

**Submission
No 71**

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

Organisation: Amnesty International Australia

Date Received: 21 August 2020

**AMNESTY
INTERNATIONAL**



DEFENDING HUMAN RIGHTS

Submission to the
**JOINT SELECT COMMITTEE'S INQUIRY INTO THE
ANTI-DISCRIMINATION AMENDMENT (RELIGIOUS
FREEDOMS AND EQUALITY) BILL 2020**

21st August 2020

Submitted by
Amnesty International Australia

Author: Nancy Mills

Contact: Joel Clark



Table of Contents

Table of Contents	2
About Amnesty International	3
Summary	4
Recommendations	6
International Legal Human Rights Frameworks	6
Freedom of thought, conscience and religion	9
Freedom of expression	10
The Right to Freedom of Thought, Conscience and Religion and other Human Rights	11
Protection of Religious Freedoms in Australia	13
Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020	15
Definitions in the Bill	16
Religious Activities	16
Religious Beliefs	17
Religious ethos organisations	17
Discrimination in work	18
State Laws and Programs	20
Conclusion	21

About Amnesty International

Amnesty International is the world's largest independent human rights organisation, with more than eight million supporters in over 160 countries.

Amnesty International is a worldwide movement to promote and defend all human rights enshrined in the Universal Declaration of Human Rights (UDHR) and other international human rights instruments. Amnesty International undertakes research focused on preventing and ending abuses of these rights.

Amnesty International is impartial and independent of any government, political persuasion or religious belief and does not receive funding from governments or political parties.

Since 1961 Amnesty International has campaigned on behalf of thousands of prisoners of conscience - people who are imprisoned because of their political, religious or other conscientiously held beliefs, ethnic origin, sex, colour, language or sexual orientation or gender identity. Amnesty International recognises the right to freedom of thought, conscience and religion as set out in Article 18 of the UDHR.

Amnesty International also campaigns against direct or indirect discrimination on the basis of race, sex, sexual orientation and gender identity, intersex variations, religion or belief, political or other opinion, ethnicity, national or social origin, disability, or other status. Amnesty International calls for states to take measures that prohibit discrimination as well as positive measures to address long-standing or systemic disadvantages, and to prevent discrimination by non-state actors. Our work on non-discrimination is grounded in human rights treaties including the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Rights of the Child (CRC), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

We work both publicly with our supporters and privately with families and lawyers in determining the most strategic approach to bring about change at any given time and within the consent which we are given. We then mobilise our large supporter base to take actions, individually and in their community.

1. Summary

- 1.1 Amnesty International welcomes the opportunity to provide this submission to the Joint Select Committee on the *Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020* (the Bill).
- 1.2 Amnesty International campaigns against direct or indirect discrimination on the basis of race, sex, sexual orientation and gender identity, intersex variations, religion or belief, and we advocate for states to fulfil their obligations to prohibit racial and religious vilification. Amnesty International is concerned about the growth of divisive political discourse in Australia and around the world that dehumanises and scapegoats religious and other minority groups for social, economic and security concerns they have no control over. Additionally Amnesty International notes the increase in organised and coordinated divisive political and media discourse around the LGBTQIA+ community, in particular the trans and gender diverse community, during and following the marriage equality debate in Australia.
- 1.3 Australia has an international legal obligation to protect the right to freedom of thought, conscience and religion, protect against all forms of discrimination and prohibit racial and religious vilification. This obligation requires taking 'all appropriate measures' to prevent intolerance on the basis of religion or belief.¹ Amnesty International is concerned, however, that the Bill has the potential to increase rather than eliminate intolerance and that it will not appropriately balance the rights of all people in New South Wales.
- 1.4 Amnesty International notes with approval the stated intention in the Explanatory Note to the Bill, that regard be had to certain international instruments when functions are being carried out under the *Anti-Discrimination Act 1977* (the Act) and that the provisions in the Act are used in a way 'that is consistent with the purpose and meaning of those international instruments'. The instruments specifically referred to are the ICCPR, the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (Declaration on Religion or Belief) and the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (Siracusa Principles). Amnesty International notes that the Explanatory Notes do not state that these principles guided the drafting of this Bill.
- 1.5 Amnesty International's view is that whenever legislation is being drafted which aims to protect the human rights of people, regard must be given to the relevant treaties, comments on the interpretation of articles in those treaties and reports by Special Rapporteurs on the progress of human rights protections and the interactions between various rights. Care must be taken to ensure that the terms of proposed legislation is in accord with principles of international human rights law.
- 1.6 There is a clear distinction in Article 18 ICCPR between the absolute right to hold a religion or belief (including a non-religious belief or a rejection of religious belief) and the right to manifest such a belief. While the right to freedom of thought and belief is absolute, in international law the freedom to manifest one's religion or beliefs may be

¹ United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, United Nations General Assembly UN Doc. A/RES/36/55 (adopted 25 November 1981) (Declaration on Religion or Belief).

subject to legitimate limitations where they are “prescribed by law”, and necessary to protect “the fundamental rights and freedoms of others”.

