

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

Organisation: Buddhist Council of NSW and Rainbodhi LGBTQIA plus Buddhist
Community

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Anti-Discrimination Amendment (Religious Freedom and Equality) Bill 2020

**Joint Submission by the Buddhist Council of NSW and
Rainbodhi LGBTQIA+ Buddhist Community**



Buddhist Council of NSW
Working for the Buddhist Community



Rainbodhi
LGBTQIA+ BUDDHIST COMMUNITY

“They abide radiating a heart full of love-kindness to one direction, and to the second, and to the third, and to the fourth. In the same way above, below, across, everywhere, all around, they radiate a heart full of love-kindness to the whole world—abundant, expansive, limitless, free of enmity and ill will.”

(The Buddha, Vattha Sutta)



The NSW Buddhist Community Submission to the Committee

This is a joint submission by the **Buddhist Council of NSW** and **Rainbodhi LGBTQIA+ Buddhist Community**.

- The Buddhist Council of NSW represents over 100 Buddhist organisations including all traditions and schools of Buddhism, and is a member of the Federation of Australian Buddhist Councils.
- Rainbodhi is a spiritual friendship group for LGBTQIA+ Buddhists and an advocate for more inclusion and diversity in the broader Buddhist community.

Buddhism is a minority religion in NSW. The 2016 Australian census reports 207,956 Buddhists in the state of NSW, 2.8% of the state population. Buddhists from NSW comprise over 40% of the total Buddhist population in Australia.

Executive Summary

Buddhism is a religion that emphasises loving kindness and compassion for all beings without discrimination. Buddhists do not seek to impose their religious views on others.

We affirm the protection of religious freedoms in NSW but we do not currently see a need for this legislation. We ask the Committee to convey our belief to Parliament that religious freedoms need to be balanced against the freedom from discrimination based on religious views. Any legislation to protect religious freedom should not exceed, nor impinge upon the human rights of all people.

We are concerned about the social implications of this Bill. We believe it has the potential to worsen religious discrimination against minority faith groups, and others. We are further mindful of unequal protections which disadvantage minority groups and the creation of double standards that give special privilege to religions. We are worried about the complexity and confusion this legislation might create in its implementation and application, especially given that federal religious reform is still being considered at this time.

Recommendation:

We do not support the Bill and ask that it not be passed.

In coming to this position, we took into consideration Buddhist philosophy, the opinions of our community members, previous Buddhist community submissions on religious legislation, and social attitudes to human rights. We also gave regard to the various pieces of state and federal legislation mentioned in Item 3 of the Committee's Terms of Reference.

We identify the following concerns about the proposed Bill that are more fully addressed in our submission:

1. Unnecessary Legislation

- This Bill was not sought by the Buddhist community.
- We do not believe that the freedom to practice religion is under threat in NSW and do not see an urgent need for this legislation.
- Numerous exemptions already exist in the Anti Discrimination Act (the Act) for discrimination on the basis of a religious view.
- Discrimination on the basis of a religious view should be limited in the narrowest way and not given broader expression where there is no religious purpose.

2. Religious Rights Above Human Rights

- This Bill creates an unequal hierarchy of human rights, elevating religious freedom above other established human rights.
- We believe that human rights should be held equally and where a religious belief is in conflict with other human rights, freedom to exercise that belief must be balanced carefully against other human rights and done so with compassionate regard.

3. Double Standards

- Religious exemptions to discriminate already exist, but this Bill will give further privileges to religions that other communities do not enjoy.
- The Bill creates a double standard where religious people will be protected from discrimination themselves, but yet will continue to have a special privilege to discriminate against other groups, including minority faiths and LGBTQIA+ people.

4. Unnecessary Discrimination

- The Bill continues to allow discrimination on the basis of religious belief, even where this belief is not relevant to employment, education, or service.

