

**Submission
No 80**

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

Organisation: Human Rights Law Alliance

Date Received: 21 August 2020

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SUBMISSION
**NSW ANTI-DISCRIMINATION AMENDMENT (RELIGIOUS FREEDOM AND
EQUALITY) BILL 2020**

DATE: 21 August 2020

TO: Parliament of New South Wales - Joint Standing Committee on the Anti-Discrimination Amendment (Religious Freedom and Equality) Bill 2020

FROM: Human Rights Law Alliance Limited

RE: **ANTI-DISCRIMINATION AMENDMENT (RELIGIOUS FREEDOM AND EQUALITY) BILL 2020**

1. This is the submission of the Human Rights Law Alliance (**HRLA**) to the Joint Standing Committee of the NSW Parliament in relation to the *Anti-Discrimination Amendment (Complaint Handling) Bill 2020 (Bill)* being promulgated by Mark Latham MLC.
2. We thank the Committee for the invitation to make a submission and welcome any opportunities to appear in support of this submission.
3. HRLA is Australia's only religious freedom law firm that acts almost exclusively in religious freedom legal cases in all States and Territories. In this context, HRLA provides the following submission on the Bill.



SUMMARY

4. HRLA supports the Bill. It is long overdue and will fill a large hole in NSW law in relation to the existing legal protections for religious Australians. It provides modest protection against discrimination for religious people and brings their protection in line with the long-standing protections given to other attributes.
5. The Bill brings NSW into line with almost all other States and Territories. The Bill is sorely needed to give a remedy to everyday Australians who regularly face hostility for their faith and have absolutely no recourse under NSW law. There should be no delay in implementing the Bill.
6. The provisions of the Bill are valid and appropriate for securing protection of religious people as:
 - 6.1 the Bill integrates well with the existing framework and protection of other attributes under the *Anti-Discrimination Act 1977 (NSW)* (**ADA**);
 - 6.2 it implements key recommendations of the 2018 Ruddock Religious Freedom Review;

- 6.3 it is consistent with the draft Federal *Religious Discrimination Bill 2019 (Federal Bill)* and is more efficient in achieving many of the aims and objectives of the Federal Bill without being out of step with the substance of the Federal Bill;
 - 6.4 it will avoid the problems with the religious freedom exemptions in the Federal *Sex Discrimination Act 1984 (SDA)* which is currently under review by the Australian Law Reform Commission.
7. Throughout our submission, we use case examples relevant to the to support our submissions.

THE CASE FOR PROTECTION OF RELIGIOUS FREEDOM IN NSW

- 8. Increasingly, people of faith are under attack in Australia because of their religious beliefs and activities. There a well-documented increase in religious antipathy towards people of faith and a push to marginalise and punish people of faith who express their viewpoint in public.
- 9. HRLA’s website www.australiawatch.com.au documents some prominent examples of hostility towards people of faith in Australia. Religious discrimination is a real problem and currently, NSW stands out as a jurisdiction where religious Australians have the least amount of legal protection against discrimination.
- 10. HRLA is contacted regularly by people of faith who face discrimination because of their faith, including by service providers, by their employers and by government agencies. Currently, these people have no protection under NSW law. We set out a small sample of examples below of Australians who have been discriminated against who would have no legal remedy in NSW because of the current lack of protection under the ADA. All the examples are deidentified.

CASE STUDY 1: Christian women banned from cafe	
<p>Two Christian women were sharing a meal in a café together, reading the Bible and talking about their faith. When they went to pay for their meal, a staff member asked the younger woman to leave and asked her friend if she was a Christian. When the older woman replied that they were Christians, he asked details about her church. He then aggressively accused the older woman of “brainwashing” her friend and told her to get out and never come back to the restaurant again. Both women felt humiliated. They are both professionals with tertiary degrees and are not used to such discriminatory treatment.</p>	 <p>1</p>
CASE STUDY 2: Christian teacher dismissed	
<p>A Catholic teacher was summarily dismissed from a placement in a public school because he spoke about his Christian faith in class after being asked questions by a student. Despite the fact that he didn’t talk about controversial subjects and wasn’t proselytising, this teacher was frogmarched off the school property in a humiliating and traumatising way that would not have occurred had he been talking about politics, sports or current events in the same way.</p>	

¹ Business vectors created by freepik.com

CASE STUDY 3: Christian employee demoted

A security guard was disciplined and demoted by a large NSW security contractor in 2020 because of his religious faith. He had been having casual conversations during breaks and lunchtime with co-workers about his Christian beliefs. No person had ever complained or objected to the discussions and there was never any controversy or heated exchange. An anonymous complaint was made and the employee was disciplined and demoted.