- 1.7 Religious discrimination harms people. Discrimination on basis of race, colour, sex, language, political or other opinion, national or social origin property, birth or other status, which includes sexual orientation, gender identity and intersex variations, harms people. The cumulative impact, on a person, of discrimination based on multiple characteristics, including religious belief, is even more harmful. Amnesty International acknowledges that religious discrimination intersects with discrimination based on other characteristics and affects people in many ways. For example, a LGBTQIA+ identifying, disabled person of faith may face discrimination in relation to their sexuality, gender identity or intersex variations as well as discrimination in relation to their faith and their disability.
- 1.8 Amnesty International is concerned that the public discussions about the concept of religious freedom and belief have been framed as a dichotomy between religious freedom versus other individual human rights, particularly LGBTQIA+ rights. This perception is false. For example, many LGBTQIA+ people are people of faith or hold strong spiritual beliefs and they consider their right to religious and spiritual belief vitally important.
- 1.9 Amnesty International has serious concerns that this Bill will, in its current form, create significant additional barriers for some people and communities attempting to access essential services such as health, mental health services, disability support services, education, accommodation, aged care, support for children in out of home care and employment. This Bill will particularly impact on LGBTQIA+ people, people with a disability and/or lived experience of mental illness, Aboriginal and Torres Strait Islander people, rural and remote communities, single parents, divorcees, people of minority faiths and beliefs, people with limited support or resources, women, children and young people.
- 1.10 Amnesty International holds the strong position that the only feasible way to protect the rights of people of faith in New South Wales, whilst not creating a situation that allows people of faith to discriminate against others, is a Human Rights Act. This Act would protect the rights of all New South Wales residents within a framework that ensures that all people’s rights are universal and indivisible. In a situation where one person’s accessing of their rights impacts or impinges on another person’s ability to access their rights, an Act would fairly balance these rights. UDHR allows for the rights to be balanced with each other so that no one human rights outweighs another.
- 1.11 Amnesty International notes that this Bill has the potential to negatively impact on many groups and individuals. Australia is home to the oldest continuing culture in the world. It is not clear that the current definition of ‘religious beliefs’ include Aboriginal and Torres Strait Islander spiritual beliefs. Religious institutions in Australia have had a long history of interacting with First Nations communities, often in deleterious ways. It is vital that the potential impact of this bill be assessed by First Nations people and their feedback taken on board. Amnesty International strongly recommends extensive community consultation with our First Nations people about the impact of this bill before it is introduced.
- 1.12 Amnesty International is concerned that the terms of the proposed Bill protects religious belief or activity at the expense of other human rights. If this Bill were to be passed, it is likely to harm members of the community. Amnesty International strongly

believes the Bill should not proceed in its current form. Any Bill which aims to protect people against discrimination based on their religious belief or lack of religious belief must do so without preferencing their rights at the expense of the human rights of others.

Recommendations

In order to protect all human rights in New South Wales, Amnesty International recommends:

- (1) The Government legislate a Human Rights Act (HR Act) for New South Wales, to ensure that fundamental rights are protected and appropriately balanced. The objective of the HR Act or Charter should contain as a minimum: right to recognition and equality, right to life, freedom of movement, right to privacy and reputation, right to religion and belief, rights to peaceful assembly and freedom of association, cultural rights (right to enjoy culture, declare and practice religion and use their language), right to education, right to access health care and the rights of children in the criminal justice process.

In regards to the Bill, Amnesty International recommends:

- (2) That the Bill not be passed in its current form.

If the Bill is to be enacted, Amnesty International recommends:

- (3) That consultations take place with Aboriginal and Torres Strait Islander people regarding the inclusion of and protection of the freedom of their spiritual and religious beliefs in the Act.
- (4) Sections 22N(3) to (5), 22S(3)-(5) and 22V(3)-(5) be removed from the Bill.
- (5) Section 22Z be removed from the Bill.

2. International Legal Human Rights Frameworks

2.1 Articles 1 and 2 of the UDHR² set out the fundamental principles underpinning all human rights.

2.2 Article 1 states:

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

2.3 Article 2 states:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

² Universal Declaration of Human Rights, United Nations General Assembly Resolution 217 A(III), 10 December 1948 (UDHR).

2.4 Article 2 of the ICCPR states in similar terms:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2.5 It is now well established that phrase 'other status' has been interpreted by human rights treaty bodies to include attributes such as age, disability, sexual orientation, gender identity or sex characteristics.

2.6 Article 7 UDHR and Article 26 ICCPR³ provide that all people are equal before the law and entitled without discrimination to equal protection of the law. Article 26 ICCPR requires State Parties, including Australia, to prohibit discrimination and guarantee protection against discrimination on the basis of 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.' Article 27 ICCPR provides particular protection for ethnic, religious, or linguistic minorities to 'enjoy their own culture, to profess and practise their own religion or to use their own language'.

2.7 The Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (the Yogyakarta Principles) and the Yogyakarta Principles plus 10 state that sexual orientation, gender identity, gender expression and sex characteristics are integral to every person's dignity and humanity and must not be the basis for discrimination or abuse⁴. These Principles call on States to take all necessary legislative, administrative and other measures to ensure the right of persons, regardless of sexual orientation, gender identity, gender expression or sex characteristics to hold and practise religious and non-religious beliefs, alone or in association with others, to be free from interference with their beliefs and to be free from coercion or imposition of beliefs⁵.

2.8 Human beings have multifaceted identities and will possess, at any time, more than one of the statuses referred to in Article 2 UDHR, and that these statuses may change over time.

2.9 Although the State of New South Wales is not a signatory to the ICCPR, the terms of the Explanatory Note to the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 (the Bill) make it clear that the intention is that when functions under the Bill are being carried out and its provisions applied, it is expected that there will be compliance with the purpose and meaning of the ICCPR, the 1981 UN Declaration on the Elimination of all forms of Intolerance and of Discrimination Based on Religion or Belief (1981 Declaration), and the Siracusa Principles on the Limitation and Derogation

³ International Covenant on Civil and Political Rights, United Nations, Treaty Series, (1966) vol.999, p.171 (ICCPR).