- We believe that discrimination on the basis of a religious belief should be exercised in the narrowest use possible and should be only for particular contexts where a genuine religious belief is a requirement of employment, education, or service.
- We are deeply concerned that religious ethos organisations that receive public funding to operate educational, health, employment and charitable services will have a right to discriminate in providing employment and services on the basis of religious belief and so disadvantage those who hold other beliefs

5. Unfair Impact on Minority Faiths

- We acknowledge the disparity of power and resources of minority faiths compared to dominant religious groups in providing educational, health, employment and charitable services.
- We are concerned that members of minority faiths will face discrimination in employment and challenges in accessing services, resulting in disadvantage.
- The Bill's exemption giving an employer the ability to override the freedom to wear religious dress in workplaces is largely discretionary, and unfairly impacts people from minority faiths and CALD communities.
- The lack of consequences for harmful religious-based speech will unfairly affect minority, who are more likely than more established faiths to be the targets of hate speech and discrimination on the basis of a religiously held view.
- This Bill is an opportunity for Parliament to consider how to lessen the ability of a dominant religion to unduly affect people of minority religions or no religion at all in the provision of employment, education and other services.

6. Protecting Speech and Actions that Harm

- We are alarmed at the creation of a category of 'protected' behaviours outside of education settings and workplaces 22N(3)-(5), 22S(2)-(4) and 22V(3)-(5), which do not allow employers or schools to enforce codes of conduct designed to protect staff and students or customers from harm.
- These protected behaviours mean that harmful statements when made outside school grounds, or around the corner from the office, or on the internet will not have any consequences, unlike the same comments made inside offices, schools or businesses.
- We believe it will be almost impossible for schools, governments, and organisations to create safe and inclusive spaces in line with community expectations to protect students, employees, or those who access services.
- Outside of workplaces and schools, the Bill protects religious beliefs and activities which may be unlawful—such as religious activity that vilifies others or breaches civil obligations—*unless that conduct is punishable by imprisonment*. We think our community expects that there should be consequences for certain actions, especially those that harm.

- We are concerned about the potential for bad-faith actors to use the excuse of religious freedom to vilify and create social disharmony that will disproportionately affect minority religions.
- There is the potential for increase in hate speech, vilification, discrimination and exclusion on the basis that it may be protected as a religious belief.

7. Untested Complexity and Confusion

- There is potential for confusion about when a genuinely held religious belief can be exercised and when that belief comes into conflict with other obligations under the Act.
- Protections given to statements and activities motivated by a religious belief are untested and their effect is uncertain. We are concerned these could result in both intentional and unintentional harmful speech, vilification, discrimination and exclusion, and also lead to confusion about the protections that the law offers
- We do not feel that the complexity of real world implications of the Bill have been considered, especially where religious freedom comes into conflict with other areas of discrimination. We believe this will lead to complexity in workplace discrimination complaints, plus disharmony in schools, workplaces and society generally.

8. Upcoming Federal Religion Reforms

- The timing of this legislation is not ideal as the federal Religious Discrimination Bill is still being prepared and considered. We believe that NSW should wait to see what changes the Bill makes rather than developing legislation in isolation.
- The Australian Law Reform Commission's Review into the state's discriminatory exemptions may make significant reforms but is paused until one year after the federal Bill is passed.
- The complexity of two new layers of religion legalisation will cause uncertainty and confusion in NSW religious groups and in broader society.

9. Inconsistencies in Current Law

- The Bill does not explain what changes will be made to the current protected category of 'ethno-religious' under Race in the Act, or clarify how this attribute will interact with the Bill.
- The Bill does not have regard to the Blasphemy law or clarify how the potential use of that law will interact with the Bill.

Areas of Concern for the Buddhist Community in Detail

1. Is this Bill Necessary?

Whilst we acknowledge the Anti Discrimination Act (the Act) does not currently have a protection covering religion, in general, we feel that the ability to freely practice a religion in NSW is already well established. We believe the NSW is a diverse, multicultural society that is tolerant of religious differences and we do not believe that religious freedom is under threat.

