the development of societies free from discrimination’.<sup>27</sup> The evident presumption behind calls to favour other human rights is that religious freedom is not as legitimate a right as other rights, and should always be ‘trumped’ by those other rights.

As noted by Patrick Parkinson (Academic Dean and Head of School for the TC Beirne School of Law, The University of Queensland):

The concern is that in a situation where the prevailing intellectual fashions of the day tend towards a disregard for religious freedom, a narrow interpretation may be given to what it means to practice religion, confining it to private belief and worship. In Communist countries of the old Soviet bloc, that amount of respect for freedom of religion was also given.<sup>28</sup>

17. Aroney, Babie and Harrison contend that this form of secular liberalism has the effect of rendering:

Religious freedom ... at best, a second-class right. Lip service is given to the need to ‘balance’ all rights, including freedom of religion, but religious organisations do not appear to have much confidence in administrative agencies, tribunals

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<sup>25</sup> *Ibid*, 1.154.

<sup>26</sup> *Freedom of Religion and Balancing Clauses in Discrimination Legislation* (21-24 June) (Magna Carta and Freedom of Religion or Belief Conference) (*Freedom of Religion and Balancing Clauses in Discrimination Legislation*). 3.

<sup>27</sup> Heiner Bielefeldt, Special Rapporteur, *Interim report of the Special Rapporteur on freedom of religion or belief*, UN Doc A/69/261 (5 August 2014).

<sup>28</sup> Patrick Parkinson, ‘Christian Concerns about an Australian Charter of Rights’ (2010) 15(2) *Australian Journal of Human Rights* 83, 102.



and courts to strike such balances in a way that treats religious freedom as a fundamental and non-derogable right. And this should be concerning. To borrow from another Victorian Tribunal decision, Australia is a 'society where people of different faiths can live, work and worship side-by-side'.<sup>29</sup>

18. The comments of Senator Fawcett in the Chair's Foreword to the Interim Report of the *Australian Commonwealth Parliament Human Rights Sub-Committee Joint Standing Committee on Foreign Affairs, Defence and Trade Inquiry into the Status of the Human Right of Freedom of Religion or Belief* are particularly prescient:

The threats to religious freedom in the 21<sup>st</sup> century are arising not from the dominance of one religion over others, or from the State sanctioning an official religion, or from other ways in which religious freedom has often been restricted throughout history. Rather, the threats are more subtle and often arise in the context of protecting other, conflicting rights. An imbalance between competing rights and the lack of an appropriate way to resolve the ensuing conflicts is the greatest challenge to the right to freedom of religion.<sup>30</sup>

19. The former United Nations Special Rapporteur on Freedom of Religion or Belief has also emphasised the importance of acknowledging the equal status of all human rights:

19. The holistic understanding of human rights has found expression in a frequently cited principle formulated at the World Conference on Human Rights, held in Vienna in 1993, that "[a]ll human rights are universal, indivisible and interdependent and interrelated". The Special Rapporteur is furthermore guided by the insight formulated at the World Conference that all human rights be treated "globally in a fair and equal manner, on the same footing, and with the same emphasis". In other words, on the normative level, human rights norms must be interpreted in such a way that they are not corrosive of one another but rather reinforce each other.

20. This principle has been summarised by the Canadian Supreme Court in the following terms:

A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the Charter and when developing the common law. When the protected rights of two individuals come into conflict Charter principles require a balance to be achieved that fully respects the importance of both sets of rights.<sup>31</sup>

21. As Judge Tulkens has said in the European Court of Human Rights (ECHR): 'In a democratic society, I believe it is necessary to seek to harmonize the principles of secularism, equality and liberty, not to weigh one against another.'<sup>32</sup>

22. A compact adopted in domestic law that preferences other rights over religious freedom misreads the requirements of international law. Consistent with

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<sup>29</sup> Nicholas Aroney, Joel Harrison and Paul Babie, 'Religious Freedom Under the Victorian Charter of Rights' in Matthew Campbell Groves, Colin (ed), *Australian Charters of Rights a Decade On* (Federation Press, 2017).

<sup>30</sup> Joint Standing Committee on Foreign Affairs, Defence and Trade, above n 20, p 13.

<sup>31</sup> *Trinity Western University v British Columbia College of Teachers* 1 SCR 772 [2001] [29-33].

<sup>32</sup> *Leyla Sahin v Turkey* 44 EHRR 5 [2007], [4].

Recommendation 2 of the Expert Panel, the foregoing philosophical propositions have found acceptance in the requirement that religious freedom should be balanced with other rights in a way that maximises their joint enjoyment. As further elaborated below, Article 3 of the Bill proposes to balance the right to religious freedom with the right to equality, consistent with these very clear norms of international law, to which we now turn.

## United Nations International Covenant on Civil and Political Rights as Foundation

### ICCPR Article 18's Express Protection of Religious Freedom

23. ICCPR Article 18 provides the international protection of religious freedom that Australia has ratified. It is in the following terms:

#### **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. (*emphasis ours*)
- (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.

As Babie, Rochow and Scharffs have recently recognised, the 'grounds for legitimate limitation' in Article 18(3) are 'seldom recognised by those advocating freedom and governments implementing them'.<sup>33</sup> To further the analysis, the following pages set out the precise requirements of that Article. We first consider the scope of the protection of religious freedom, and then examine the scope of the permissible limitations that may be placed on the manifestation of religious belief, pursuant to Article 18(3).

### Scope of the Protection of Religious Freedom

24. The right to religious freedom under ICCPR Article 18 is not limited in its application to religious institutions or their employees, it applies to 'everyone', not just religious ministers. These are stand-alone rights that, as with all human rights enshrined in the ICCPR, operate *ad infinitum*. They grow out of the universal recognition that each human being is entitled to dignity and respect as part of his or her membership in the human family. They are not subject to review by State Parties to the Covenant. It is important to recall that, finding their precursor in the *United Nations Universal Declaration of Human Rights* (UDHR), the Article 18 rights were adopted globally and enshrined as part of a 'universal declaration' with memories of the horrors of the Second World War still vivid in people's minds. The international consensus built around both the UDHR and the ICCPR was in part attributable to the experience of

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<sup>33</sup> Babie, Rochow and Scharffs, 2, above n 8, p 6.

Nazism in Germany, which provided an irrefutable demonstration of how far the State could go in breaching fundamental human rights. Included within that demonstration was the right to religious freedom. It is that context which illuminates the Preamble to the ICCPR, wherein it states that each of the rights were in 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family'.

25. ICCPR Article 4(2) reflects the fundamental aspect of the right to religious freedom under ICCPR Article 18, listing it amongst a limited suite of the freedoms that may not be infringed upon in a time of 'public emergency which threatens the life of the nation'.

26. The United Nations Human Rights Committee (UNHRC) in its General Comment on ICCPR Article 18 has described the right to freedom of thought, conscience and religion in the following terms:

The right to freedom of thought, conscience and religion (which includes the freedom to hold beliefs) in ICCPR Article 18.1 is far-reaching and profound; it encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others.

27. The UNHRC's General Comment 22 provides the following description of the activities protected within the scope of Article 18:

The concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including building places of worship, the use of ritual formulae and objects, the display of symbols, and the observance of holidays and days of rest. The observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or head coverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group. In addition, the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications.

28. In *Sister Immaculate Joseph v Sri Lanka*<sup>34</sup> the UNHRC relied on the 1981 *UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* (Religious Declaration) (also referenced at Article 3(1)(b) of the Bill) in interpreting the requirements of ICCPR Article 18. The preamble to the *Religious Declaration* contains the following comments concerning intolerance against religion and belief:

Considering that religion or belief, for anyone who professes either, is one of the fundamental elements in his conception of life and that freedom of religion or belief should be fully respected and guaranteed ...

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<sup>34</sup> *Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzinger of Sri Lanka v Sri Lanka*, Communication No. 1249/2004, U.N. Doc. CCPR/C/85/D/1249/2004 (2005).

Concerned by manifestations of intolerance and by the existence of discrimination in matters of religion or belief still in evidence in some areas of the world,

Resolved to adopt all necessary measures for the speedy elimination of such intolerance in all its forms and manifestations and to prevent and combat discrimination on the ground of religion or belief...

29. Article 2 of the *Religious Declaration* relevantly provides:

1. No one shall be subject to discrimination by any State, institution, group of persons, or person on grounds of religion or other beliefs.
2. For the purposes of the present Declaration, the expression "intolerance and discrimination based on religion or belief" means any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.