⁴ *The Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity*, 2007, Principle 2; *The Yogyakarta Principles plus 10 - Additional principles and State obligations on the application of international human rights law in relation to sexual orientation, gender identity, gender expression and sex characteristics to complement The Yogyakarta Principles*, 10 November 2017, Preamble.

⁵ *Yogyakarta Principles*, Principle 21

Provisions in the International Covenant on Civil and Political Rights (Siracusa Principles).

- 2.10 It is not clear whether or not the purpose and meaning of the ICCPR, the 1981 Declaration and the Siracusa Principles were at the core of the drafting process for this Bill. Further, these documents are not the only international human rights instruments which have something to say about the right to freedom of religion and belief. For example, Article 14 of the Convention on the Rights of the Child (CRC) provides that States parties shall 'respect the right of the child to freedom of thought, conscience and religion' with Article 13 guaranteeing their right to freedom of expression, and Article 15 recognising the rights of the child to freedom of association and to freedom of peaceful assembly.⁶ The Declaration on the Rights of Indigenous Peoples at Article 12 states that Indigenous peoples have the right to 'manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies.'⁷
- 2.11 No other parts of the Act, which prohibit discrimination on grounds which find their basis in international human rights law, explicitly refer to the application of the ICCPR and Siracusa Principles when functions under the Act are being carried out and its provisions applied. If the intention is to apply the principles set out in the ICCPR to the Act only with respect to religious freedom and belief, then this sets standards for interpretation which do not apply to all rights protected by the Act. The better course would be to enact a Human Rights Act for New South Wales in which all rights would be interpreted in accordance with the ICCPR and international human rights law.

Discrimination

- 2.12 The ICCPR does not define 'discrimination' and does not explain what would constitute 'discrimination.' The United Nations Human Rights Committee's⁸ view is that, in light of definitions of discrimination in the Convention on the Elimination of All Forms of Racial Discrimination⁹ and in the Convention on the Elimination of All Forms of Discrimination Against Women¹⁰, discrimination in the ICCPR 'should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.'¹¹
- 2.13 A similar definition of 'discrimination' is found in Article 2(2) of the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief (Declaration on Religion and Belief).¹²

⁶ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, (entered into force 2 September 1990) (CRC).

⁷ United Nations General Assembly, UN Doc A/RES/61/295 (13 September 2007).

⁸ The Human Rights Committee is the body of independent experts that monitors the implementation of the ICCPR by States (see Part IV ICCPR).

⁹ CERD article 1

¹⁰ CEDAW article 1

¹¹ Human Rights Committee, General Comment No. 18: Non-Discrimination, 37th session, (1989), para 6,7.

¹² United Nations General Assembly UN Doc. A/RES/36/55 (adopted 25 November 1981) (Declaration on Religion and Belief).

2.14 The Declaration on Religion and Belief further provides that States shall take ‘effective measures to prevent and eliminate discrimination on the grounds of religion or belief,’ including the enactment or repeal of legislation, and take ‘all appropriate measures’ to prevent intolerance on the basis of religion or belief¹³. This Declaration also states that ‘Nothing in the present Declaration shall be construed as restricting or derogating from any right defined in the Universal Declaration of Human Rights and the International Covenants on Human Rights.’¹⁴

Freedom of thought, conscience and religion

2.15 The rights to freedom of thought, conscience and religion are enshrined in Article 18 UDHR and Article 18 ICCPR, which states:

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, morals or the fundamental rights and freedoms of others.
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.

2.16 The right to freedom of thought, conscience and religion also includes theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief¹⁵.

2.17 It should be noted that Article 18 is one of the articles in the ICCPR with respect to which no derogations are permitted (see Article 4(2) ICCPR). The extent of any limitations on the right to manifest one’s religion or belief is set out in Article 18(3) above.

2.18 Amnesty International recognises the distinction between the absolute right to freedom of thought, conscience and religion (including a non-religious belief or a rejection of religious belief) and the right to manifest such a belief. While the right to freedom of thought, conscience and religion is absolute, in international law, the freedom to manifest one’s religion or beliefs may be subject to legitimate limitations.¹⁶ Such limitations must be prescribed by law and be necessary for the protection of:

¹³ Declaration on Religion and Belief, Article 4.

¹⁴ Declaration on Religion and Belief, Article 8.

¹⁵ See Article 18(3) ICCPR, and UN Human Rights Committee, General Comment 22 (48) CCPR/C/21/Rev.1/Add.4 27 September 1993 (General Comment 22).

¹⁶ See General Comment 22, para 3,4; Special Rapporteur, *Report of the Special Rapporteur on freedom of religion and belief*, 43rd sess, UN Doc A/HRC/43/48 (27 February 2020), para 60 (2020 Report).

- national security or public order (or public safety in the case of freedom of association);
- public health or morals; or
- the rights and freedoms of others¹⁷.

2.19 The Special Rapporteur on freedom of religion or belief, states that the limitations on manifesting freedom of religion or belief is that this freedom must not be used for ends that are inconsistent with the United Nations Charter or relevant human rights instruments. Article 30 UDHR and Article 5 ICCPR state that no human right may be invoked to destroy another human right.¹⁸

2.20 Interpretive principles relating to limitations referred to in the ICCPR are set out in the Siracusa Principles, with the following being the most pertinent with respect to Article 18(3):

9. No limitation on a right recognized by the Covenant shall discriminate contrary to Article 18, paragraph 1.

10. Whenever a limitation is required in 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;
- (d) is proportionate to that aim.