11. The above case studies demonstrate the need for this Bill. It is not appropriate that religious people are not protected in NSW from discrimination when, if any other person was treated like these people on the basis of another attribute such as disability or sexuality or because of their sex, then they have recourse to remedy under the ADA. Religious belief and activity should be accorded the same protection as other attributes which have had long-standing legal protection in NSW.

INTEGRATION OF THE BILL WITH ADA

12. The NSW *Anti-Discrimination Act 1977* frames its protections differently from other jurisdictions such as the *Equal Opportunity Act 2010* in Victoria. Instead of listing protected attributes such as, sex, age, disability etc and then providing a single framework for prohibiting discrimination, the ADA includes separate discrimination regimes for each protected attribute that has been added to the ADA.
13. The Bill will add a further standalone set of discrimination prohibitions to the ADA for religious belief and activity. This repetition does lead to some redundancy in the ADA as compared to legislation in other jurisdictions but the approach of the Bill is completely consistent with the approach taken in relation to other attributes. To delay this Bill for administrative reasons of trying to avoid an overly-complex ADA is undesirable as it would prioritise administration over substance.
14. Further, there is a distinct advantage in having a separate Part of the ADA for each attribute, as it allows the particular unique attributes of different rights to be recognised. This is certainly advantageous for the protection of religious belief and activity under the Bill.
15. Religious freedom has unique characteristics that require particular consideration that are not applicable for other rights. This is evident when one looks at Article 18 of the *International Covenant on Civil and Political Rights* which sets out the rights of freedom of thought, conscience and religion that Australia is required to promote and protect.

Article 18 International Covenant on Civil and Political Rights

- 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.**
- 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.**
- 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.**

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.*

16. It can be seen that religious freedoms are broadly defined in the ICCPR and include the right to exercise rights both individually or communally, in public and in private, and the right to manifest those beliefs.
17. It also extends to the rights of parents to ensure the religious and moral education of their children as they see fit. These are unique attributes of religion that are not shared by other attributes such as sex, age, sexual orientation, gender etc. These unique attributes require a slightly different approach to discrimination protection that the ADA in NSW allows because of the way it has a separate regime for each attribute.
18. Thus, it is our view that the Bill, which sets out a self-contained regime for protection of religious belief and activity, will integrate well and easily within the existing framework of the ADA and is consistent with the protections that are afforded to other protected attributes.

CONSISTENCY AND BALANCE WITH OTHER PROVISIONS OF THE BILL

19. Historically, submissions by lobbyists, interest groups and policy analysts about Australian laws to protect religious freedom (such as in relation to the Federal Bill) fail to recognise the unique character of religious freedom rights as enunciated in the ICCPR. These submissions often contain various assertions such as:
 - 19.1 religious freedom protections will prioritise religion over other attributes;
 - 19.2 religious organisations get special treatment;
 - 19.3 religious freedom protections are unbalanced compared to other rights; and
 - 19.4 religious freedom rights will be used to allow the suppression of other rights and freedoms.
20. HRLA expects that submissions in relation to this Bill will be no different. Such submissions are generally incorrect and appear to be advocacy rather than analysis.
21. This Bill accords religious belief near-identical protection to other protected attributes under the ADA, and is consistent and balanced in this regard. It does not give undue protection to religious belief or activity in comparison to other rights or unduly privilege religious freedom rights over other rights.
22. Bespoke provisions in the Bill reflect the unique nature of religious freedom rights and reflect international obligations under the *International Covenant on Civil and Political Rights* including:
 - 22.1 inclusion of appropriate recognition of Australia's commitments under international instruments in the Principles in section 3 of the ADA. The Bill will require courts to interpret the ADA in accordance with international law.
 - 22.2 "religious ethos organisations" are protected from religious discrimination claims in clause 22M, which reflects that religious freedom should be protected when exercised in community and publicly and that parents have the right to determine the moral and religious upbringing of their children in religious ethos organisations.

- 22.3 activities outside of work are given protection in section 22N, which will reflect that religious freedom rights under Article 18 of the ICCPR include the right to manifest those beliefs in public in your own time without undue interference by your employer.
23. It is our view, that because the Bill introduces stand-alone provisions for religious belief and activity in a way that is consistent with the ADA, it can be introduced without risk of impacting other protections or giving disproportionate protections to religious freedoms. There is also less risk of unintended consequences relating to the balance of rights.