30. The *Religious Declaration* includes an extensive outline of the practices which fall within the scope of activities protected by ICCPR Article 18:

The right to freedom of thought, conscience, religion or belief shall include, inter alia, the following freedoms:

- (a) To worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes;
- (b) To establish and maintain appropriate charitable or humanitarian institutions;
- (c) To make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief;
- (d) To write, issue and disseminate relevant publications in these areas;
- (e) To teach a religion or belief in places suitable for these purposes;
- (f) To solicit and receive voluntary financial and other contributions from individuals and institutions;
- (g) To train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief;
- (h) To observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief;
- (i) To establish and maintain communications with individuals and communities in matters of religion or belief at the national and international levels.

The description of 'religious activity' provided at page 4 of the Explanatory Notes to the Bill appears to place clear reliance on this outline.

31. Importantly, the UNHRC has clarified that ICCPR Article 18 extends not only to the right to engage in religious activities, but also to the right to refuse to engage in activities that are contrary to religious obligation. For example, in *Karnel Singh Bhinder v. Canada*<sup>35</sup> the UNHRC confirmed that a requirement that a person refrain from wearing

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<sup>35</sup> CCPR/C/37/D/208/1986, 9 November 1989; see also *Yaker v. France*, CCPR/C/123/D/2747/2016, 17 July 2018, concerning a criminal prohibition on the wearing of an Islamic full faced veil.

a religiously mandated form of clothing 'is regarded as raising issues under Article 18', thus engaging ICCPR Article 18's protection to religious manifestation. The matter concerned a complaint against a requirement that a Sikh engineer wear a hard hat in the workplace. Although falling for consideration within the scope of Article 18, the complained of requirement was ultimately found not to breach the Article, being 'justified by reference to the grounds laid down in Article 18, paragraph 3'.<sup>36</sup>

32. The UNHRC also considers that compulsion against conscience, in the form of required affirmations that breach one's religious convictions, fall within the scope of the protections offered by Article 18. For example, in respect of Rwanda, the UNHRC has expressed its concern over the repercussions experienced by Jehovah's Witnesses for their refusal to perform certain mandated acts:

37. The Committee is concerned about the restrictions placed on the enjoyment of freedom of conscience and religion of Jehovah's Witnesses with regard to refusing to sing the national anthem, to attend religious ceremonies of another faith in schools or to take an oath holding the national flag (arts. 2, 18, 23-24 and 26-27).

38. The State party should guarantee, in practice, freedom of thought, conscience and religion and refrain from actions that may limit this right beyond the narrow restrictions permitted in Article 18 of the Covenant.<sup>37</sup>

33. Paul Taylor in his Commentary on the ICCPR listed the following additional examples from country reviews in which the Committee has raised concern over religious believers and atheists being coerced to act against their conscience:

Costa Rica, enquiring what oath an atheist was required to take upon appointment as a public official, in the light of a constitutional provision which contemplated a Catholic oath; Ireland, when expressing concern that judges were required to take a religious oath; Israel, out of concern at the lack of civil marriage and civil burial ceremonies for those not belonging to a religion; Bahrain, because the liberty of conscience of members of the Shia community was not effectively guaranteed; in the case of Algeria it expressed concern at allegations of attacks, acts of intimidation and arrests targeting those who did not fast during Ramadan; and inevitably the Criminal Code provisions in Morocco which criminalised 'actions contrary to the Muslim religion' were bound to cause issues of conscience for many who contravened them.<sup>38</sup> (emphasis ours)

As the UNHRC stated in *Yoon and Choi v. Korea* 'respect on the part of the State for conscientious beliefs and manifestations is itself an important factor in ensuring cohesive and stable pluralism in society'.<sup>39</sup>

34. Following the approach taken in international law, the Bill expressly clarifies that 'religious activity' includes both refusals to perform acts contrary to religious requirements and coerced affirmations that breach religious convictions. The

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<sup>36</sup> *Ibid*, [6.2].

<sup>37</sup> Rwanda CCPR/C/RWA/CO/4 (2016) 37.

<sup>38</sup> Paul Taylor, *A Commentary on the International Covenant on Civil and Political Rights* (Cambridge University Press, 2020), 513.

<sup>39</sup> *Yoon and Choi v. Korea*, CCPR/C/88/D/1321–1322/2004, 3 November 2006 [8.4].

Explanatory Notes to the Bill clarify that religious activities include ‘refusal (including refraining from participating in activities that are inconsistent with religious beliefs)’. Also included is ‘any activity or manifestation motivated by a religious belief, whether in public or in private, and whether individually or in community with others.’

The Explanatory Notes then clarify:

The examples make clear that the proposed Part does not intend to protect solely ‘sacred acts’ or acts in the performance of a ‘religious ritual’. It is necessary to clarify in anti-discrimination law that, for many religious believers, religious convictions that impact on or motivate behaviour can extend to the whole of their personal values and lived experience.<sup>40</sup>

The Explanatory Notes also clarify that:

A refusal to engage in acts that are contrary to religious teaching can be [sic] characteristic that appertains generally, or is generally imputed, to persons of a particular religious tradition. The Bill seeks to prohibit discrimination against people on this basis.<sup>41</sup>

#### Scope of Permissible Limitations on Religious Freedom

35. The right to religious freedom is not an unfettered right. As Babie, Rochow and Scharffs have recently recognised:

Unrestrained, rights to liberty of religion or conscience could give rise to acceptance of all sorts of damaging extremist conduct and cultist domination of individuals, with constitutional barriers often preventing state intervention. States must have appropriate mechanisms to prevent socially deleterious activity.<sup>42</sup>

In response to such concerns, international law has long recognised that limitations may be placed upon religious manifestation. However, recognising the foundational place that religious freedom holds in guaranteeing a free society, ICCPR Article 18(3) provides that, “(f)reedom 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.” In conformance with that provision the law has developed a strict regime that must be satisfied prior to the imposition of limitations.

#### United Nations Jurisprudence Interpreting International Law Protections

36. In General Comment 22, the UNHRC describes the right to religious freedom as a ‘fundamental’ right,

which is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security. Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are

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<sup>40</sup> *Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 (NSW)*, Explanatory Notes, p 4

<sup>41</sup> *Ibid*, p 5.

<sup>42</sup> Babie, Rochow and Scharffs, 3 above n 8, p 6.

predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner.<sup>43</sup>

This statement has provided the pivotal lynchpin around which the jurisprudence of the UNHRC has developed, including in matters such as *Prince v. South Africa*,<sup>44</sup> *F.A. v. France*,<sup>45</sup> *Türkan v. Turkey*,<sup>46</sup> *Hebbadj v. France*,<sup>47</sup> and *Yaker v. France*.<sup>48</sup>

37. Subsequent to UNHRC General Comment 22, a more detailed elaboration of the requirements of ‘necessity’ has been provided by the Committee in General Comment 27: Article 12 (Freedom of Movement). The principles for limitations in General Comment 27 have been adopted in General Comment No. 34: Article 19 (Freedom of Opinion and Expression). They can be considered to apply to ICCPR Article 18. General Comment 27 states:

restrictive measures must conform to the *principle of proportionality*; they must be appropriate to achieve their protective function; they must be *the least intrusive instrument* amongst those which might achieve the desired result; they *must be proportionate to the interest to be protected* ... The principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law.<sup>49</sup> (*emphasis ours*)

By expressly requiring that ‘fundamental regard’ be had to the principles for applying limitations in international law, the Bill seeks to embed the **principle of proportionality** into decision-making under the Act.

38. The United Nations Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt, offers the following analysis of the requirements of ICCPR Article 18(3):

35. With regard to manifestations in the forum externum, limitations are only permissible if they meet all the criteria set out in article 18, paragraph 3, of the Covenant. Accordingly, any limitations must be legally prescribed and must be “needed” to pursue a legitimate aim — the protection of “public safety, order, health, or morals or the fundamental rights and freedoms of others”. In addition, such restrictions must remain within the realm of proportionality, which, inter alia, means *that they must always be limited to the minimum degree of interference that is necessary to pursue a legitimate purpose*. These criteria are prescribed with a view to safeguarding the essence of freedom of religion or belief, even in situations of conflict with the rights or freedoms of others or with important public interests.

36. *The onus of proof therefore falls on those who argue in favour of the limitations, not on those who defend the full exercise of a right to freedom*. Confirming this critical function, the Human Rights Committee insists “that paragraph 3 of article 18 is to be strictly interpreted: restrictions are not allowed on grounds not specified there [...]. Limitations may be applied only for those purposes for which they were

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<sup>43</sup> Human Rights Committee, *General Comment No 22: Article 18*, 48th sess, (20 July 1993), [8].