Any assessment as to the necessity of a limitation shall be made on objective considerations.

11. In applying a limitation, a state shall use no more restrictive means than are required for the achievement of the purpose of the limitation.

12. The burden of justifying a limitation upon a right guaranteed under the Covenant lies with the State.

2.21 With respect to the phrase ‘prescribed by law’ in Article 18(3), Siracusa Principle 16 states that laws ‘imposing limitations on the exercise of human rights shall not be arbitrary or unreasonable.’

Freedom of expression

2.22 Individuals also enjoy the protection of the right to freedom of expression and the right to freedom of association (Articles 19 and 22 of the ICCPR).

2.23 Freedom of expression is a fundamental human right. It is essential to, and interrelated with, the realisation and exercise of all human rights. Every human being has the right to hold opinions, receive information and express themselves freely. Like all human

¹⁷ ICCPR Article 18(1) and (3).

¹⁸ 2020 Report, para 61.

rights, freedom of expression must be protected and balanced alongside other rights. Governments may impose some legitimate restrictions on certain forms of speech, as long as they are demonstrably necessary to ensure respect for the rights of others, such as the right to be free from discrimination, or for the protection of certain specified public interests¹⁹. Any such restrictions on freedom of expression must be prescribed by law and must conform to the strict tests of necessity and proportionality²⁰. Importantly, governments also have a positive obligation to prohibit advocacy of national, racial or religious hatred²¹.

2.24 The Special Rapporteur on freedom of religion and belief stated, with respect to the relationship between freedom of expression and freedom of religion:

Criticism of religion, religious leaders or doctrine, which is often an exercise of freedom of expression, is not a violation of freedom of religion or belief.²²

2.25 That criticism is not a violation of freedom of religion or belief is because that criticism does not interfere with a person's right and freedom to hold that religion or belief.

The Right to Freedom of Thought, Conscience and Religion and other Human Rights

2.26 The starting point to considering the relationships between these rights is to recognize that all human rights, including freedom of religion or belief are rights that reside with the individual and not with the group per se.²³ It is the responsibility of the State to ensure the enjoyment of all human rights by all people.

2.27 In his 2018 Report, the Special Rapporteur on freedom of religion and belief states that a State's obligation to promote and protect the right to freedom of religion or belief must be understood within a broader human rights-based framework. This framework emphasises the principles of universality, equality and freedom and satisfies the duties to respect, protect and promote all human rights for everyone. In order for this right to be realised, States must guarantee equal protection under the law for all people. Article 5 ICCPR provides that no State, group or person may 'engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms' enshrined in the ICCPR.²⁴

2.28 The Special Rapporteur noted that freedom of religion and belief and the right to equality and non-discrimination are 'inextricably' linked. The 'overarching test' for assessing whether conflicts between States and religion are prone to perpetuating rights violations, is any resulting propensity for promoting non-discrimination 'in the equal enjoyment of all human rights by all.'²⁵ A State must ensure that the purpose or effect of dealing with freedom of religion does not lead to 'nullification or impairment of

¹⁹ ICCPR Article 19(3).

²⁰ United Nations Human Rights Committee, *General Comment 34: Article 19: Freedoms of opinion and expression*, 102nd sess, UN Doc CCPR/C/GC/34, 12 September 2011, para. 22.

²¹ ICCPR Article 20(2).

²² 2018 Report, para 43.

²³ 2018 Report, para 84.

²⁴ Special Rapporteur, *Report of the Special Rapporteur on freedom of religion and belief*, 37th sess, UN Doc A/HRC/37/49 (28 February 2018 para 30 (2018 Report)).

²⁵ 2018 Report, para 33.

the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.²⁶

2.29 States are required by international law to be ‘impartial guarantors of the enjoyment of freedom of religion or belief of all individuals and groups within their territory or subject to their jurisdiction.’ As is clear from the discussion above, this includes individuals who do not have any religious belief. There is no hierarchy of human rights. Where there is a conflict between freedom of religion and the right to non-discrimination and equality, the focus should be on ensuring that all human rights are protected.²⁷

2.30 In his 2020 Report, the Special Rapporteur noted that the mandate from the Human Rights Council²⁸ had encouraged him and his predecessors to ‘apply a gender perspective’ to their work. He reports on situations in which gender-based violence and discrimination grounded in religious justifications persist, either directly from official laws and policies or carried out by private actors.²⁹ During the consultation process during the preparation of the 2020 Report, it was noted that there was ‘an increasing use of religion and belief to deny reproductive health and sexual rights; criminalize protected conduct and deny the equal personhood of LGBT+ persons; or to undermine the right to freedom of religion or belief to women, girls and LGBT+ persons.’³⁰

2.31 The Special Rapporteur stated that he was ‘deeply concerned’ about numerous reports that he received alleging that

‘religious interest groups are engaged in campaigns characterizing rights advocates working to combat gender-based discrimination as ‘immoral’ actors, seeking to undermine society by espousing ‘a gender ideology’ that is harmful to children, families, tradition and religion. Invoking religious tenets as well as pseudoscience, such actors argue for the defence of traditional values rooted in interpretations of religious teaching about the social roles for men and women in accordance with their alleged naturally different physical and mental capacities; often calling on governments to enact discriminatory policies.’³¹

2.32 The Special Rapporteur notes that religious groups are not monolithic and that their role in perpetuating norms that promote gender inequitable attitudes is complex. Many voices exist within religious groups and institutions, including faith based actors who campaign for the rights of women, girls and LGBT+ persons and promote gender equality.³²

2.33 The Special Rapporteur observes that religions

‘are not necessarily the source of gender-based discrimination and violence, but that rather, interpretations of those beliefs, which are not protected, per se, and which are not necessarily held by all members of a religious community, are often the source of gender-based violence and discrimination. In fact, this report emphasizes that

²⁶ 2018 Report, para 34; Declaration on Religion and Belief, article 2(2).