THE BILL IMPLEMENTS THE RUDDOCK REVIEW RECOMMENDATIONS

24. The objectives of the Bill are valid because it will implement key recommendations of the 2018 Ruddock Review into religious freedom, including:
- 24.1 the recommendation that the *Siracusa Principles* and the *International Covenant on Civil and Political Rights* be given consideration and regard in State laws about religious freedom (Recommendation #1) – which will be given effect by Schedule [1] of the Bill; and
- 24.2 NSW should amend its anti-discrimination law to protect religious belief and activity (Recommendation 16) – which is the central effect of the Bill.

THE BILL IS CONSISTENT WITH THE FEDERAL BILL

25. The NSW Bill is to be commended as largely compatible and consistent with the proposed Federal Bill. While the subject matter covered by the Bill is substantively the same as that provided by the Federal Bill in almost all respects, the NSW Bill gives effect to these protections in ways that are far more effective and efficient from a practitioner's point of view. They are also more aligned with positions taken in domestic and international law in relation to religious freedom rights.
26. We set out two examples below of ways that, in our view, the Bill is superior to the Federal Bill in a number of areas where both Bills cover the same substance, but where the NSW Bill's construction is more efficient and will lead to more efficient carriage of complaints of religious discrimination.

Establishment of Religious Belief

27. A central requirement for a successful claim of religious discrimination will be establishment that the complainant had a religious belief. Clause 22KA of the Bill provides that the test for whether a belief is a religious belief is that:
- 27.1 it is a sincere belief; and
- 27.2 it is not fictitious, capricious or an artifice.
28. This is a substantial improvement on the legal test that is set out in clause 5(1) of the Federal Bill, which requires proof of a belief that a hypothetical person of the same religion would reasonably consider is in accordance with the tenets, beliefs and teachings of that religion. This is a convoluted test that adds nothing to the overall balance and effect of the Federal Bill.
29. The NSW Bill test is simple. In addition, the test for "religious belief" in the Bill aligns with the position that the High Court has taken in these matters as set out in the Explanatory Note.

CASE STUDY 4: Byron & Keira Hordyk

BYRON & KEIRA HORDYK

Byron and Keira are a WA couple who applied to become respite foster carers for children between the age of 0-5 and were promptly rejected and labelled as “unsafe” by the agency due to their traditional Christian beliefs about gender and sexuality. Byron and Keira said they would love any foster child who was placed with them, but that they couldn’t affirm or promote a sexual identity that conflicts with their Christian convictions. Byron and Keira were devastated at how they were treated by the foster care agency and have made a discrimination claim to ensure that Christians like them are not excluded from consideration as foster carers for needy children.

Under the WA *Equal Opportunity Act*, the Hordyks are required to lead evidence from religious experts to substantiate that their beliefs about sexuality and gender are legitimately held beliefs and that they conform to the teachings of their religion and the teachings of their church. What should be a non-contentious issue and which ultimately is not the contested aspect of their claim requires significant time and expense of unnecessary evidence, as well as inefficiency in the running of the claim if this is contested and requires Court time. The Bill will provide a simpler test of sincerity which will be easier to prove, won’t materially affect the resolution of the contested issues in the discrimination claim, but which will make the claim much more efficient to run for all parties.

Direct and Indirect Discrimination Comparator Test

30. As is standard for discrimination prohibitions, the Bill includes a prohibition on discrimination that makes use of a comparator. Clause 22L of the Bill prohibits direct discrimination on the basis of religious beliefs or activities. To prove discrimination, a religious adherent must establish the following elements:
 - 30.1 that they hold a religious belief or engaged in a religious activity;
 - 30.2 the identity of an appropriate hypothetical comparison person is that has different religious beliefs; (**comparator**);
 - 30.3 what are the circumstances that are “not materially different”;
 - 30.4 that they have been treated ‘less favourably’ than the comparator; and
 - 30.5 that the less favourable treatment is ‘on the ground’ of the Applicants’ religious belief.
31. This is a complex test and is unnecessarily complex. In most jurisdictions, there is a risk that the very attributes that form part of the religious conviction will be included as part of the circumstances that are “not materially different” which effectively hollows out the protection supposed to be afforded against discrimination by the Bill.