<sup>44</sup> CCPR/C/91/D/1474/2006, 31 October 2007.

<sup>45</sup> CCPR/C/123/D/2662/2015, 16 July 2018.

<sup>46</sup> CCPR/C/123/D/2274/2013, 17 July 2018.

<sup>47</sup> CCPR/C/123/D/2807/2016, 17 July 2018.

<sup>48</sup> CCPR/C/123/D/2747/2016, 17 July 2018.

<sup>49</sup> Taylor, 516-7, above n 38, p 20,

prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner”.<sup>50</sup> (our emphasis added)

39. In order to ensure that any limitations imposed are ‘proportionate’ to the outcome sought through the limitation and are ‘no more restrictive than are required’, decision makers under the Bill are under an obligation to explore alternative means to pursue the purpose for which a limitation of a human right is proposed. A proportionate approach to the resolution of the boundary of competing rights requires investigation of means to accommodate competing rights without unduly burdening the right to religious freedom.

40. The further comments of the Special Rapporteur are worthy of setting out in full:

47. Before resorting to restrictions on the freedom to manifest one’s religion or belief, legislators or representatives of the judiciary should always analyse the respective cases with empirical and normative precision. However, States sometimes impose restrictive measures in a rather loose way, beyond the confines of article 18, paragraph 3, of the International Covenant. This may also happen in the context of gender-related anti-discrimination policies. *Based on overly simplistic perceptions, according to which religions per se constitute obstacles to the development of societies free from discrimination, some States may even be tempted to turn the principle of in dubio pro libertate upside down by restricting in case of doubt manifestations of religion or belief without providing the required empirical and normative evidence.*

48. The Special Rapporteur would like to reiterate in this context that when States wish to impose restrictions they always bear the burden of proof, both at the level of empirical evidence and at the level of normative reasoning. Furthermore, for limitations to be legitimate, they must meet all criteria set out in article 18, paragraph 3, of the International Covenant. Accordingly, limitations must be legally prescribed and they must be clearly needed to pursue a legitimate aim, the protection of “public safety, order, health, or morals or the fundamental rights and freedoms of others”. In addition, restrictions must remain within the realm of proportionality which, inter alia, means they must be limited to a minimum of interference. Finally, the forum internum dimension of freedom of religion or belief does not allow for any restrictions whatsoever, according to article 18, paragraph 2, of the International Covenant.<sup>51</sup>

41. As an example of ‘the required empirical and normative evidence’ necessary on which to justify limitations proposed the Special Rapporteur continues:

49. A much discussed issue in the context of limitations of freedom of religion or belief concerns restrictions on the wearing of religious symbols, including headscarves, turbans, kippas or religious jewellery, such as a cross attached to a necklace. In many cases those restrictions particularly affect women from religious

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<sup>50</sup> Heiner Bielefeldt, Special Rapporteur, above n 27, p 15.

<sup>51</sup> *Ibid.*



minorities. Although there may be reasons for imposing limitations for specific situations, the Special Rapporteur has noted that some of the measures taken in this regard fail to meet all the requirements of article 18, paragraph 3, of the International Covenant. For instance, laws prohibiting the Islamic headscarf in public institutions are frequently based on conjectures that women do not wear such head garments of their own free will. The empirical evidence for these conjectures often remains questionable. Moreover, if there are some clear cases of impositions, this experience will not necessarily suffice to justify general or broad prohibitions of the headscarf in public life or by users of such public institutions as schools, universities or public administration.

*50. Under the principle of proportionality, States have always to look for less farreaching and less intrusive restrictions before issuing legislation that infringes on freedom of religion or belief.* Another part of the proportionality test concerns the question of whether limitations are actually conducive to the legitimate purpose they are supposed to foster. It may happen that measures do not only fail to serve the said purpose; they may actually worsen the situation of many individuals, particularly women, for instance by further restricting their spaces of personal movement and infringing their rights to education and participation in public life.’<sup>52</sup>

42. The jurisprudence of the UNHRC in interpreting the requirements of ICCPR Article 18 demonstrates that sufficient international precedent exists to prevent damaging conduct in the name of religion. For example, in *Prince v. South Africa* the UNHRC denied a claim that a prohibition on ingesting illegal drugs amounted to an unlawful restriction on religious manifestation. Similarly, in *Ross v. Canada*<sup>53</sup> the Committee concluded that ICCPR Article 18 did not protect a teacher who made anti-Semitic remarks while off-duty on the basis that such remarks raised or strengthened anti-Semitic feeling.

43. However, as Taylor has observed, the test of necessity imposes strict requirements of proof. Failure to evidence the ‘necessity’ of a restriction has proven fatal to a State party’s response:

Recent religious dress code decisions against France demonstrate the contrast between, on the one hand, the ease of satisfying as legitimate the purpose of measures, and, on the other hand, the stringency of the test of necessity, requiring ‘evidence to a high standard in proof of necessity’. The mere fact that a measure serves a theoretically acceptable aim does little to provide the justification needed, yet States often rely on that alone.<sup>54</sup>

44. We have provided this extensive outline of the requirements of international law to protect religious freedom to assist the Committee in its deliberations, and in particular, in considering how New South Wales law may best give effect to these principles.

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<sup>52</sup> *Ibid.*

<sup>53</sup> CCPR/C/70/D/736/1997, 18 October 2000.

<sup>54</sup> See for example, *Bikramjit Singh v. France* CCPR/C/106/D/1852/2008, 1 November 2012 [8.6]; see also *Yaker v. France*, CCPR/C/123/D/2747/2016, 17 July 2018, and *Hebbadj v. France*, CCPR/C/123/D/2807/2016, 17 July 2018 both concerning a criminal prohibition on the wearing of an Islamic full faced veil.

Against that background, we now turn to how the Bill seeks to give effect to these long standing and well-regarded principles of international law that protect the fundamental right to freedom of religion.

#### The Bill Adopts These International Law Requirements

45. The Bill seeks to give effect to the precise requirements of international law by express reference. Article 3(1) of the Bill requires that ‘the Minister, Board, President, Tribunal and Courts’ have ‘fundamental regard’ to the ICCPR. Article 3(2) of the Bill provides guidance to decision makers under the Bill in interpreting the requirement that they have ‘fundamental regard’ to the ICCPR by specifically directing attention to the Siracusa Principles. *The United Nations Economic and Social Council’s Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* set out principles for the interpretation of the limitations clauses within the ICCPR, of which ICCPR Article 18(3) is an example.<sup>55</sup> The Principles provide that ‘all limitation clauses shall be interpreted strictly and in favour of the rights at issue’. The Principles provide that:

Whenever a limitation is required in the terms of the Covenant to be "necessary," this term implies that the limitation:

- a. is based on one of the grounds justifying limitations recognized by the relevant article of the Covenant,
- b. responds to a pressing public or social need,
- c. pursues a legitimate aim, and
- d. is proportionate to that aim.

46. Importantly, the *Siracusa Principles* require that ‘[i]n applying a limitation, a state shall use no more restrictive means than are required for the achievement of the purpose of the limitation.’<sup>56</sup> This requirement is proposed to be applied verbatim to decisions made under the Act by its inclusion at Article 3(2)(d) of the Bill.

47. The Explanatory Notes to the Bill clarify the intention of Article 3 to be added by the Bill in the following terms:

[Article 3] establishes the principles of the Act, including that the Minister, Board, President, Tribunal and Courts have fundamental regard to certain international instruments in carrying out functions under the Act and that the provisions of the Act are used in a way that is consistent with the purpose and meaning of those international instruments (the 1966 *International Covenant on Civil and Political Rights*, the 1981 *UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, and the 1985 *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*). That is, any limitation imposed on a religious believer’s or non-believer’s manifestation of their belief or non-belief under the Act (including through the ‘reasonableness test’ for indirect discrimination in Part 2B) must not encroach on the protections afforded to that person in international law. These include that only ‘necessary’

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<sup>55</sup> UN Commission on Human Rights, *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 41st sess, E/CN.4/1985/4 (28 September 1984).

<sup>56</sup> *Ibid* [11].

limitations may be imposed pursuant to certain limited grounds, that any such limitations must ‘pursue a legitimate aim and be proportionate to that aim’ and be applied using ‘no more restrictive means than are required for the achievement of the purpose of the limitation’.<sup>57</sup>

As Taylor has recently commented ‘the requirements for implementing Article 18 indicate the precision required in domestic law, particularly in confining suitably the eligible grounds of limitation’.<sup>58</sup> In our view, the Bill adequately acquits the task of precisely reflecting the requirements of international law when balancing religious freedom with other rights.