The Act already provides broad freedoms to discriminate on the basis of religious view in instances where the ability to discriminate would otherwise be prohibited, including against women, the LGBTQIA+ community, people with disabilities, unwed people and divorcees. We are concerned that if this Bill is passed, these and other members of our community could face discrimination in employment, healthcare, disability services, and education from other religious ethos organisations on the basis of a religious view.

Importantly, despite being a minority religion in Australia, the Buddhist community has never sought to change or introduce any legislation on the basis of religious activity. The current system of applying for specific religious exemptions to anti-discrimination legislation, whilst discriminatory against many groups, is still preferable over giving general rights for a religion to discriminate. We also prefer a narrow view of how and when exemptions should be applied, and believe that they should only be used to discriminate in particular contexts, where there is a genuine religious need to do so.

The number of people professing to be religious is falling in Australian society. Over 30% of people identified as having no religion in the 2016 census¹, we believe that there is little community appetite from Buddhists and the broader community for giving religious groups further powers to discriminate based on religious views over other human rights.

2. Religious Freedom Above Other Human Rights

The Australian Buddhist community has previously shown strong support for human rights, including: supporting the changes to Marriage Act; supporting gender equality; opposing racism and religious intolerance. Our view is that anti-discrimination law was developed to protect people from discrimination for aspects of themselves that are innate and cannot be changed, such as race, gender, sexuality and disability. Religion, however, is generally a personal choice and although the right to practice religion should be affirmed, it needs to be held in balance with other human rights, not take precedence. We believe religious freedom that conflicts with other human rights should be carefully and narrowly used and should be tempered by compassion.

¹ <https://www.abs.gov.au/AUSSTATS/abs@.nsf/mediareleasesbyReleaseDate/7E65A144540551D7CA258148000E2B85>

This position has previously been expressed by the Australian Buddhist community in submissions made to the draft versions of the federal Religious Discrimination Bill. In each of the submissions made by the **Buddhist Council of NSW**, the **Australian Sangha Association** and the **Federation of Australian Buddhist Councils**², the authors and their communities were most concerned that religious freedom should not become a positive right to discriminate in a blanket way, or that religious rights should exceed protections of other human rights, nor be at the expense of other human rights. The authors saw the introduction of further religious rights to discriminate as a threat to social harmony and cohesion, with the potential to would cause hardship and suffering for people of minority faiths, as well as LGBTQIA+ people.

We are concerned that the Bill does not sit in balance with the need to protect other human rights and is at risk of elevating the religious rights of particular groups above other human rights of all people in NSW.

3. Double Standards

Given the secular, pluralistic nature of our society, we feel that the ability to discriminate should rightly be limited to field that is as narrow as possible. For a minority religion such as Buddhism, we want to make sure that members of our community, including women, LGBTQIA+ people, unwed people, those with a disability, and others, face as little discrimination as possible, including being discriminated against by a religious ethos organisation. We are concerned that discrimination against minorities will increase with the ability for religious ethos organisations to discriminate basis of religion. This will impact our community in essential areas including access to education, employment services, health care services and disability services. As a matter of principle, we do not believe that people should be discriminated against on the basis of religion, except where there are justifiable religious reasons only.

We noted above that religious organisations in NSW already have the power to discriminate against many groups in society on the basis of exemptions. For example, currently the types of exemptions that a private educational institution can lawfully make in regards to employment include: on the grounds of sex, transgender status, pregnancy, marital or domestic status, disability and homosexuality. However, it is noteworthy that the Expert Panel Report: Religious Freedom Review (2018) (the Panel) made a Recommendation directing jurisdictions across Australia to remove discriminatory exemptions by religious schools in employment on the basis of race, disability, pregnancy or intersex status.³

The Panel's recommendation shows that existing exemptions are not always in step with community expectations. We also recognise there is broadly in our society, a desire to move away from discrimination that is based on religiously motivated moral views. We agree with the Panel that the law should reflect society's changing views on these issues. We suggest that any future legislation should bear this momentum away from religious morality in mind—especially in regard to the

² See Section 8, p15 below.

³ *Expert Panel Report: Religious Freedom Review (2018)*, p63.

increasing acceptance of the LGBTQIA+ community—and be cautious about enshrining further intolerance into legislation.

