

**Submission
No 141**

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

Organisation: Trans Health Australia

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TRANS HEALTH AUSTRALIAN SUBMISSION

NSW Parliament Joint Select Committee on the
Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020

'Trans Health Australia' was founded in 2012 and is the largest transgender and gender diverse persons' advocacy and support network in Australia. Our national network of private peer support groups currently has over 5000 members across Australia, not least in New South Wales. We are a grassroots organisation that includes a wide range of lived experience, occupational competencies and a broad diversity of gender outside the historical (western culture) binary.

Trans Health Australia makes this submission to the Joint Select Committee currently considering the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020. We wish to clearly highlight the negative impact of the Bill, particularly upon transgender and gender diverse people.

We consider the Bill to be both highly destructive and socially harmful. In its proposed form it will disrupt the delicate balance of existing human rights legislation. It will undermine the positive multi-cultural and multi-faith environment of NSW. We are opposed to its further development. The content of the proposed amendments is extraordinarily inflammatory and should not be given the implied credence of parliamentary debate.

We note that the Joint Select Committee's terms of reference (TOR) are:'

1. *A Joint Select Committee, to be known as the Joint Select Committee on the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020, be appointed.*
2. *That the Committee inquire and report into the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020, including whether the objectives of the bill are valid and (if so) whether the terms of the bill are appropriate for securing its objectives.*
3. *That the Committee, in undertaking (2), have to regard to:*
 - (a) *Existing rights and legal protections contained in the Anti-Discrimination Act 1977 (NSW) and other relevant NSW Commonwealth legislation;*
 - (b) *The recommendations relevant to NSW from the Expert Panel Report: Religious Freedom Review (2018);*
 - (c) *The interaction between Commonwealth and NSW anti-discrimination laws and the desirability of consistency between those laws, including consideration of*
 - (i) *The draft Religious Discrimination Bill 2019 (Cth) which has been released for public consultation, and*
 - (ii) *The Australian Law Reform Commission's reference into the Framework of Religious Exemptions in Anti-discrimination Legislation.'*

TOR above; 2 'That the Committee..... whether the objectives of the bill are valid....'.

We note that there have been no published 'objectives of the bill'. The Hon Mr Latham in his second reading speech states;

'The purpose of the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill can be stated in a single sentence: To extend protections against discrimination beyond existing categories of citizenship and identity in New South Wales to people of religious faith and non-faith.'



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We submit that the objective to provide additional rights based on faith and non-faith is fundamentally at odds with the current balance of anti-discrimination legislation. To extend rights based on faith requires that other rights such as the right to unimpeded access to health care be considered of secondary import. We do not believe that this is a sustainable premise. If enacted the Bill will have a disproportionality large effect on vulnerable minorities. Minorities such as gender diverse, homosexual and bisexual people have often been the targets of hostility. Much of the attempt to reduce our human rights to a lesser status has been driven by doctrine. The active faith community within our organization would state that such exclusive doctrine is not compatible with the basic tenants of the major faith traditions.

We submit that no additional protections are required to ensure the full range of socially acceptable free expression of religious belief.

TOR 2 continued '*...whether the terms of the bill are appropriate....*'

We submit that the terms of the bill are entirely inappropriate:

To quote from the NSW Parliament Legislation Review Digest:

'In short, if passed, the Bill may protect behaviour from certain educational authorities, charities etc, that is currently deemed to be discriminatory and unlawful under the Act. The Committee acknowledges that the Bill seeks to balance freedom of religion with other human rights. However, the Committee refers the amendments to Parliament to consider whether they are reasonable and proportionate in the circumstances.'

Terms that permit charities to refuse care of a minority group only because they fail to conform to a heteronormative cisgender norm are never reasonable, proportionate or appropriate.

We are dismayed that a religious based charity, could reject a long serving volunteer because they are gay or gender non-conforming.

To again quote from the NSW Parliament Legislation Review Digest:

'These amendments may limit the provisions that can be enforced under an employment contract. They may also limit what can be included in an employment contract as regards codes of conduct. The amendments may thereby impact on freedom of contract – the freedom of parties to choose the contractual terms to which they are subject.'