#### Recent Inquiries by Australian Committees Support the Approach in the Bill

48. Inclusion of the *Siracusa Principles* in Article 3 gives effect to the recommendations of both the Commonwealth Committee and the Expert Panel. As the Expert Panel recognised:

Although not binding under international law, the Siracusa Principles referred to in Chapter 2 have been influential in clarifying the application of limitation clauses in the ICCPR... The Panel is of the view that the Siracusa Principles form a sound basis for parliaments to assess whether a law limiting the operation of freedom of religion or other rights is unduly burdensome.<sup>59</sup>

This culminated in the following recommendation (recommendation 2):

Commonwealth, State and Territory governments should have regard to the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights when drafting laws that would limit the right to freedom of religion.<sup>60</sup>

Similarly, the 2017 Commonwealth Sub-Committee Interim Report also concluded that ‘the Siracusa Principles provide guidance for interpreting the “limitations clauses” in the ICCPR, such as those found in Article 18(3)’.<sup>61</sup> The Bill gives effect to these recommendations by requiring, as an interpretive principle within the Act itself, that all decision makers have regard to the relevant international law governing the limitation of religious freedom when making determinations under the Act.

#### “Necessity” Test for Imposing Limitations Adopted in the Bill vs. Reasonableness

49. The requirements for the placing of limitations on religious manifestation assume a particular form when applied to the unique context of anti-discrimination law. The Bill, adopting the equivalent protections granted to the other protected attributes in the remainder of the Act, proposes to protect a religious adherent from:

- a. less favourable treatment (direct discrimination); or
- b. being subjected to unreasonable requirements with which they cannot comply (indirect discrimination)

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<sup>57</sup> Explanatory Notes, n 28, 2.

<sup>58</sup> Taylor, 536, above n 38, p 20.

<sup>59</sup> Expert Panel, , 1.149, above n 7, p 6.

<sup>60</sup> Expert Panel, above n 7, p. 6.

<sup>61</sup> Joint Standing Committee on Foreign Affairs, Defence and Trade, above n 21. p 13.

‘on the ground of’ their religious beliefs or activities. By enshrining protections against discrimination on the basis of religious belief and activity, the Bill seeks to give effect to the protection given equality contained at ICCPR Article 26. However, it does this in a way that interacts with the protections granted to the freedom of religion and belief at Article 18 of the Covenant, as is contemplated by the Covenant itself. To our knowledge, this is the first attempt to provide a balancing that aligns with the international standard within Australian anti-discrimination law.

50. The clear overlap between Article 18 and Article 26 has been long recognized within the jurisprudence of the UNHRC. The same is true of the equivalent overlap between Article 9 and Article 14 of the *European Convention on Human Rights*. As the European Court of Human Rights has observed, ‘Article 9 is often relied upon in conjunction with Article 14 of the Convention, which prohibits discrimination based on, among other things, religion and opinions’.<sup>62</sup> This overlap is seen in myriad complaints which argue breach of both the protection to religious freedom and the protection against religious discrimination.<sup>63</sup>

51. That ICCPR Articles 18 and 26 require separate consideration in the circumstances of each case is reflected in the deliberations of both the UNHRC and the ECHR. However, where the test for indirect discrimination in domestic law allows a limitation to be placed upon the manifestation of religious belief on the grounds that the limitation is ‘reasonable’, Article 18 may be breached. **This is because ICCPR Article 18 permits limitations to be placed upon religious manifestation only where it is ‘necessary’ to do so.** That is, a finding that detrimental conduct is not technical discrimination on the basis it is ‘reasonable’ in accordance with domestic prohibitions on indirect discrimination may operate to place a limitation on the manifestation of religious belief that is not ‘necessary’ and does not satisfy the associated requirements of ICCPR Article 18. To avoid this outcome, some provision is required in domestic legislation to ensure conduct that passes the test for indirect discrimination does not amount to a limitation of the religious freedom of an individual or corporation that fails to accord with the protections offered in international law. Article 3 of the Bill avoids this outcome by requiring that claims be resolved according to the limitation standard in ICCPR Article 18.

52. It is widely recognised, by both Australian and international courts, that a standard of ‘necessity’ imposes a higher obligation than a standard of ‘reasonableness’. The notion that the term ‘necessary’ imposes upon the relevant party a high threshold, has been endorsed by the ECHR, wherein it held:

[‘Necessary’] is not synonymous with ‘indispensable’ ... neither has it the flexibility of such expressions as ‘admissible’, ‘ordinary’, ‘useful’, ‘reasonable’

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<sup>62</sup> European Court of Human Rights, *Guide on Article 9 of the European Convention on Human Rights Freedom of thought, conscience and religion* (30 April 2020).

<sup>63</sup> In the jurisprudence of the UNHRC see for example, *Bhinder v. Canada*, CCPR/C/37/D/208/1986, 9 November 1989 [6.1]; *Prince v. South Africa*, CCPR/C/91/D/1474/2006, 31 October 2007 [7.5]; *F.A. v. France*, CCPR/C/123/D/2662/2015, 16 July 2018; *Türkan v. Turkey*, CCPR/C/123/D/2274/2013, 17 July 2018; *Hebbadj v. France*, CCPR/C/123/D/2807/2016, 17 July 2018; *Yaker v. France*, CCPR/C/123/D/2747/2016, 17 July 2018.

or ‘desirable’. ... [I]t is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of ‘necessity’ in this context.<sup>64</sup>

Similarly, in the context of Australian anti-discrimination law, Bowen CJ and Gummow J have recognised that ‘the test of reasonableness is less demanding than one of necessity, but more demanding than a test of convenience.’<sup>65</sup>

53. The UNHRC recently emphasized the need for State Parties to provide ‘clear justification’ of the purpose of any restriction on the manifestation of a religious belief.<sup>66</sup> In importing the requirement that necessary limitations only be imposed according to the requirements of ICCPR Article 18, the Bill introduces this effective requirement. Courts will then be required to provide clear reasons to the parties in the terms of requirements for the imposition of limitations under Article 18. The obligation is not just to explain how a limitation is based on ‘reasonable and objective criteria in pursuit of an aim that is legitimate under the Covenant’,<sup>67</sup> which may be acquitted by the standard test for indirect discrimination. Article 3 operates as a gloss to the indirect discrimination test, to require, alongside consideration of the question of whether the conduct can amount to discrimination pursuant to Article 26, whether the conduct contravenes Article 18.

The Principle of “Proportionality” is adopted by the Bill

54. In Section 3(2)(c), the Bill requires decision makers to have ‘fundamental regard’ to means by which limitations on religious belief may be ‘proportionate’. In order to acquit this obligation, an analysis of alternative means to progress the claimed right must be undertaken. Whilst not exhausting the factors which would be proportionate, in the context of service supply, where the religious freedom of a service supplier is proposed to be limited, the availability of equivalent services from alternative suppliers will be a relevant consideration in determining whether the limitation is proportionate. The Explanatory Notes to the Bill provides the following example, demonstrating how a decision maker under the Bill may acquit the obligations of the proportionality analysis:

As for the remaining provisions of the Act, Section 22L must be interpreted in accordance with new Section 3, Principles of Act. In particular, the Siracusa Principles apply the requirement that limitations on religious manifestation must ‘pursue a legitimate aim and be proportionate to that aim’. The following example assists in clarifying this intended operation.

A Satanist requests that a publisher print materials that promote the teachings of Satanism. A Jewish employee of the publisher requests that she not be required to facilitate the order. Having fundamental regard to the International Covenant on Civil and Political Rights and the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, it would not be necessary or proportionate, for the employer to require her

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<sup>64</sup> *Handyside v United Kingdom* (1976) 1 EHRR 737 [48].

<sup>65</sup> *Secretary, Department of Foreign Affairs v Styles* (1989) 23 FCR 251, 263.

<sup>66</sup> *Türkan v. Turkey*, CCPR/C/123/D/2274/2013, 17 July 2018

<sup>67</sup> General Comment 18 see also *Türkan v. Turkey*, CCPR/C/123/D/2274/2013, 17 July 2018.

involvement in the order where alternative employees who do not have a genuine religious objection are available to facilitate the order. Similarly, it would not be necessary or proportionate for the employer to require her involvement in the order where alternative publishers are reasonably available to facilitate the order. In both of these cases, for the employer to require her involvement in the order would use 'more restrictive means than are required'. In addition, to require such conduct would not be compatible with the international instruments stated at section 3.<sup>68</sup>

In this way the Bill seeks to reflect the detailed framework for balancing rights imposed by international law within New South Wales law.