Although we believe that exemptions represent a compromise to religious views and are better than a blanket religious right to discriminate, it is important to note that the narrowest application of their use is preferred because of the harm religious exemptions can cause to vulnerable members of our community. In particular, we are aware that religious exemptions have a disproportionate impact on the human rights and dignity of minority groups, including LGBTQIA+ people and their right to be free from discrimination.

It is clear that the existence of exemptions already creates an unequal discriminatory environment towards women, LGBTQIA+ people, and minority groups, and that such exemptions put religious views above other human rights. The Bill will make this situation even more unfair, by creating a double standard which ensures that religious people would be protected from discrimination themselves, but yet will continue to have a special privilege to discriminate against others. This creates an unequal society that places religious freedom above other human rights.

We wish to emphasise that these exemptions have real world consequences. As an example, we note the section on employment in the Panel's report which describes the effects of currently existing exemptions on the LGBTQIA+ community, including:

- reports of religious schools terminating the employment of staff on the basis of their sexuality, despite the staff not openly discussing those issues in the school.
- LGBTI communities enduring stress and mental health pressures whilst hiding important aspects of their identity from colleagues and students.
- LGBTI people being prevented from full participation in the school community, and worried about being dismissed.
- the indirect negative impact on students of creating environments that were unaccepting of LGBTI people.
- an employee at a religious school who was employed despite being open about being same-sex attracted. Later, when the leadership of the school changed, that teacher was dismissed on the basis of his sexuality.⁴

In relation to the discriminatory use of exemptions we believe it is more compassionate and ethical to give regard to the qualities of the 'whole person' over one aspect of their identity, whether this is LGBTQIA+ identity, sex, pregnancy, marital or domestic status, disability or pregnancy. Such an approach reflects a Buddhist view that there should be equality and freedom in regards to others and that we should not cause harm to others. We believe that it is difficult to justify protecting the rights of religious groups from discrimination when they retain a uniquely special privilege to discriminate against whole sections of our society.

⁴ Ibid, p54.

4. Unnecessary Discrimination

The Bill continues to allow discrimination on the grounds of religious belief through the exemptions mentioned above, even where this belief is not relevant to their employment, membership, education or service. It further adds the right to discriminate on the basis of religion for religious ethos organisations in regard s to employment and delivery of services. The Bill defines a religious ethos organisation very broadly, including charity and commercial operations:

(a) a private educational authority that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion, or (b) a charity registered with the Australian Charities and Not-forprofits Commission under the Australian Charities and Not-forprofits Commission Act 2012 of the Commonwealth that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion, or (c) any other body that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion.⁵

Given the broad range of social, educational and employment activities covered by such organisations, we are concerned at the provision to allow discrimination on the basis of religion in such essential areas. This will impact minority faiths as well as other minority groups and create disadvantage and unfairness in our society. We believe that discrimination on the basis of a religious belief should always be exercised in the narrowest use possible and should be only for particular contexts where a genuine religious belief is a requirement of employment, membership, education, or service – for example in the teaching of religious belief.

We are deeply perturbed that religious ethos organisations that receive public funding to operate educational, health, employment and charitable services will have a right to discriminate in providing employment and services on the basis of religious belief. We note that such concerns were raised in the Panel review out of concern for the impacts of such approaches:

The Panel does not accept arguments that a right to discriminate in the provision of goods and services is required or proportionate to ensure the free and full enjoyment of Australians' rights to freedom of religion under international law. Rather, the Panel is of the view that allowing businesses and individuals to discriminate in the provision of goods and services would unnecessarily encroach on other human rights, and may cause significant harm to vulnerable groups in the community

...The Panel heard from other stakeholders that religious bodies should not receive public funding if they acted in a way that was discriminatory towards some members of the community, particularly LGBTI people. Particular concern was heard with respect to funding provided for the provision of services by a faith-based organisation where no alternative service provider was available in that location... The Panel also heard from stakeholders who argued that religious

⁵ *Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020*, p4

*bodies should not receive any public funding and should not be eligible to provide government-funded services—regardless of whether or not they discriminate.*⁶

In addition to the concerns about fairness and equity in accessing publicly funded services, we are also worried about the right of faith ethos organisations (and their charity and commercial bodies) to challenge NSW government programs, policies, contracts and decisions which contradict their particular religion, seeing this as a novel, unwarranted and untested approach to government policy.