This effectively prevents workplaces and professional bodies having a code of conduct agreement with staff members.

22S would prohibit the college of physicians from disciplining a doctor who stands outside a mental health clinic with a placard that identified themselves as a doctor and advocated for example:

- That mental distress is only ever a spiritual disorder and there is no point attending the clinic
- That mental distress indicates the person is a sinner
- That converting from religion A to faith B is all that is required to be well
- Homosexuality is a mental illness that requires deprogramming.



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Or outside a sexual health clinic declaring

- The bible is clear it is not possible to be raped in marriage as husbands are entitled and directed to dominate their wives.
- That sodomites are damned in this life and the next

The placard carrying doctor is using the status of his membership of the profession to behave in ways outside all professional norms. Such behaviour has immediate real and harmful consequences to members of the gender diverse community. There are far too many structural barriers to our members having full unfettered access to health care as it is.

To again quote from the NSW Parliament Legislation Review Digest:

Specifically, schedule 1[2], proposed subsection 22N(3) would make it unlawful for an employer to restrict, limit, prohibit or otherwise prevent an employee from engaging in a “protected activity”. A “protected activity” is defined as a religious activity that occurs at a time other than when the employee is performing work, and at a place other than the employer’s place of work. Further, “protected activity” must not include any direct criticism of, or attack on the employer, and must not cause any direct and material financial detriment to the employer. However, direct and material financial detriment does not include the loss of sponsorship, or a boycott of the employer, in response to the “protected activity”.

The effect is that an employee can, in their own time, advocate a religious position that deeply offends resulting in loss of custom and good standing of the employer. The argument that what one does in one’s own time is sacrosanct is fallacious.

Taken to its limit an employee could not be sanctioned if that male employee was convicted of a domestic violence crime against their wife because of their sincerely held Abrahamic religious view that wives are the property of husbands and it is the husband’s duty to control and discipline his wife.

The rights this Amendment seeks to support include the right of any and all religions to behave in an offensive way to all different religions.

The absurd: The structure of 22KB is inclusive of Theistic Satanism. Hence a member of the Church of Satan cannot be asked to desist wearing their iconography such as a pentagram and inverted crucifix even though this may be deeply offensive to the vast majority of theists.

TOR 3

That the Committee, in undertaking (2), have to regard to:

(a) Existing rights and legal protections contained in the Anti-Discrimination Act 1977 (NSW) and other relevant NSW and Commonwealth legislation

Trans Health Australia strongly rejects actions that wind back human rights for our members.

The Anti-Discrimination Board of NSW is active in facilitating civil conversations about the rights and full participation of all. We believe that more must be done to support transgender and gender diverse people. We are distressed on a daily basis that progress is so very slow. The notion that we could be subject to a fresh round of legislative dehumanisation is appalling.



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The *Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020* however threatens to disrupt existing slow progress and make further dialogue more difficult. The Bill disregards the necessary balance between different rights which has been painstakingly constructed, not least ignoring the ever more apparent needs of hitherto marginalised people, not least those who are transgender and gender diverse.

Trans Health Australia considers that there are no necessary overwhelming conflicts between classes of rights that penalize the right to religious freedoms. Providing extra rights for religious bodies to exclude vulnerable minorities disproportionately harms those minorities. This would directly impact upon transgender and gender diverse people who, as statistics show, struggle more than the general NSW population with accessing necessary employment, health, education and other services.

The record of many religious bodies has not been good in addressing this, and religious power and prejudice has often reinforced discrimination. This Bill seeks to weaken NSW legislation that exists to prevent such discrimination.

Many of our members are also people of faith, from all types of religion present in Australia. Their rights are often significantly limited within religious groups and need strengthening not diminishing. To reinforce powers to reject them and others would therefore be a serious betrayal of the forward-looking evolution of NSW rights. It would be a significant setback to enabling genuine social inclusion and mutual respect.

TOR 3

continued;

That the Committee, in undertaking (2), have to regard to:

(b) The recommendations relevant to NSW from the Expert Panel Report: Religious Freedom Review (2018)

Trans Health Australia considers that the Expert Panel's Report is at its heart a tainted document. The use of selective stakeholder views is problematic in the extreme.