#### Academic Support for the Approach in the Bill

55. By providing this form of direction, the Bill responds to concerns that the proportionality analysis may leave wide scope for judicial discretion. As U.S. legal scholar Cole Durham noted proportionality analysis confers:

significant discretion on judges in weighing religious freedom claims. A primary issue here is that cultural shifts associated with the process of secularization lead many judges to assign greater weight to secular state interests and less to religious concerns. This can occur because religion is no longer seen to deserve special protection, because there is a sense that religious activities and religious views should be consigned exclusively to the private sector, because religion has become more suspect as a locus of social danger, or for any of a variety of other reasons. Even if judicial biases are not skewed in this way, there is a risk that the characterization of the values being balanced can be manipulated so that the system wide interests of the state are balanced against the individualized concerns of the religious freedom claimant<sup>69</sup>

56. In Durham's view, such judicial biases have left religious communities with reason for concern:

Depending on the particular country, the history of judicial appointments, the current composition of the judiciary, and traditions of deference or activism, religious communities may be more or less wary of judges and the power they have in interpreting religious freedom norms.<sup>70</sup>

The provision of specific examples applying the proportionality analysis assist in providing certainty to complainants and respondents seeking to access the Bill's protections.

57. As Cole Durham has insightfully identified, there is merit in ensuring precision when seeking to balance religious freedom with competing rights through legislative means:

In most areas, the tendency is toward generating greater specificity in human rights norms. Excessive abstraction leaves too much room for discretion. This helps to explain why most constitutions around the world are much more detailed today than similar documents were in the 18th century. Some see this as a loss of

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<sup>68</sup> Explanatory Notes, n 28, 5.

<sup>69</sup> W. Cole Jr. Durham, 'Religious Freedom in a Worldwide Setting: Comparative Reflections' (Speech delivered at Pontifical Academy of Social Sciences, Brigham Young University, 30 April 2011).

<sup>70</sup> Ibid.

elegance, but in large part it is a result of increased experience and a desire to clearly resolve known issues.

He offered the following analysis of the ICCPR's requirements for limitations to the right to religious freedom:

Limitations on manifestations must pass three tests. First, they must be prescribed by law. This requirement has a formal element (requiring that the interference in question is legally authorized) and a qualitative element (requiring that fundamental rule of law constraints such as non-retroactivity, clarity of the legal provisions, absence of arbitrary enforcement and the like be observed)...

International standards go further and prescribe a restricted set of permissible or legitimating grounds for limitations. ... these legitimating grounds are restricted to those which are necessary "in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others." While the legitimating grounds are quite broad and in most cases at least one is available to support the particular limitations being challenged, it is quite clear that only the enumerated legitimating grounds may be invoked to justify a limitation...

The real core of the ICCPR... test lies in assessing whether the particular limitation is "necessary".<sup>71</sup>

58. Durham provides the following review of the jurisprudence of the ICCPR and the ECHR: the issue of necessity must be assessed on a case-by-case basis. However, certain general conclusions have emerged. First, in assessing which limitations are "proportionate," it is vital to remember that "freedom of thought, conscience and religion is one of the foundations of a democratic society". State interests must be weighty indeed to justify abrogating a right that is this significant. Second, limitations cannot pass the necessity test if they reflect state conduct that is not neutral and impartial, or that imposes arbitrary constraints on the right to manifest religion. Discriminatory and arbitrary government conduct is not "necessary"—especially not in a democratic society. In particular, state regulations that impose excessive and arbitrary burdens on the right to associate and worship in community with others are impermissible. In general, where laws are not narrowly tailored to further one of the permissible legitimating grounds for limitation, or *where religious groups can point to alternative ways that a particular state objective can be achieved that would be less burdensome for the religious group and would substantially accomplish the state's objective, it is difficult to claim that the more burdensome alternative is genuinely necessary*. Further, counterproductive measures are obviously not necessary. Finally, the U.N. Human Rights Committee has noted that limitations "must not be applied in a manner that would vitiate the rights guaranteed in article 18," and the ECHR would no doubt take a similar position. Finally, restrictions on religious freedom "must not impair the very essence of the right in question." (our emphasis added).<sup>72</sup>

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<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*



## New South Wales Can and Should Rely on International Law of Religious Freedom

59. Support for the application of the principles of international law and jurisprudence protecting religious freedom as provided in the Bill is available to the Committee because the Commonwealth of Australia has ratified the ICCPR and is bound by the First Optional Protocol to the ICCPR. Article 50 of the ICCPR provides that '[t]he provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.' This means that New South Wales has obligations under the ICCPR, and further that the Commonwealth has obligations to ensure that New South Wales law complies with the ICCPR. Under the First Optional Protocol individuals and organisations may make complaints to the UNHRC that Australian legislation, including legislation of individual States and Territories pursuant to Article 50 of the ICCPR, does not align with the protections offered by the ICCPR.

60. Consequently, commenting on the Victorian Charter of Rights, Associate Professor Julie Debaljak notes that 'where the Victorian Charter obligations are less rigorous than the minimum protections guaranteed under international human rights law, the Commonwealth may still be held to account internationally for any violations of Australia's international human rights obligations.'<sup>73</sup> The same applies to New South Wales - a failure by the New South Wales government to adequately protect the religious freedom of the citizens of New South Wales as required in international law will mean that the Commonwealth is responsible for any ensuing breaches of religious freedom. Any failure by New South Wales to acquit its obligations would then fall for consideration by the Commonwealth. To act consistently with its obligations under international law it is open to the Commonwealth to pass legislation that prevails against any law that fails to reflect the international standard.

61. It is also relevant to note that, in its 2017 Concluding Observations to the sixth periodic report of Australia, the UNHRC called for religious belief to be protected in Commonwealth law. The Committee noted its concerns about the "lack of direct protection against discrimination on the basis of religion at the federal level", and made the following recommendation:

The State party should take measures, including by considering consolidating existing non-discrimination provisions in a comprehensive federal law, in order to ensure adequate and effective substantive and procedural protection against all forms of discrimination on all the prohibited grounds, including religion, and intersectional discrimination, as well as access to effective and appropriate remedies for all victims of discrimination.<sup>74</sup>

62. This recommendation has relevance for New South Wales, which has also failed to implement a protection against discrimination on religious grounds. The absence of

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<sup>73</sup> Julie Debaljak, 'Balancing Rights in a Democracy: The Problems with Limitations and Overrides of Rights under the Victorian Charter of Human Rights and Responsibilities Act 2006' (2008) 32(2) *Melbourne University Law Review* 422.

<sup>74</sup> Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, 102<sup>nd</sup> sess, UN Doc CCPR/C/AUS/CO/6 (9 November 2017), [17-18].



such protections within both Commonwealth and New South Wales law renders residents of New South Wales exposed to religious discrimination.

#### Religious Corporations Are Protected as well under Anti-Discrimination Law

63. Various examples within the Explanatory Notes to the Bill clarify that references to 'person' within the Bill include incorporated and unincorporated bodies. This recognition finds support in international law. Article 18 protects the right to exercise the '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.' In Concluding Observations, the UNHRC has noted that the procedure for registration has been used to discriminate between groups.<sup>75</sup> In 2005 the UNHRC found that Sri Lanka had breached both ICCPR Articles 18 (freedom of religion) and 26 (freedom from discrimination) by refusing the incorporation of an Order of Catholic nuns.<sup>76</sup> They concluded:

7.4 As to the claim under article 26, the Committee refers to its long standing jurisprudence that there must be a reasonable and objective distinction to avoid a finding of discrimination, particularly on the enumerated grounds in article 26 which include religious belief. In the present case, the authors have supplied an extensive list of other religious bodies which have been provided incorporated status, with objects of the same kind as the authors' Order. The State party has provided no reasons why the authors' Order is differently situated, or otherwise why reasonable and objective grounds exist for distinguishing their claim. As the Committee has held in *Waldman v Canada*, therefore, such a differential treatment in the conferral of a benefit by the State must be provided without discrimination on the basis of religious belief. The failure to do so in the present case thus amounts to a violation of the right in article 26 to be free from discrimination on the basis of religious belief...

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee reveal violations by Sri Lanka of articles 18, paragraph 1, and 26 of the Covenant.