5. Unfair Impact on Minority Faiths

We acknowledge the disparity of power and resources of minority faiths compared to dominant religious groups in providing educational, health, employment and charitable services. Currently, dominant faith-based organisations—often large, long-established and sophisticated organisations—employ, educate and provide services to millions of Australians, including those of different and no religious belief. Many of these organisations and services are publicly funded, and operate in areas which were previously provided by the public sector. Minority faith groups generally do not have the resources or power to match these types of services and, as such, people of minority faiths will continue to need to access services provided by larger faith groups, including schools, charities and employment services.

We are very concerned that the Bill will allow for a religious ethos organisation to discriminate both in the employment of staff and the delivery of services. When considering this Bill, we see that Parliament has an opportunity to examine the development of appropriate mechanisms which lessen the ability of a dominant religion to unduly affect people of minority religions in the provision of employment, education and other services. As the Bill stands, we believe it will result in religious ethos organisations discriminating against minority groups in employment even when there is no religious need. It will also lead to challenges in accessing services, creating disadvantage.

Whilst we live in a well functioning multicultural and multifaith society, minority faiths are more still likely to be the targets of hate speech and discrimination on the basis of a religiously held view. Often discrimination against minority groups is more subtle and sometimes Australian culture simply does not give regard to important religious considerations of minority faith groups. A good example of this is shown by the legal impediments that Sikh people face in wearing the Dastar turban, which is a mandatory part of their faith. Many minority groups, including Buddhists, report experiences where their religious expression has been limited due to a cultural blindness and insensitivity that is often created by bureaucracy and legislation. Even though minority groups are told that they have freedom to express their faith, the reality is that such freedoms exist only in as much as they conform to existing mainstream cultural ideas about what constitutes a legitimate expression of faith, which is often based on the status quo of the dominant religions.

Although the Bill sets out the right for employees to wear religious dress, it also includes a clause that allows for this to be set aside by an employer in regards to:

⁶ Expert Panel Report: *Religious Freedom Review (2018)*, p53.

(i) the workplace safety, productivity, communications and customer service requirements of that employment, and (ii) the industry standards of that employment.⁷

Giving an employer the ability to override the freedom to wear religious dress in workplaces is worrisome because it is largely discretionary and the Bill is too broad in scope to provide any real clarity. The people who will be unfairly impacted by this clause are most likely to be people from minority faiths and CALD communities, whose religious expression is significantly different from that of mainstream, culturally dominant religious groups. This will have the effect of reinforcing the status quo and limiting the freedom of religious expression by minority groups.

6. Protecting Speech and Actions that Harm

We believe that actions and speech have ramifications and that people should be encouraged to act responsibly where there is the potential to harm others. We are concerned that the Bill grants new protections to allow for religious speech and activities to occur without consequence outside of education settings and the workplace even though that speech or activity may still have a harmful impact in those settings. We are further troubled that actions and speech which may usually be considered unlawful—such as religious activity that vilifies others or breaches civil obligations—will be protected, unless that conduct *is not punishable by imprisonment*, which we suggest is a fairly low bar for civil conduct.

We believe that this freedom from consequence causes harm, and would grant religious groups rights which exceed the expectations that general society has for acceptable behaviour. Even though this protection applies outside a person's workplace or school setting, we see the potential for this protection will still have the effect of creating an atmosphere of disharmony in those settings because of the way views and actions are transmitted in the modern world. Whilst the physical boundaries outside workplaces and schools are fixed and limited, the effects of harmful statements or actions are not, and easily travel across these boundaries, especially over the internet. We have concern and compassion for situations where employees must continue working alongside an employee who has expressed harmful views outside of a workplace that would not be allowed inside that workplace. This protection without consequences will create more disharmony and is certain to negatively affect our society.