32. Case law for other protected attributes has established the difficulty of constructing appropriate comparators and the difficulty of determining what attributes are to be included as “not materially different”.²

CASE STUDY 5: Israel Folau



ISRAEL

Israel Folau was a professional rugby player for NSW and the Australian national rugby team, the Wallabies. In May 2019, Folau’s employment was terminated by Rugby Australia for posting a Bible verse on social media which warned various categories of people (including homosexuals) that hell awaits unless they repent and turn to Jesus Christ. Rugby Australia determined that Folau’s personal posts violated Rugby Australia’s commitment to inclusivity, diversity and acceptance that constituted a high-level breach of the Union’s Professional Players Code of Conduct. In a high profile case, Folau commenced legal action against Rugby Australia for unlawful termination because of his religion under the Federal Fair Work Act (having no recourse under current NSW state law). Rugby Australia issued an apology and confidentially settled with Folau for an undisclosed amount.

Under the Federal Bill, the problematic comparator test might prevent Israel Folau from showing differential treatment on the basis of his beliefs, despite being able to clearly show that he was fired for quoting a Bible verse. Under the Federal Bill, Israel would have to first construct a hypothetical comparator (say an atheist applicant who does not hold Christian beliefs) and then determine whether they would be treated differently. A Court is likely to determine that the “not materially different” circumstances might include Israel’s view that homosexuality is a sin. This would include the very content of Israel’s Christian belief in the comparison and his claim would fail before the real issue (whether firing him was reasonable) can be determined. Under the NSW Bill, this risk is lessened as the addition of clauses 22KB and 22L(3) of the Bill clarify that acts flowing from a person’s religious beliefs are not a component of the circumstances of the complaint; they are instead characteristics that attach to persons of that religious belief. This is also clarified in the Explanatory Note for the NSW Bill and is a commendable addition to the Bill.

The Indirect Discrimination Test - Reasonableness

33. Both the NSW Bill and the Federal Bill provide that religious discrimination is only permissible where it is reasonable. Under the Federal Bill, the test for reasonableness is set at far too low a bar for allowing discrimination and is inconsistent with the clearly articulated principles of Article 18 of the *International Covenant on Civil and Political Rights* and the *Siracusa Principles*.
34. A similar approach as in the Federal Bill in overseas jurisdictions has led to some surprisingly draconian discrimination against religious adherents being determined to be reasonable.
35. Clause 3 and 22L of the NSW Bill provide that reasonableness will be determined in accordance with the proper international law test of reasonableness which is to be commended. In this regard, the NSW Bill provides better and more consistent protection against religious discrimination than

² *Purvis v New South Wales (Department of Education and Training)* [2003] HCA 62

the Federal Bill without taking a substantially different approach or one which is out of step with what the Federal Bill proposes.

CASE STUDY 6: Felix Ngole (UK)



Felix Ngole (UK)

Felix Ngole was a social work student at the University of Sheffield and a devout Christian. In 2014, he posted Bible verses about homosexuality on a public Facebook page of a US news agency as part of a political debate. Sheffield University accused Ngole of breaching its student code of conduct and expelled him from the university. He appealed through a University hearing and two committee appeals and then to the High Court. The High Court used balancing criteria similar to those specified in the Federal Bill to determine that the University's suppression of Felix Ngole's rights was reasonable. Ngole was subsequently successful in the UK Court of Appeal in 2019, four years after the event.

A university student should never be kicked out and deprived of an education and a career just for posting bible verses on the internet in another country. Yet, the UK High Court used a similar set of principles as proposed in the Federal Bill to do just that to Felix Ngole. Fundamental rights of freedom of expression and religion need a higher level of protection. Courts have shown a ready willingness to trample fundamental religious freedoms where the balancing test is set at a low standard. The NSW Bill adopts an appropriately higher test for reasonableness that reduces the risk of a poor decision like Felix Ngole was subjected to.

36. This is but a small sample of the ways that HRLA considers that, from a practitioner's point of view, the Bill is appropriate and aligned with the Federal Bill while providing more efficient and improved legal tests for key elements of religious discrimination cases. We consider that the Bill will improve discrimination complaint processes and lead to economical and timely progress of complaints through Commissions, Tribunals and Courts.