²⁷ 2018 Report, para 81.

²⁸ The Human Rights Council is a 47 State, inter-governmental body within the United Nations, responsible for the promotion and protection of human rights around the world.

²⁹ 2020 Report, para 9.

³⁰ 2020 Report, para 14-15.

³¹ 2020 Report, para 34.

³² 2020 Report, para 39.

freedom of religion or belief can be an important tool to empower women and LGBT+ persons of faith in their struggles for equality, and that respect for the freedom of belief of women and LGBT+ persons, as well as other human rights which underwrite this freedom should be promoted and protected.³³

- 2.34 The Special Rapporteur said that an ‘area of particular concern regarding accommodations to national law for religious beliefs’ is the use of conscientious objections by healthcare providers and institutions who use religious grounds to refuse to perform abortions or provide access to contraception. The Human Rights Committee is also concerned about this, as well as the absence of effective referral mechanisms to legal abortion services when a conscientious objection is exercised. Further, the Human Rights Committee has also suggested that conscientious objection should only be permitted, if at all, for individual medical providers.³⁴
- 2.35 The Special Rapporteur stressed that ‘the universal right to equality is unqualified in a way that the obligation to promote the right to manifest religion or belief, which can be subject to limitation where necessary to protect the rights of others, is not.’³⁵ He rejected any claim that religious belief can be invoked as ‘a legitimate “justification” for violence or discrimination against women and girls or against people on the basis of their sexual orientation or gender identity.’ The manifestation of religious belief may be limited, in accordance with Article 18(3) ICCPR, to protect fundamental rights, including non-discrimination and equality. This principle is the foundation of all human rights, including the right to freedom of religion and belief.³⁶ Where there is a collision between freedom of religion or belief and non-discrimination, all relevant information needs to be carefully analysed to maximise the protection of both sets of rights through a proportional analysis, rather than a hierarchy of rights.³⁷
- 2.36 The Special Rapporteur’s views on the interaction between the right to freedom of religion and belief and other human rights are summarised in the following statements:
- The State has an obligation to guarantee to everyone, including women, girls and LGBT+ persons, an equal right to freedom of religion or belief, including by creating an enabling environment for pluralist and progressive self-understanding to be manifested. Moreover, not all claims for institutional autonomy may warrant an exemption from general laws against discrimination and nor can religious beliefs be privileged over non-religious beliefs.³⁸

3. Protection of Religious Freedoms in Australia

- 3.1 Freedom of religion in Australia is recognised in the Australian Constitution. Section 116 states that:

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion,

³³ 2020 Report, para 40.

³⁴ 2020 Report, para 44.

³⁵ 2020 Report, para 69.

³⁶ 2020 Report, para 70.

³⁷ 2020 Report, para 72.

³⁸ 2020 Report, para 75.

and no religious test shall be required as a qualification for any office or public trust under the Commonwealth³⁹.

3.2 According to the Human Rights Commission in its submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade Inquiry into the status of the human right to freedom of religion or belief, although Australia has an international legal obligation to protect the right to freedom of thought, conscience and religion, there is only limited protection of that right in our domestic law⁴⁰.

3.3 Amnesty International supports the definition of 'freedom of religion' of the United Nations Human Rights Committee in its General Comment on ICCPR, in which it states:

The right to freedom of thought, conscience and religion (which includes the freedom to not hold beliefs) in 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 others⁴¹.

3.4 For the purpose of this submission, Amnesty International references the then Human Rights and Equal Opportunity Commission's (HREOC) definition of 'religion or belief' which is:

'A particular collection of ideas and/or practices:

- that relate to the nature and place of humanity in the universe and, where applicable, the relation of humanity to things supernatural;
- that encourage or require adherents to observe particular standards or codes of conduct or, where applicable, to participate in specific practices having supernatural significance;
- That are held by an identifiable group, regardless of how loosely knit and varying in belief and practice, that are seen by adherents as constituting a religion or system of belief⁴².

3.5 The Expert Panel for the Religious Freedom Review reported in 2018 and made the following observations:

(a) It did not accept that religious freedom was in 'imminent peril,' and noted that Australians generally enjoy religious freedom. However, the Expert Panel accepted that the protection of difference of faith and belief in a democratic, pluralist country like Australia requires constant vigilance;⁴³

³⁹ *Commonwealth of Australia Constitution Act 1900*

⁴⁰ Australian Human Rights Commission submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade, Submission 12, para. 5.

⁴¹ General Comment No. 22 (1993) paragraph 1 in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.3, 1997, page 36.