The Bill's test of belief is that it should be a "genuine belief:" and that "holding of the religious belief is sincere and is not fictitious, capricious or an artifice." However, the Bill does not make clear how the test of a genuinely-held religious belief will be measured or applied. This is a difficult area, because beliefs are often private and unknowable. Beliefs are also changeable and can be mistaken.

Where a genuine belief which harms others is stated outside school grounds, or around the corner from the office, or on the internet, we believe it will be almost impossible for governments, schools and organisations to create safe and inclusive spaces in line with community expectations to protect students, employees, or those who access services.

⁷ *Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020*, p8

We are further concerned about the potential for bad-faith actors to exploit the legislation's protections; claiming a religious view when they do not possess one. In some cases, this will impose unreasonable obligations on employers and professional bodies to respond without knowing whether a statement is based in any religious belief, or is merely the expression of a political or personal view (which is not otherwise protected). This may result in organisations being unwilling to challenge bad behaviour because they are worried about running afoul of the legislation.

There is also the potential for this protection to be invoked in arbitrary and inconsistent ways, giving rise to the potential for abuse, or that people may use this protection as a tool to start or shut down unrelated disputes, or pursue personality clashes and so on.

We are concerned about these protections emboldening the use of hate speech and vilification that will impact of minority faiths, LGBTQIA+ people and other vulnerable groups. When examining the question of vilification, the Panel noted:

...examples about hate speech directed at people of faith, generally directed towards people of minority religions in Australia. The Panel was also presented with examples of hate speech against other groups, particularly LGBTI people and communities.⁸

These provisions will remove the ability of governments and employers to protect vulnerable staff and customers when people say offensive, derogatory or harmful about women, LGBTIQ+ people, people with disabilities people of faith, and others if those things are said on the way to school, outside a workplace or on the internet. We believe that in a pluralistic multicultural and multi-faith society, people should not be subjected to the religious opinions of others entirely without consequence, especially if it creates harm. The idea that there should be no ramifications for conduct based on a religious belief is at odds with other human rights protections valued by our society.

7. Untested Complexity and Confusion

We are aware that the federal government still intends to introduce its Religion Bill and this could happen at any time. Given this situation, we believe the Committee should have a regard for potential discrepancies and inconsistencies that could occur between NSW and federal legislation if the federal bill is passed, especially in terms of protections and exemptions. We believe that the timing of this Bill is premature give the federal legislation is still being prepared and considered. We suggest the NSW government should wait until the federal legislation is tabled and see what remains to be done after the commonwealth legislation is known.

We also see potential confusion for people of faith as to their rights and responsibilities under the various complex legislations at the state and federal level. We have regard to the difficulties in explaining and implementing the dual layers of complex legal information to our diverse multicultural Buddhist community organisations and members, which include many people from

⁸ Expert Panel Report: *Religious Freedom Review (2018)*, p84.

various CALD communities.

We are also concerned about the potential for the intentional or unintentional misapplication of religious freedom by religious people and organisations. Given the complexity and layered nature of the legislations, we fear people may wrongly seek to use religious freedom in areas where no right to discriminate exists. We are concerned that people may intentionally misuse religious freedom provisions without fear because of a prevailing general attitude that puts religious freedom above all else, without regard to the actual specifics of the state or federal legislation, including other anti-discrimination laws. We see this as an added layer of complexity with many legal ramifications and an unnecessary burden on our justice system.

8. Upcoming Federal Religion Reforms

As noted above, we are concerned about the interaction and added complexity of developing new legislation in NSW whilst important changes to federal legislation are still being considered. The Committee's Terms of Reference gives regard to two upcoming pieces of commonwealth reforms including the Federal Religious Discrimination Bill and Australian Law Reform Commission's Review into religious exemptions in anti-discrimination legislation.