THE BILL AVOIDS THE EXEMPTION PROBLEMS OF THE SEX DISCRIMINATION ACT

37. The NSW Bill is to be commended for avoiding the problems with exemptions for religious organisations that were highlighted out of the Ruddock Review and which are the subject of current review by the Australian Law Reform Commission.
38. In early 2019, there was a failed attempt to remove Federal protections for religious ethos organisations in the *Sex Discrimination Act 1984* (Cth) pursuant to the *Sex Discrimination Amendment (Removing Discrimination Against Students) Bill 2018* (**Penny Wong Bill**). Arising out of that failed initiative, the matter of exemptions in anti-discrimination legislation was referred to the Australian Law Reform Commission which is scheduled to report sometime in the next few years.

39. This process highlighted that the *Sex Discrimination Act 1984* is a problematic piece of legislation. It elevates a particular and narrow set of protected attributes and gives those attributes absolute protection from discrimination.
40. In the Federal *Sex Discrimination Act*, the positive exercise of other fundamental rights – particularly religious freedom rights – are framed negatively as exemptions, as if the positive exercise of those rights conveys special status.
41. This has the effect of making it appear that religious organisations are being given special status and rights to discriminate that no-one else gets. This mischaracterisation of religious freedom rights as some sort of special treatment makes them vulnerable to attack and removal such as was attempted in the Penny Wong Bill.
42. There was absolutely no evidence that religious schools were expelling students who identify as same sex attracted or who experience gender dysphoria. It was a complete scare campaign and dog whistling exercise.
43. Rather than responding to a real pressing social need, the Penny Wong Bill proposed to remove protections accorded to Christian Schools to operate in accordance with parents’ fundamental human rights to have their children educated in accordance with their religious convictions, including about sexual orientation and gender identity.
44. The Penny Wong Bill was a knee-jerk reaction to an illusory problem which highlights the problem of framing religious freedom rights in legislation as an “exemption” – it makes religious freedoms easy to attack.
45. The Bill avoids the identified problems with the Sex Discrimination Act that are currently being considered by the Australian Law Reform Commission, at least as it relates to the narrow category of religious discrimination.
46. Clause 22M of the Bill provides that religious freedom rights exercised by religious ethos organisations (where religious adherents exercise their rights collectively in an organisation as protected by Article 18 of the ICCPR) are not exemptions, but in fact do not constitute discrimination.
47. Clause 22M of the Bill provides that it is not religious discrimination where a religious ethos organisation operates consistently with its religious doctrines, tenets, beliefs and teachings. It is important to recognise that this protection only extends to religious discrimination, and doesn’t extend to any other protected attribute under the ADA.

CASE STUDY 7: Ballarat Christian School



BALLARAT CHRISTIAN SCHOOL

Ballarat Christian College was sued by Rachel Colvin, a former teacher, for discrimination. Mrs Colvin claimed that she was forced to resign as a result of discrimination after the College clarified the wording of its Statement of Faith in regard to marriage being between one man and one woman. The College strongly denied Mrs Colvin's discrimination claim and sought to resolve the situation in accordance with its established policies and procedures. After mediation and to avoid further disruption and costs of legal fees, the matter was settled between Ballarat Christian College and Mrs Colvin. The College was able to reach the settlement without conceding any changes to its Statement of Faith or policies.

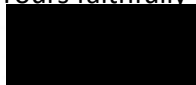
Under Victorian discrimination law, Ballarat Christian School was able to be pursued by a teacher of different religious belief for purported religious discrimination over differences in belief about Christian teaching on marriage, sexuality and gender. The lack of clarity around the protection for religious ethos organisations in Victoria makes Commissions, Tribunals and Courts into arbiters of theological disputes – not their field of expertise. The Bill provides that such claims of religious discrimination cannot be taken against religious ethos organisations such as Christian Schools as long as they are engaging in conduct consistent with their purposes. This will prevent activist complaints and will allow parents and schools to determine the religious and moral basis upon which they operate in accordance with their fundamental human rights.

48. The formulation of protections for religious ethos organisations in the Bill avoids the problems with the Federal Sex Discrimination Act which are currently being reviewed by the Australian Law Reform Commission.
49. Thus, the Bill is to be commended as an important development in the formulation of protections for religious ethos organisations like Christian Schools and will ensure that claims of no merit, like that taken against Ballarat Christian School, won't be able to be taken in NSW.

CONCLUSION

50. In summary, the HRLA welcomes the Bill and considers that its objectives are valid and appropriate for extending protection from discrimination to religious Australians. While there are amendments that could be made to further improve the Bill, HRLA submits that the Joint Select Committee should recommend that the Bill be adopted as part of the legislative programme for the NSW Parliament.

Yours faithfully



John Steenhof

Principal Lawyer – Human Rights Law Alliance