64. Leading jurist Manfred Nowak has also acknowledged that the communal and associational aspects of religious freedom are further supported by ICCPR Articles 22 and 27. Article 22 protects the 'right to freedom of association with other people.' Manfred Nowak has explained that this right includes the collective right of an existing association to represent the common interests of its members.<sup>77</sup>

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<sup>75</sup> See the following observations, cited by Taylor, above n 26, 527: Lithuania CCPR/C/79/Add.87 (1997) 18; Hungary CCPR/CO/74/HUN (2002) 14; Belgium CCPR/CO/81/BEL (2004) 26; Lithuania CCPR/CO/80/LTU (2004) 16; Bulgaria CCPR/C/BGR/CO/3 (2011) 25; Tajikistan CCPR/C/TJK/CO/2 (2013) 20; Kyrgyzstan CCPR/C/KGZ/CO/2 (2014) 22; Austria CCPR/C/AUT/CO/5 (2015) 31–32; Belarus CCPR/C/BLR/CO/5 (2018) 45; Bulgaria CCPR/C/BGR/CO/4 (2018) 35.

<sup>76</sup> *Sister Immaculate Joseph and 80 Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzinger v Sri Lanka v Sri Lanka*, Communication No. 1249/2004, U.N. Doc. CCPR/C/85/D/1249/2004 (2005).

<sup>77</sup> Manfred Nowak, *CCPR Commentary* (Kehl am Rhein: Engel, 1993), 386–9.

65. In the context of the European Convention on Human Rights, in *X and Church of Scientology v Sweden* the European Commission of Human Rights (ECHR) recognized the ability of a church to exercise Article 9 religious freedom rights on behalf of its members, accepting that:

[w]hen a church body lodges an application under the Convention, it does so in reality, on behalf of its members. It should therefore be accepted that a church body is capable of possessing and exercising the rights contained in Article 9 (1) in its own capacity as a representative of its members.<sup>78</sup>

Subsequent decisions have confirmed that religious corporations are direct beneficiaries of the rights conferred under Article 9 and may exercise those rights in their own capacity,<sup>79</sup> with the ECHR clarifying that:

a complaint lodged by a church or a religious organisation alleging a violation of the collective aspect of its adherents' freedom of religion is compatible *ratione personae* with the Convention, and the church or organisation may claim to be the "victim" of that violation within the meaning of Article 34 of the Convention.<sup>80</sup>

66. The above recognition of the rights of incorporated bodies to protection within anti-discrimination law is consistent with various examples provided in the Explanatory Notes to the Bill which seek to clarify that such bodies may rely upon the Bill's protections against discrimination. The Explanatory Notes provides the following examples concerning the operation of clauses 22W and 22Z respectively:

Example 3: A local government or State Government agency refuses to provide a grant or funding or other economic benefit or provides it on disadvantageous conditions because the applicant holds or expresses a religious belief or is associated with a person who does so.<sup>81</sup>

Example 1: A government agency refuses to appoint or hire or promote or dismisses a person, employee or contractor because that person holds or expresses a religious belief or is associated with a person who does so.<sup>82</sup>

The Church supports the Bill because it makes such discrimination unlawful.

### Part III – The test of religious belief should be decided by the religion, not the courts

67. The Bill introduces specific tests for Courts to apply when taking evidence of religious belief. These tests seek to ensure that Courts recognise the sincere self-conception of a believer/religious institution. The Bill requires Courts to use the following definition when applying the sincere self-conception test :

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<sup>78</sup> (1979) 16 DR 68, 70.

<sup>79</sup> See in particular *Kontakt-Information-Therapie and Hagen v Austria* No. 11921/86, 57 DR 81 (Dec 1988), 88; *A.R.m. Chappell v UK*, No. 12587/86, 53 DR 241 (Dec. 1987), 246; *Iglesia Bautista 'El Salvador' and Ortega Moratilla v Spain* No. 17522/90 72 DR 256 (Dec 1992).

<sup>80</sup> European Court of Human Rights, *Guide on Article 9 of the European Convention on Human Rights Freedom of thought, conscience and religion* (30 April 2020).

<sup>81</sup> Explanatory Notes, n 28, 8.

<sup>82</sup> *Ibid*, 8.

***genuinely believes*** in relation to a person means the person's holding of the religious belief is sincere and is not fictitious, capricious or an artifice.<sup>83</sup>

Various clauses then require decision-makers to have regard to the 'genuine belief' of the adherent when determining the application of the Bill's protections. The Explanatory Notes clarifies:

The 'sincerity test' (genuinely believes) gives effect to the approach consistently adopted by the highest courts in Australia (specifically in *Church of the New Faith v Commissioner for Payroll Tax (Vic)*), the United Kingdom, United States and Canada as a means to avoid courts determining matters of religious doctrine or disputation. This test does not interfere with the ability to impose legitimate limitations on religious activities, as allowed elsewhere in the Act and the proposed Part.<sup>84</sup>

The drafters of the Bill have clarified that requiring decision-makers (Courts) to have regard to 'genuine beliefs' will not grant an ability for a purported religious believer to simply write themselves into legal protection by merely attesting to a 'sincere' belief. Rather, the intent of the test is to avoid imposing on the Courts the obligation to leave the domain of the law and decide matters of religious doctrine. There are, unfortunately, many examples of Australian and international courts taking upon themselves the role of interpreting church doctrine. As the Explanatory Notes clarify, the Bill responds to such examples by pointing to the emphasis placed on the sincerity or genuineness of the adherents beliefs in question by the High Court in *Church of the New Faith v Commissioner for Payroll Tax (Vic)*). This "genuine belief" test is also supported by judicial opinion outside Australia.

#### International Law Support

68. The UNHRC has recently observed that '*the contents of a religion or belief should be defined by the worshippers themselves*', subject to the proviso that they be a 'religion' or 'belief' which it has framed as 'beliefs formed by a system of principles or philosophical consideration of life.'<sup>85</sup> Distinguished international jurist Nowak has observed that 'freedom of thought and religion is not infrequently termed, along with freedom of opinion, the core of the Covenant, since this nucleus demonstrates that that the international Bill of Rights is based on the philosophical assumption that the individual as a rational being is master of his or her own destiny'.<sup>86</sup> To that extent, the Bill seeks to recognize the ability of individuals to deliberate upon, and sincerely form, their own conscientious commitments. Similarly, the ECHR recognizes that only in clear and extreme cases can a claim to religious belief be disregarded entirely, as in *X v United Kingdom*,<sup>87</sup> where the applicant had provided no information to ascertain the objective existence of the 'Wicca' religion.

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<sup>83</sup> Clause 22K (1) in the Bill

<sup>84</sup> *Ibid*, 2.

<sup>85</sup> *Alger v Australia* CCPR/C/120/D/2237/2013, 13 July 2017, [6.5].

<sup>86</sup> Nowak, 408, above n 77, p 32.

<sup>87</sup> (1977) 11 DR 55.

## Common Law Courts Support

69. By adopting a 'genuine belief' test, the Bill directs decision-makers to adopt an approach that permits the religious institution and religiously convicted individual the maximum scope to define their own doctrine. As the Canadian Supreme Court has recognized, the right to religious freedom does not necessitate an inquiry into whether religious 'beliefs are objectively recognized as valid by other members of the same religion, nor is such an inquiry appropriate for courts to make'.<sup>88</sup>
70. The comments of Lord Nicholls in *R (on the application of Williamson) v Secretary of State for Education and Employment*<sup>89</sup> seem to offer the specific wording upon which the Bill's definition of 'genuine belief' is based, drawn originally from Iacobucci J in the decision of the Supreme Court of Canada in *Syndicat Northcrest v Amselem*:<sup>90</sup>

It is necessary first to clarify the court's role in identifying a religious belief calling for protection under article 9. When the genuineness of a claimant's professed belief is an issue in the proceedings the court will inquire into and decide this issue as a question of fact. This is a limited inquiry. The court is concerned to ensure an assertion of religious belief is made in good faith: 'neither fictitious, nor capricious, and that it is not an artifice', to adopt the felicitous phrase of Iacobucci J in the decision of the Supreme Court of Canada in *Syndicat Northcrest v Amselem* (2004) 241 DLR (4th) 1, 27, para 52. But, emphatically, it is not for the court to embark on an inquiry into the asserted belief and judge its 'validity' by some objective standard such as the source material upon which the claimant founds his belief or the orthodox teaching of the religion in question or the extent to which the claimant's belief conforms to or differs from the views of others professing the same religion. Freedom of religion protects the subjective belief of an individual. As Iacobucci J also noted, at page 28, para 54, religious belief is intensely personal and can easily vary from one individual to another. Each individual is at liberty to hold his own religious beliefs, however irrational or inconsistent they may seem to some, however surprising. The European Court of Human Rights has rightly noted that 'in principle, the right to freedom of religion as understood in the Convention rules out any appreciation by the state of the legitimacy of religious beliefs or of the manner in which these are expressed': *Metropolitan Church of Bessarabia v Moldova* (2002) 35 EHRR 306, 335, para 117. The relevance of objective factors such as source material is, at most, that they may throw light on whether the professed belief is genuinely held. Everyone, therefore, is entitled to hold whatever beliefs he wishes. . . . The belief must relate to matters more than merely trivial. It must possess an adequate degree of seriousness and importance. As has been said, it must be a belief on a fundamental problem. With religious belief this requisite is readily satisfied. The belief must also be coherent in the sense of being intelligible and capable of being understood. But, again, too much should not be demanded in this regard. Typically, religion involves belief in the supernatural. It is not always susceptible to lucid exposition or, still less, rational justification. The language used is often the language of allegory, symbol and metaphor. Depending on the subject matter, individuals cannot always be expected to express themselves with cogency

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<sup>88</sup> *Syndicat Northcrest v Amselem* [2004] 2 SCR 551 [43].