Future Federal Reform and the Draft Religious Discrimination Bill 2019

We refer the Committee to submissions in response to the draft federal Religious Discrimination Bill (2019) from peak bodies in the Buddhist community, including the Buddhist Council of NSW, the Australian Sangha Association, and the Federation of Australian Buddhist Councils.

In broad terms, the authors of those submissions were in favour of protecting religious freedom but did not see a need for a specific Religious Freedom Act. They regarded current anti-discrimination legislation and exemptions sufficient for ensuring religious freedom. They also expressed concerns about the impact of religious discrimination on minority faiths and LGBTQIA+ communities.

- Buddhist Council of NSW, [*Submission: 1st Draft of Religious Discrimination Bill Sept 2019*](#)
- Australian Sangha Association, [*Submission: 1st Draft of Religious Discrimination Bill, Oct 2019*](#)
- Australian Sangha Association and Federation of Australian Buddhist Councils, [*Submission: 2nd Draft of Religious Discrimination Bill, Jan 2020*](#)

The Australian Law Reform Commission's reference into the Framework of Religious Exemptions in Anti-discrimination Legislation.

The Australian Law reform Commission's Review is still ongoing and will not be complete until 12 months after the federal Religious Discrimination Bill is passed through parliament. The work of this Review is to clarify the Expert Panel's recommendations that Australian jurisdictions review (and in some circumstances abolish) exemptions to anti-discrimination provisions that allow for discrimination on the basis of race, disability, pregnancy, or intersex status. The Review is also considering broader human rights and the remaining religious exemptions that permit religious

schools to discriminate in relation to staff and students on the basis of sexual orientation, gender identity, or relationship status.

In regards to the timing of the NSW Bill, it is pertinent to note that this Review is waiting for the passing of the Federal Religious Discrimination Bill. This is a prudent approach given the potential for the federal legislation to impact on the various existing state and territory exemptions. However, it also means that important and pressing questions regarding discrimination towards students and teachers in religious schools have unfortunately been deferred and left in limbo. As it remains to be seen what recommendations may be made by the Law Reform Commission, it would be imprudent for NSW to introduce the Bill at this time, when there is continuing uncertainty as to the impact of both the federal bill and the Review, given there may be conflicting legislation in the future or added layers of complexity and confusion for religious communities to comprehend and implement.

9. Inconsistencies in Current Legislation

We are concerned that the Bill does not address several inconsistencies regarding unequal religious protection already found in existing NSW legislation.

Ethno-religious Category

Whilst there is currently no anti-discrimination legislation solely for religion, there is limited protection for certain religious groups under the Act for discrimination based on race, under the protected category of 'ethno-religious' groups, including Sikhs and Jews. The Expert Panel Report: Religious Freedom Review (2018) noted, in regard to this category that:

...ethno-religious origin has generally been interpreted to include Jewish people but not Muslim people, and accordingly the New South Wales legislation does not protect Muslim people against religious discrimination.⁹

The Bill does not clarify what changes, if any, would be made to the ethno-religious category protections. In cases where ethnic cultural attitudes and religious attitudes are legitimately combined; certain groups will still enjoy further protections under this category that are denied to other religious groups, including those who might have an ethno-religious identity that is unrecognised by the legislation. This creates an unequal distribution of protections and rights.

Nor does the Bill address which law might take precedence if these two areas of the legislation come into conflict. This is especially important to consider in advance, given the Bill's new tests in a variety of areas including appropriateness of religious dress in the workplace, employment discrimination in small businesses, and the no-consequence protected activities of employees outside of work hours.