⁴² Human Rights and Equal Opportunity Commission, (1998), *Article 18: Freedom religion and belief*, m R2.5, p.v

⁴³ Report of the Expert Panel: Religious Freedom Review, 18 May 2018, page 8, para 1.6, available at [https://www.pmc.gov.au/domestic-policy/religious-freedom-review#:~:text=On%2022%20November%202017%2C%20the.Report%20to%20the%20Prime%20Minister_\(Expert%20Panel%20Report\)](https://www.pmc.gov.au/domestic-policy/religious-freedom-review#:~:text=On%2022%20November%202017%2C%20the.Report%20to%20the%20Prime%20Minister_(Expert%20Panel%20Report).).

(b) ‘ Diversity in religious belief is just one example of the many differences that exist within pluralistic societies such as Australia. Australia embraces diversity in a host of areas including race, religion, culture, sex, sexuality, national origin, and political and other opinions. It welcomes expression of this diversity, subject only to the importance of respecting the rights of others.’⁴⁴

(c) The Expert Panel noted that human rights are indivisible, and that governments cannot choose to protect freedom of religion and belief over other human rights. All human rights must be protected and that where one right 'gives way' to another, that must occur within the framework provided by international law.⁴⁵

- 3.6 New South Wales does not have overarching human rights legislation to, for example, balance the freedom of religion with other fundamental human rights, such as the right to freedom of expression and the right to non-discrimination⁴⁶. Amnesty International notes the recommendation in the Religious Freedom Review: Expert Panel Report to the effect that it would be appropriate to use ‘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.’⁴⁷
- 3.7 Victoria, the Australian Capital Territory and Queensland provide specific protections for freedom of religion through their human rights legislation⁴⁸.
- 3.8 A HR Act would provide vital human rights protections for people in New South Wales.

4. Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020

- 4.1 Amnesty International’s strong belief is that everyone in New South Wales would benefit from a Human Rights Act which fosters understanding and respect for human rights and provides tools to challenge injustice.
- 4.2 Amnesty International knows that the only feasible way to protect the rights of people of faith whilst not creating a situation that allows people of faith to discriminate against others is a Human Rights Act. A Human Rights Act would protect the rights of all persons in New South Wales within a framework that ensures that all people’s rights are universal and indivisible. In the situation where one person’s access to their human rights impacts another person’s ability to access their rights, a Human Rights Act would fairly balance these rights.
- 4.3 The Human Rights Act should be based on the principles articulated in the UDHR and the ICCPR regarding identified universal and inalienable human rights. The Human Rights Act would prohibit discrimination and guarantee protection against discrimination. Most importantly, where it appears that honouring one person’s right

⁴⁴ Expert Panel Report, page 9, para 1.9.

⁴⁵ Expert Panel Report, page 13, para 1.37.

⁴⁶ For example, New Zealand, Canada and the United Kingdom

⁴⁷ Expert Panel Report, page 1, recommendation 3. [r.](#)

⁴⁸ Charter of Human Rights and Responsibilities Act 2006, art 14 (Vic); Human Rights Act 2004, art 14 (ACT); Human Rights Act 2019, s 20 (Qld).

intersects with and impinges on another's, the HR Act would include a means of resolving the matter.

- 4.4 Amnesty International notes that the UN Human Rights Committee, in its review of Australia's compliance with the ICCPR, recommended in November 2017 that Australia 'adopt comprehensive federal legislation giving full effect to all [ICCPR] provisions across all state and territory jurisdictions.'⁴⁹ Amnesty International's view is that all Australian states that have not yet done so, should also pass legislation creating a Human Rights Act.

Recommendation 1: The Government legislate a Human Rights Act (HR Act) for New South Wales, to ensure that fundamental rights are protected and appropriately balanced. The objective of the HR Act or Charter should contain as a minimum: right to recognition and equality, right to life, freedom of movement, right to privacy and reputation, right to religion and belief, rights to peaceful assembly and freedom of association, cultural rights (right to enjoy culture, declare and practice religion and use their language), right to education, right to access health care and the rights of children in the criminal justice process.

- 4.5 Amnesty International acknowledges that an Act is not presently under consideration by the government. In these circumstances, including provisions in the *Anti-Discrimination Act 1977* to protect the right to freedom of thought, conscience and religion (Article 18 ICCPR) and prohibit discrimination and guarantees protection from discrimination (Article 26 ICCPR) would be appropriate.
- 4.6 Amnesty International believes that the Bill should not be enacted in its current form as the proposed amendments to the Act go far beyond the terms of Articles 18 and 26 ICCPR. Amnesty International's strong recommendation is that any amendments to the Act against discrimination of people based on their religious belief or lack of religious belief take place without preferencing the rights of people of faith at the expense of the human rights of others. There is no hierarchy of human rights, yet the effect of the Bill is to prioritise and privilege religious beliefs over other human rights. Amnesty International is very concerned that this Bill in its current form would entrench preferential treatment for some people into law and would enable discrimination against many people in New South Wales.

Recommendation 2: The Bill not be passed in its current form.

Definitions in the Bill

Religious Activities

- 4.7 'Religious activities' are very broadly defined as 'engaging in religious activity, including an activity motivated by religious belief,' so long as the activity does not

⁴⁹ Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, CCPR/C/AUS/CO/6, 9 November 2017 [5].

constitute an offence punishable by imprisonment under New South Wales or Commonwealth law. Not all criminal offences are punishable by imprisonment.