<sup>89</sup> [2005] 2 AC 246.

<sup>90</sup> (2004) 241 DLR (4th) 1, 27, 52.

or precision. Nor are an individual's beliefs fixed and static. The beliefs of every individual are prone to change over his lifetime. Overall, these threshold requirements should not be set at a level which would deprive minority beliefs of the protection they are intended to have under the Convention.

71. In that matter Lord Walker held:

For the court to adjudicate on the seriousness, cogency and coherence of theological beliefs is (as Richards J put it in *R (Amicus) v Secretary of State for Trade & Industry* [2004] IRLR 430, 436–7, para 36) to take the court beyond its legitimate role. . . .

72. In requiring regard be given to the 'genuine beliefs' of religious adherents, and their associated institutions, the Bill recognises that courts are ill-equipped to determine what should be considered to be the doctrine of religious institutions. In light of such concerns Aroney, Babie and Harrison have raised:

... two general concerns to which, in the future, a court mindful of religious liberty will need to give more attention. The first is what Christopher McCrudden calls the internal point of view in religious liberty adjudication. Claimants are entitled to expect judges will be willing and able to appreciate and understand the group, its ways and its practices, in terms of the group's own standards. This takes imagination and religious literacy, rather than, as in [*Christian Youth Camps Ltd v Cobaw Community Health Services Ltd*], imposing an external view. The second is a commitment to the group's autonomy as central to religious liberty. One reason why courts avoid theological inquiry is because of a commitment to the group's authority to determine questions of religion, morality, and practice for itself.<sup>91</sup>

## Part IV – Differentiation in treatment is not always unlawful discrimination and supports a 'general limitations clause' approach

73. Clause 22M of the Bill recognizes the foundational importance of associational freedom in securing the religious freedom of religious bodies, faith-based charities and religious educational institutions, including through their staffing and volunteering. It is in the following terms:

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

*(1) For the purposes of this Part, 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 if the organisation genuinely believes the conduct—*

*(a) is consistent with the doctrines, tenets, beliefs or teachings of the religion of the organisation, or*

*(b) is required because of the religious susceptibilities of the adherents of the religion of the organisation, or*

*(c) furthers or aids the organisation in acting in accordance with the doctrines, tenets, beliefs or teachings of the religion of the organisation.*

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<sup>91</sup> Aroney, Harrison and Babie, above n 29, p 16.

(2) Without limiting subsection (1), conduct referred to in that subsection includes giving preference to persons of the same religion as the religion of the religious ethos organisation.

(3) Nothing in this section, or any provision of this Act that refers to a religious ethos organisation, affects the operation of section 56 (Religious bodies).

74. The right to religious freedom is enjoyed not solely by individuals, but also by religious institutions. Religious freedom operates at not only the individual level, but also at the religious community level. To that end, religious freedom overlaps with, thus enjoys the benefit of protections granted for associational freedom. The protection of the right of association is a central foundation of equality and pluralism in modern democratic society. As Burke famously argued:

*To be attached to the subdivision, to love the little platoon we belong to in society, is the first principle (the germ as it were) of public affections. It is the first link in the series by which we proceed toward a love to our country and to mankind.*<sup>92</sup>

#### International Law Support

75. We have already noted above the protections against religious discrimination granted to incorporated bodies under international human rights law (see ¶¶ 63 - 66). Clause 22M gives effect to that international law by introducing an exception to the prohibitions on religious discrimination in the proposed new Part 2B – Discrimination on the ground of religious beliefs or religious activities.

76. The right of religious communities to define their character is foundational to the preservation of freedom in democratic societies. This principle was recognised by the ECHR in *Hasan v Bulgaria* in the following terms:

Religious communities traditionally and universally exist in the form of organised structures. They abide by rules which are often seen by followers as being of divine origin ... Participation in the life of the community is thus a manifestation of one's religion protected by art 9 of the Convention. Where the organisation of the religious community is at issue, art 9 must be interpreted in the light of art 11 of the Convention which safeguards associative life against unjustified State interference. Seen in this perspective, the believer's right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully free from arbitrary State intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which art 9 affords. It directly concerns not only the organisation of the community as such but also the effective enjoyment of the right to freedom of religion by all its active members. Were the organisational life of the community not protected by art 9 of the Convention, all other aspects of the individual's freedom of religion would become vulnerable.<sup>93</sup>

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<sup>92</sup> Edmund Burke, *Reflections on the Revolution in France*, 41 (J. G. A. Pocock ed., Hackett Pub. Co. 1987) (1790).

<sup>93</sup> *Hasan and Chaush v Bulgaria* (European Court of Human Rights, Grand Chamber, Application no. 30985/96, 26 October 2000) ('*Hasan and Chaush v Bulgaria* (European Court of Human Rights, Grand Chamber, Application no. 30985/96, 26 October 2000)'). [62].

77. Turning to the jurisprudence that has developed under the ICCPR, in *Delgado Páez v Colombia* the UNHRC considered a communication that involved a teacher that had been disciplined within the Colombian Catholic schools system for his advocacy of 'liberation theology'. The UNHRC stated:

With respect to Article 18, the Committee is of the view that the author's right to profess or to manifest his religion has not been violated. The Committee finds, moreover, that Colombia may, without violating this provision of the Covenant, allow the Church authorities to decide who may teach religion and in what manner it should be taught.<sup>94</sup>

The decision is authority that ICCPR Article 18 (and thus the Bill if enacted) would permits religious institutional autonomy in respect of the appointment of staff within religious educational institutions.

78. That UNHRC ruling is consistent with the view of the former United Nations Special Rapporteur on freedom of religion or belief Heiner Bielefeldt that religious institutions 'constitute a special category, as their raison d'être is, from the outset, a religious one. The autonomy of religious institutions thus undoubtedly falls within the remit of freedom of religion or belief.'<sup>95</sup> Elsewhere he has argued:

religious institutions constitute a special case. As their raison d'être and corporate identity are religiously defined, employment policies of religious institutions may fall within the scope of freedom of religion or belief, which also includes a corporate dimension...<sup>96</sup>

79. Affirming these sentiments the Australian Human Rights Commission (formerly the Australian Human Rights and Equal Opportunity Commission) has stated that:

special provision for religious institutions is appropriate. It is reasonable for employees of these institutions to be expected to have a degree of commitment to and identification with the beliefs, values and teachings of the particular religion...Accommodating the distinct identity of religious organisations is an important element in any society which respects and values diversity in all its forms.<sup>97</sup>

80. The following further statements of the former United Nations Special Rapporteur on Freedom of Religion also elaborate on the imperatives of recognising religious institutional autonomy:

57. Freedom of religion or belief also covers the right of persons and groups of persons to establish religious institutions that function in conformity with their religious self-understanding. This is not just an external aspect of marginal significance. Religious communities, in particular minority communities, need an appropriate institutional infrastructure, without which their long-term survival options as a community might be in serious peril, a situation which at the same time would amount to a violation of freedom of religion or belief of individual members (see A/HRC/22/51, para. 25). Moreover, for many (not all) religious or

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<sup>94</sup> Human Rights Committee, *Views: Communication 195/1985*, 39<sup>th</sup> sess, UN Doc CCPR/C/OP/3 (1990) [5.7].

<sup>95</sup> A/69/261 (2014) [38].

<sup>96</sup> Interim Report of the Special Rapporteur on Freedom of Religion or Belief, 5 August 2015 at [68].

<sup>97</sup> Human Rights and Equal Opportunity Commission, *Article 18: Freedom of Religion and Belief*, (1999), 109.



belief communities, institutional questions, such as the appointment of religious leaders or the rules governing monastic life, directly or indirectly derive from the tenets of their faith. Hence, questions of how to institutionalize religious community life can have a significance that goes far beyond mere organizational or managerial aspects. Freedom of religion or belief therefore entails respect for the autonomy of religious institutions.