Chapter 6 -Discrimination references the International Covenant on Civil and Political Rights (the ICCPR or Covenant). When right collide guidance on the ICCPR, in particular its provisions on limitation and derogation, may be drawn also from the Siracusa Principles. Its' clear finding was to respect these principles listed below.

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

(a) is based on one of the grounds justifying limitations recognized by the relevant article of the Covenant;

(b) responds to a pressing public or social need;

(c) pursues a legitimate aim; and

(d) is proportionate to that aim.

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.



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We submit that there is no (10 (b)) pressing social need to alter the current balance of rights as expressed in NSW law. The object of the Bill as described in Mr. Latham's second reading speech sounds innocuous and is not legitimate. (10 (c)) The effect of the Bill is in no way proportional. It removed rights to engage in contract. It removes rights to access care from and employment by faith based organisations. The Bill fails 1.1 above.

We submit that the Joint Select Committee can only conclude that the expert panel advice (*that legislation must be consistent with the Siracusa Principles*) compels the committee to judge the Bill unworthy of progress.

TOR 3 continued

That the Committee, in undertaking (2), have to regard to:

(c) The interaction between Commonwealth and NSW anti-discrimination laws and the desirability of consistency between those laws, including consideration of:

(i) The draft Religious Discrimination Bill 2019 (Commonwealth)

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

Regarding ((c) (i)) Trans Health Australia considers that the broad community disquiet around the draft *Religious Discrimination Bill 2019 (Commonwealth)* underlines the need for Australian Parliaments to step back from enabling further repressive powers for religious bodies.

The Bill before the Joint Select Committee is highly problematic and its course very uncertain. In its draft form, it certainly represents a significant setback to transgender and gender diverse people, other hard-pressed minority groups, women, and equity for people of all faith outlooks.

It will setup direct conflict between commonwealth anti-discrimination legislation. This is made clear in the expert panel report. (1.380)

While the Racial Discrimination Act does not specifically prohibit discrimination on the grounds of religious identity or belief, it can be regarded as covering religious groups that can establish a common 'ethnic origin'. This has been interpreted to include Jewish and Sikh people.

The Bill would allow a religious ethos organisation to exclude Jewish and Sikh people on the basis that they do not share the religious views of the organization. That behaviour would be in breach of the racial discrimination bill.

Further the expert panel (1.385)

In its 1999 Review of the Anti-Discrimination Act 1977, the New South Wales Law Reform Commission also recommended the inclusion of religion as a ground of discrimination, while recognising the need to delimit carefully the scope of the ground and to apply appropriate exceptions.

The Bill fails absolutely to provide any safeguards.

It is our submission that this bill must not proceed.



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- It seeks to extend rights based on religious affiliation at the expense of other human rights in a manner not consistent with Australia's international commitments.
- It will produce obvious and unworkable conflict with other antidiscrimination law.
- It has no safeguards for one faith tradition in (doctrinal) conflict with another.
- Highly marginalised groups such as gender diverse and homosexual persons will be excessively harmed by the Bill.
- To their shame the major religions have a sad history of persecuting these groups and a Bill which asserts that it is their right to so do is clearly antisocial.

A parliamentary democracy is one in which by social contract each individual accepts that we all have equal rights and we ascribe to a one vote one value ideal. The individuals agree that majority decision has moral authority.

The measure of compassion and justice for any democracy is how well it treats its minorities. The NSW parliament is not the place for minority bashing under the poorly constructed guise of "supporting" an established majority.

Author Credits :

The Revd Dr Josephine Inkipin is a transgender woman, licensed Anglican priest, former General Secretary of the NSW Ecumenical Council, and a Lecturer in Theology at St Francis College Brisbane.

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Ms Melody Moore is the founder and convenor of Trans Health Australia, a trans woman living with permanent disability. She is an unpaid volunteer a leader in the community who devotes her spare time and energy as a human rights advocate and peer support mentor who contributes her experience and insights to the advancement of equality and human rights. She raises awareness through public education, advocates to improve access to medical services and other support services critical to the health and well being of the Australian trans and gender diverse community.