Blasphemy Law

Another area of existing law which has the potential to create confusion and come in to conflict with the Bill is the continued existence of the Blasphemy law. This common law offence in NSW is also

⁹ Expert Panel Report: Religious Freedom Review (2018), p93.

present in statute and common law at the Federal level. Section 574 of the Crimes Act 1900 (NSW) modifies the law to clarify that mere statements are not enough to warrant prosecution, and though the law has not been used in recent history, it's future usage remains a possibility. The Victorian version of the law was last invoked in 1987 when then Archbishop George Pell tried unsuccessfully to secure a court injunction to prevent the National Gallery of Victoria from displaying an artwork.¹⁰

The Blasphemy law has rightly been criticised as an example of religious privilege, since, in Australia, it only provides protection to the Christian religion, and no other religion. We believe that Blasphemy laws are out of step with a modern, tolerant, multicultural society. Religion should be subject to the same questioning and criticism as other areas of public life, and no one religion should be given unequal protections above and beyond those afforded to others. In discussing submissions received on the subject of blasphemy, the Panel noted:

*The Panel's view is that the concerns raised during the consultations are valid. Indeed, the prohibition of certain speech on the grounds of religious belief presents difficult problems for reconciling competing rights in a free society where beliefs and ideas of any kind should be able to be debated and criticised.*¹¹

The Panel also made a Recommendation that: "Those jurisdictions that have not abolished statutory or common law offences of blasphemy should do so."¹² However, this has not yet occurred in NSW. The Bill does not address how the continued presence of the blasphemy law will sit alongside the proposed changes to the Act.

The Panel also addressed the use of blasphemy legislation in the international context:

*Internationally, blasphemy laws have been routinely criticised by human rights groups as draconian and vulnerable to abuse. In the most recent annual report by the United Nations Special Rapporteur on freedom of religion and belief, the Special Rapporteur noted that blasphemy laws were being used to 'target political dissidents, humanists, non-believers or any religious thinker who expressed different theological views than the state-sponsored religion'. The report concluded that blasphemy laws stifle the enjoyment of freedom of religion and called for such laws to be repealed as a matter of priority.*¹³

The Blasphemy law is a relic of a bygone age where a dominant religion had a special protection from criticism and offence. In the context of establishing broader protections for all religions through this Bill, the Blasphemy law might serve as a cautionary tale; raising questions of whether our contemporary society desires the further privileging of religious sensibilities over other viewpoints. By giving religious organisations a special protection under anti-discrimination law, it remains to be seen if the Bill will have the potential for increasing grounds for offence, religiously motivated hate speech, the stifling freedom of speech, or the full expression of religiosity in minority religions.

¹⁰ *Archbishop of Melbourne v Council of Trustees of National Gallery* [1998] 2 VR 391; (1997) 96 A Crim R 575

¹¹ *Expert Panel Report: Religious Freedom Review (2018)*, p89

¹² *Ibid*

¹³ *Ibid*

Recommendations to the Committee

We do not support the Bill and ask that it not be passed.

We affirm the protection of religious freedoms in NSW but we do not believe that the freedom to practice religion is currently under threat. As such, we do not see a need for this legislation or any special need for religious privilege. Whilst we do not endorse this Bill as it stands, we are anxious that any legislation to protect religious freedom should not exceed, nor impinge upon the human rights of all people in NSW. We ask the Committee to convey our position to Parliament that:

- Freedom of religion should not be placed above any other human rights
- Religious freedoms need to be balanced against the freedom from discrimination based on religious beliefs.
- Where freedom of religious beliefs conflict with other human rights and protections a compassionate balance should be made.
- We believe that religious freedoms to discriminate should have a narrow expression.

Further we suggest:

- Faith-based organisations be required to publish their policies on employment and services, and should be entitled to discriminate only in accordance with their published policies.
- Faith-based organisations should be allowed to discriminate in employment on the basis of protected attributes only if the possession of that attribute is a genuine occupational requirement of the role.
- Faith-based organisations receiving public funding for provision of non-religious services should not discriminate on the basis of religion.
- If faith-based organisations choose to discriminate on the basis of protected attributes, state funding should be withdrawn.

We thank you for the opportunity to make a submission and look forward to the results of the Committee's deliberations.

Yours,

Venerable Akālika Bhikkhu
Board of Directors
Buddhist Council of NSW;
Spiritual Advisor, Rainbodhi
LGBTQIA+ Buddhist Community

Gawaine Powell
Chairperson, Board of Directors
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