...

59. It cannot be the business of the State to shape or reshape religious traditions, nor can the State claim any binding authority in the interpretation of religious sources or in the definition of the tenets of faith. Freedom of religion or belief is a right of human beings, after all, not a right of the State. As mentioned above, questions of how to institutionalize community life may significantly affect the religious self-understanding of a community. From this it follows that the State must generally respect the autonomy of religious institutions, also in policies of promoting equality between men and women. . . . What the State can and should do, however, is to provide an open framework in which religious pluralism, including pluralism in institutions, can unfold freely.<sup>98</sup>

81. On the particular question of the rights of individuals vis-à-vis associations, in *Sindicatul "Păstorul Cel Bun" v Romania*,<sup>99</sup> the Grand Chamber of the ECHR considered that:

In accordance with the principle of autonomy, the State is prohibited from obliging a religious community to admit new members or to exclude existing ones. Similarly, art 9 of the Convention does not guarantee any right to dissent within a religious body; in the event of a disagreement over matters of doctrine or organisation between a religious community and one of its members, the individual's freedom of religion is exercised through his freedom to leave the community...the State should accept the right of such communities to react, in accordance with their own rules and interests, to any dissident movements emerging within them that might pose a threat to their cohesion, image or unity.<sup>100</sup>

82. As articulated by former U.S. Chief Justice Brennan, 'there can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members that it does not desire.'<sup>101</sup> The same reasoning applies to any requirement imposed by the State upon an association to employ persons who do not hold their worldview, particularly where those roles are seen as the public voice of that association. As Gwyneth Pitt argues:

where communities exist based on a particular faith or belief which is accepted as a blueprint for every aspect of a members' lives, it is difficult to see why they should not be able to require that everyone within the community should share

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<sup>98</sup> A/68/290 (2013) [57], [59]–[60].

<sup>99</sup> (2014) 58 EHRR 284, 319 [137] (citations omitted).

<sup>100</sup> *Ibid* [165].

<sup>101</sup> *Roberts v United States Jaycees*, 468 US 609 (1984).



the same faith. This must be relevant to the strength and sustainability of the community in that form and seems unremarkable.<sup>102</sup>

83. As noted by Parkinson, the modern tendency that ‘the only human rights that should be given any real significance are individual ones, and not group rights ... can make adherents disregard the competing claims of groups which would justify a right of positive selection in order to enhance the cohesion and identity of the group.’<sup>103</sup> In the absence of a form of associational exception, the right of the sole individual will prevail against the rights of other individuals to associate around a common concern. Such would undermine pluralism, equality and diversity within our community. As noted by Parkinson and Harrison:

‘Balancing’ the group’s decision and the claims of an individual through litigation [in this case expressed by enabling dissentient volunteers or employees to litigate for exclusion] is, in principle, wrong. It requires an assumption that the court is competent to assess the necessity of a religious group’s decision. Rather, the legislative decision recognises the autonomy of the group — and so it should. As Julian Rivers argues:

If the law sides with the individual, there is no way of protecting collective freedom to unite around a given conception of priesthood [or, we add, a collective view of the requirements of a religious body, like a school], but if the law sides with the collective body, there is always the option of exit and founding a new organization.<sup>104</sup>

It is also noted that the Full Federal Court made this point – that religious groups must have religious freedom if religious freedom is to be properly understood. *See Illiafi v The Church of Jesus Christ of Latter-Day Saints Australia*,<sup>105</sup> at ¶¶ [76] and [99] affirming the international human rights law we have outlined in this submission.

#### Differences in Anti-Discrimination Tests Used for Religious Ethos Organisations

84. Clause 22M further adopts, but slightly modifies, existing tests within anti-discrimination law exemptions in a way that appears intended to better accommodate the practices of religious institutions. In particular, subparagraph 22M(1)(a) adopts a test that requires that the *conduct be consistent with* religious doctrine, tenets, beliefs or teachings. This is distinct from tests that require *conduct to conform with* religious doctrine. In *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd*<sup>106</sup> (Cobaw), the interpretation applied to the phrase ‘conforms with the doctrines of the religion’ by the Victorian Court of Appeal was that ‘the doctrine requires, obliges or dictates that the person act in a particular way when confronted by the circumstances

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<sup>102</sup> Gwyneth Pitt, ‘Religion or Belief: Aiming at the Right Target?’ in Helen Meenan (ed), *Equality Law in an Enlarged European Union: Understanding the Article 13 Directives* (Cambridge University Press, 2007) 202, 222–3.

<sup>103</sup> Patrick Parkinson, ‘Christian Concerns about an Australian Charter of Rights’ (2010) 15(2) *Australian Journal of Human Rights* 83, 88.

<sup>104</sup> Joel Harrison and Patrick Parkinson, ‘Freedom Beyond the Commons: Managing the Tension Between Faith and Equality in a Multicultural Society’ (2014) 40(2) *Monash University Law Review* 413.

<sup>105</sup> [2014] FCAFC 26 (19 March 2014).

which resulted in their acting in the way they did’<sup>107</sup> and ‘as requiring it to be shown that conformity with the relevant doctrine(s) of the religion gave the person no alternative but to act (or refrain from acting) in the particular way.’<sup>108</sup> The drafting thus makes clear that this strict reading is not to be applied. Instead, the term ‘consistent’ is adopted, noting the Macquarie Dictionary definition of that term is ‘agreeing or accordant; compatible’.

85. In addition, subclause 22M(1)(b) adopts a test that requires that the conduct be entered into ‘because of religious susceptibilities’. This is distinct from tests that require that the conduct be ‘necessary to avoid injury to religious susceptibilities’. Applying such a test in *Cobaw*, the Victorian Court of Appeal held that that test required demonstration of various matters, including that the harm be ‘unavoidable’. Again, it appears that the strict reading applied in *Cobaw* is not intended to be applied. Subclause 22M(1)(c) also appears intended to provide further clarity by permitting religious institutions to engage in conduct that ‘furthers or aids the organisation in acting in accordance with the doctrines, tenets, beliefs or teachings of the religion of the organisation.’

#### Clause 22M as an Exception, not an Exemption: Example of ‘General Limitation Clause’

86. Finally, we note that the Explanatory Notes to the Bill clarify that clause 22M provides an exception, not an exemption. The provision says that when a religious institution acts in accordance with its beliefs, this is not discrimination, as technically described at law. This brings NSW into line with international practice. In part, General Comment 18 of the United Nations Human Rights Committee recognises that “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” under the International Convention on Civil and Political Rights.<sup>109</sup>

In substance, clause 22M introduces a ‘general limitations clause’ – a provision that acknowledges that certain legitimate forms of differentiation in treatment are not unlawful as discrimination.

87. The notion of a ‘general limitations clause’ has received wide ranging and distinguished support. In its consideration of proposals for a ‘general limitations clause’ the Expert Panel stated that it ‘could see the potential benefits of such provisions. Accordingly, it encourages jurisdictions to consider the use of such provisions as they modernise the exceptions in their discrimination laws.’<sup>110</sup> In 2008, the Australian Senate Legal and Constitutional Affairs Committee<sup>111</sup> recommended that the exemptions in s 37 and 38 of the SDA be replaced by a general limitations clause. Noting this recommendation in its 2016 Freedoms Inquiry Report, the Australian Law Reform Commission (ALRC) concluded ‘further consideration should be given to whether freedom of religion

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<sup>109</sup> Explanatory Notes, n 28, 3.

<sup>110</sup> Expert Panel, 1.134, above n 7, p 6.

<sup>111</sup> Australian Senate Legal and Constitutional Affairs Committee, *Inquiry into the Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality*, 12 Dec 2008

should be protected through a general limitations clause rather than exemptions'.<sup>112</sup> The Report acknowledged that:

A broader concern of stakeholders is that freedom of religion may be vulnerable to erosion by anti-discrimination law if religious practice or observance is respected only through exemptions to general prohibitions on discrimination. An alternative approach would involve the enactment of general limitations clauses, under which legislative definitions of discrimination would recognise religious practice or observance as lawful discrimination, where the conduct is a proportionate means of achieving legitimate religious objectives.<sup>113</sup>

The ALRC referred to a particular model put forward by Professors Patrick Parkinson and Nicholas Aroney in their joint submission to the Commonwealth Attorney-General's Department Consolidation of Commonwealth Anti-Discrimination Laws in 2011.

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<sup>112</sup> Australian Law Reform Commission, 'Traditional Rights and Freedoms— Encroachments by Commonwealth Laws', ALRC Report No 129 (2016) [5.124], [5.154].

<sup>113</sup> Ibid [5.7].