- 4.8 Conduct that may infringe on another person's human rights and may be unlawful could be repeatedly carried out by people claiming it is motivated by their religious beliefs. This repeated conduct would be permitted by this bill as long as the offense was not punishable by imprisonment. We are aware that a large proportion of bullying, harassment and persecution occurs at levels that would not result in imprisonment however the repetitive nature of the behaviour has profoundly harmful impacts on many members of our society.
- 4.9 This Bill therefore protects religious activities which may be unlawful or which breach civil obligations: people participating in activities which are not 'religious activities' are expected to not breach any criminal law or their civil obligations. The identical actions or activities of different people may cause harm to others or impinge on their human rights, but if one person's conduct is characterised as 'religious activities' that conduct would be permissible under this Bill.

Religious Beliefs

- 4.10 Amnesty International notes that the definition of 'religious belief' in the Bill, 'having a religious conviction, belief, opinion or affiliation', is a narrower definition than 'thought, conscience and religion' in Article 18 UDHR, Article 18(1) ICCPR, Article 1 1981 Declaration and Article 14(1) CRC. The Bill's definition of 'religious belief' is also narrower than the phrase 'religion or belief' which is used in commentary on freedom of thoughts, conscience and religion. Further, it is much narrower than the HREOC definition in 3.4 of this submission.
- 4.11 The definition of 'religious beliefs' makes no reference to Aboriginal, Torres Strait Islander and other First Nations people spirituality. There is also no mention of Indigenous spirituality in the Explanatory Notes. The right of Indigenous people to their spirituality and religious traditions is confirmed in Article 12, Declaration on the Rights of Indigenous Peoples. Amnesty International's view is that the definition of 'religious belief' in the Bill does not include Indigenous spirituality and religious traditions. Amnesty International understands that many Aboriginal and Torres Strait Islander and other First Nations people do not describe their beliefs as 'religious beliefs'.

Recommendation 3: Consultations take place with Aboriginal and Torres Strait Islander people regarding the inclusion of and protection of the freedom of their spiritual and religious beliefs in the Act.

Religious ethos organisations

- 4.12 The inclusion of 'religious ethos organisations,' which are described in the Explanatory Notes as 'private educational authorities, registered charities and other bodies conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion' in a Bill protecting freedom of religion and belief is problematic. Human rights are held by individual persons who also have the right to worship in a community.⁵⁰

⁵⁰ Article 18(1) ICCPR.

Human rights are not held by religions⁵¹ or the private educational authorities, charities, camps or organisations or associations who are associated with a religion.

- 4.13 Amnesty International acknowledges that private religious schools and charities can have religious characteristics where a particular religious ethos is taught and which informs the manner in which they operate. Private religious schools also receive government funding. The sources of this funding include New South Wales and Australian residents of all races, colours, sexes, persons of faith and persons of no faith, political views, national and social origins, sexual orientations and gender identities. Amnesty International is firmly of the view that any school, charity, organisation or association receiving taxpayer and resident sourced funds from the New South Wales or Federal governments, must not discriminate in its operations. Additionally, any private religious organisation providing services (e.g. education) without government funding, still has a responsibility to protect the human rights of the children accessing their services.
- 4.14 Section 22M(2) of the Bill permits a religious ethos organisation to give preference to persons of the same religion as that of the religious ethos organisation. Amnesty International acknowledges that there are roles, such as chaplaincy services within religious schools, hospitals and nursing homes for example, where it is appropriate that those positions are occupied by a person of the same religious beliefs as those underpinning those organisations. Many positions in these organisations could be held by someone of a different or no faith, without interfering with its underlying religious ethos. This diversity of staff can potentially benefit clients who may not be members of the same religion as members of the organisation.
- 4.15 Amnesty International's firm position is that religious organisations in receipt of public funding or providing health and social services on behalf of the government, must not be permitted to discriminate in the provision of those services or in the employment of staff, in ways that would otherwise be unlawful. Non-religious providers of the same types of services are required to hire and employ staff and deliver services without discrimination.
- 4.16 It should be noted that the reality in NSW (and throughout Australia) is that services provided to children and adults, often at times when they are most vulnerable, are frequently provided by, what would be described as religious ethos organisations in the Bill. In circumstances such as out of home care, mental health and counseling services, general health services, disability support services, crisis support, aged care services and education, the human rights of the individual must not be discarded in favor of the "rights" of an organisation.

Discrimination in work

- 4.17 The right of all people to work is enshrined in Article 23 UDHR, Article 7 International Covenant on Economic, Social and Cultural Rights, Article 11 CEDAW and Article 5(e)(i) CERD. Yogyakarta Principle 12 states that everyone has the right to 'decent and productive work, to just and favourable conditions at work and to protection against unemployment, without discrimination on the basis of sexual orientation or gender identity.'

⁵¹ 2020 Report, para 49.

- 4.18 Amnesty International agrees that no one should be discriminated against in relation to their employment for any reason, including their religious faith or lack of faith. This Bill goes much further than that protection. Section 22M explicitly permits religious ethos organisations to discriminate against any person not of the same faith when hiring employees. In contrast, it is unlawful for any other employer to discriminate against a person on the ground of religious belief or religious activities during the hiring process, terms on which employment is offered, conditions and benefits of employment and dismissing an employee (see sections 22N(1) and (2) of the Bill).
- 4.19 It is unlawful for employers to 'restrict, limit, prohibit or otherwise prevent an employee from engaging in a protected activity' or 'punish or sanction an employee for engaging in a protected activity' (section 22N(3)). The employee's conduct which amounts to 'protected activity' means a religious activity performed at a time other than when the employee is performing work, and not at the employer's place of work and does not include direct criticism of, or attack on, or does not cause any direct and material financial detriment to the employer (section 22N(4)). Neither boycotts or secondary boycotts of the employer by other persons or withdrawal of sponsorship or financial or corporate support due to the employee's protected activity constitute financial detriment to the employer (section 22N(5)).
- 4.20 Similar provisions are included in the Bill with respect to qualifying bodies (section 22S(3) to (5)) and educational authorities (section 22V(3) to (5)). Amnesty International notes that similar provisions are not included in the Act with respect to the prohibition of discrimination on the basis of any characteristic. The effect of this is to treat the right to religious freedom as more important than other human rights. There is no hierarchy of human rights. The right to equality is not qualified, whereas the right to freedom of thought, conscience and religions may be limited in some circumstances.⁵²
- 4.21 Amnesty International expects that the vast majority of religious activities by persons of faith would be uncontroversial and have no effect on or cause no financial detriment to their employers business. The question which arises, however, is whether it is appropriate to protect all religious activities of an employee, which are by definition protected activities, regardless of the harm they may cause to a business' reputation or that of its employees, or people in the broader community. If, for example, a Government employee, responsible for making decisions for about access to a particular program to assist single parents, was reported in the news as saying that based on their religious beliefs only widows or widowers should receive assistance through the program, the effect of sections 22N(3) to (5) is that no action could be taken against that employee. A different employee who said the same thing, but did not assert that their view was based on religious belief, could be disciplined. The harm these comments would have on non-widowed single parents would however be the same.
- 4.22 Education authorities and qualifying bodies may have acute problems with this Bill. Education authorities are responsible for the education of and care for students during school hours. A school counsellor espousing conversion practices for lesbian, gay, trans or gender diverse children, because those children are seen to be broken or sick and cannot be accepted by God, can cause great harm. If the counsellor relies on their religious beliefs as the basis for their views, then, even if the statements are contrary to the standards of conduct for school counsellors, the education authorities will not be able to discipline the counsellor. This is the case, even where there is evidence that

⁵² ICCPR Articles 26 and 18(3).

conversion practices cause harm. When these views are expressed in schools, an atmosphere is created where students are emboldened to bully LGBT students: the impacts can be devastating.

- 4.23 A qualifying body, which has a requirement each member be 'a fit and proper person', may be able to discipline one member for making statements which cause reputational harm to the partnership they work for, but the same statements made by another member who says they are made based on their genuine religious beliefs, could not be subject of disciplinary proceedings. Again the potential harm to individuals and the partnership is the same in both cases.
- 4.24 Amnesty International is concerned that the provisions of sections 22N(3) to (5), 22S(3)-(5) and 22V(3)-(5) create a system where religious activities, which are protected activities, are to be protected, regardless of any interference they may cause to the human rights of others. If the protected activity involves a person exercising their freedom of expression, the terms of these provisions appear to conflict with Article 19 ICCPR which sets out the right to freedom of expression (Article 19(2)). Article 19(3) states that freedom of expression 'carries with it special duties and responsibilities' and therefore may be subject to restrictions. If the restrictions are provided for by law and are necessary, they can address respect for the rights or reputations of others and for the protection of national security, public order or public health or morals.
- 4.25 No human right should be protected to the extent that it is allowed to interfere with or restrict the human rights of another person.

<p>Recommendation 4: Sections 22N(3) to (5), 22S(3)-(5) and 22V(3)-(5) be removed from the Bill.</p>

State Laws and Programs

- 4.26 The terms of section 22Z(1) and (2) make it unlawful to discriminate against a person or a religious ethos organisation on the ground of religious belief or religious activities in the course of performing any function under at State law, or for the purpose of a State program, or in the course of carrying out any responsibility for the administration of a State law or the conduct of a State program. The effect of this section is that people, religious ethos organisations and commercial enterprises which define themselves as religious, could challenge NSW government programs, policies, contracts and decisions, on the basis of a conflict with their religious beliefs. This would be the case even where that person, organisation or commercial enterprise is administering the program, responsible for applying a policy or is a party to the contract. Neither organisations nor commercial enterprises are holders of a right to freedom of religious belief: only people have that right.
- 4.27 Amnesty International's firm view is that all organisations receiving public funds, contributed to by all members of the community, to provide public services should not discriminate in the provision of those services.

Recommendation 5: Section 22Z be removed from the Bill.

5. Conclusion

- 5.1 Amnesty International supports including the right to freedom and belief in the Anti-Discrimination Act in terms similar to those prohibiting discrimination on the grounds of race, sex, marital or domestic status, disability, homosexuality and age.
- 5.2 The people of New South Wales and Australia are a dynamic collection of people from all parts of the globe with diversity in racial and cultural backgrounds, faiths and beliefs, domestic arrangements, relationships, sexual orientations and gender identities, skills, talents and abilities who combine to create our strong communities. The responses of our communities to the bushfires in late 2019 and early 2020 and the Covid-19 pandemic are evidence of this. All people are entitled to have their human rights recognised and protected, without discrimination, when they are contributing to, participating in and receiving services in our communities.
- 5.3 The Bill, as drafted, goes further than simply protecting the right to freedom and belief: it elevates freedom of religious belief, treating it as more important than other human rights. This is a fundamental misunderstanding of human rights. Human rights do not exist in a hierarchy. Human rights exist in a framework which emphasises principles of universality, equality and freedom which also respects, protects and promotes all human rights for everyone.
- 5.4 The Bill, as drafted, should not proceed.