

**Submission
No 144**

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

Organisation: Church of Scientology Australia

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CHURCH OF SCIENTOLOGY AUSTRALIA

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

INTRODUCTION

The Church of Scientology Australia welcomes the opportunity to provide a submission on the *Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020* (“Bill”).

We would like to thank the Joint Select Committee for this opportunity and their time in reviewing this submission.

Background

In September 1965, Scientology’s founder L Ron Hubbard wrote in a foundational essay, *The Aims of Scientology*:

A civilization without insanity, without criminals and without war, where the able can prosper and honest beings can have rights, and where Man is free to rise to greater heights, are the aims of Scientology. Nonpolitical in nature, Scientology welcomes any individual of any creed, race or nation. We seek no revolution. We seek only evolution to higher states of being for the individual and for society.

In continuing to further these aims, the Church of Scientology Australia advocates for the fair and equal treatment of all religions. We recognise the essential role religion plays in the wellbeing of an individual’s life by providing meaning, purpose, and opportunities for betterment, as well as the indispensable role it plays on a community level in promoting social cohesion, morality and the care of the vulnerable. It is difficult to imagine a flourishing and prosperous twenty-first century Australia without the free practice of religion.

As widely recognised in the landmark High Court decision that established the standard for the definition of religion for Australia and, in fact, throughout the Commonwealth of Nations, the Church of Scientology historically has been a staunch supporter of religious freedom and rights.

Freedom of religion, the paradigm freedom of conscience, is of the essence of a free society. The chief function in the law of a definition of religion is to mark out an area within which a person subject to the law is free to believe and to act in accordance with his belief without legal restraint.¹

¹ *Church of the New Faith v Commissioner of Payroll Tax* (Vic) (1983) 154 CLR 120, 130.

Cited in the opening pages of the *2018 Religious Freedom Review: Report of the Expert Panel*, the foregoing quotation from the *Church of the New Faith v Commissioner of Payroll Tax (1983)* encapsulates our view and stance concerning the protection of religious freedom.

Fundamental Human Rights

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

The right to freely hold religious beliefs, to communicate those beliefs and to freely engage in religious practices is a fundamental right, internationally recognised and protected in the *Universal Declaration of Human Rights (1948)* as well as the *International Covenant on Civil and Political Rights (1966)*.

For thousands of years, in all recorded ancient cultures and civilisations, religion has been a significant component. It is inseparable from individual and societal wellbeing.

Religion and spirituality lies deep within our Australian culture. It is as ancient as the first Australians, the indigenous peoples and nations who inhabited our continent long before English settlement in 1788.

Religious Discrimination

Despite the various human rights instruments that protect religious freedom, for nearly as long, religious adherents in different parts of the world have been victims of violence, persecution, discrimination and vilification.

Religious freedoms have had to be continually defended and upheld. To quote the overused yet pithy expression, “eternal vigilance is the price of liberty”.

As shown in the recent study undertaken by Jonathan Fox, Professor of Religion and Politics at Bar-Ilan University in Tel Aviv, religious discrimination is on the rise throughout the world, and Australia is no exception to this trend.³

While Australia is a relatively tolerant nation and for the most part, fortunately, it is not violent oppression that inhibits our free exercise of this right, there are a growing number of limitations imposed on the right to freely practice religion and to manifest one’s religious beliefs.

As detailed in the section *Objectives of the Bill, Religious Discrimination in Australia: Protection is Needed* of this submission, discrimination based on religion is alarmingly upsurging in Australia.

The limitations we face are not as easy to see as violence. Discrimination and vilification are however awfully insidious. Discrimination against one’s right to freely manifest one’s

² *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18(1) (“ICCPR”).

³ Jonathon Fox, *Thou Shalt Have No Other Gods before Me* (Cambridge University Press, 2020).

religious beliefs is a serious violation of human rights, just as it is a serious violation of human rights to discriminate based on age, gender, disability, race, etc. No one but the holder of the beliefs can understand their importance and meaning. And as such, no one but the victims of discrimination and vilification, can understand the gravity of each instance of discrimination.

The effect of discrimination on this right was proclaimed in the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* (“*Declaration*”):

Article 2

Discrimination between human beings on the grounds of religion or belief constitutes an affront to human dignity and a disavowal of the principles of the Charter of the United Nations, and shall be condemned as a violation of the human rights and fundamental freedoms...⁴

And yet, in recent times, we see increasingly unbalanced and unfair standards adopted in society due to a lack of laws that protect all rights equally. In the media, and workplaces especially, we see fierce protection of the rights of those with a non-binary gender identity in workplaces, yet efforts to denigrate and the making of false utterances on religions in the media are given a free rein.

Considering the range of matters currently covered by state, territory and Commonwealth anti-discrimination and equal opportunity legislation, matters of religion in NSW are now in a position of inequality.

Given that approximately 65% of the NSW population identify with a faith, it is fair, right, and in accordance with international standards that religion should be raised from this inequality, and receive the same protections as other protected categories.⁵

On behalf of the Church of Scientology Australia, I am pleased to present this submission and we appreciate your time in reviewing it.

Yours Sincerely,

Reverend Vicki Dunstan
Church of Scientology Australia

14 September 2020

⁴ *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, GA Res 36/55, UN Doc A/RES/36/55 (25 November 1981) art 2 (“*Declaration*”).

⁵ Multicultural NSW, “*Religion – Summary*”, New South Wales, Cultural Diversity, Religion (Web Page of Demographic Resources, 2018) <<https://multiculturalnsw.id.com.au/multiculturalnsw/lga-religion>>

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EXECUTIVE SUMMARY

We commend the Hon. Mark Latham MLC and those who have assisted in the preparation of this Bill. Their intention is evident in the Bill—to address an inequality in a non-discriminatory manner, and bring an equal voice to all persons of New South Wales, whether they hold religious beliefs, non-religious beliefs or no beliefs.

We support the Bill in its entirety. It is thoughtful and well drafted, ensuring a fine level of certainty for all those it affects.

We have highlighted some issues that may arise in this document. Importantly, we have illustrated a few instances where some additions to the text would help to fully realise the Bill's objects.

In summary:

1. **Objectives of the Bill**

- In New South Wales, religion is not a protected category like race, disability, age, sex, sexual orientation and identity, despite the international instruments that create and promote the protection of these categories call for the equal protection of religion and faith.
- As reported by different government agencies and religious groups across Australia, which are specified in this submission, instances of religious discrimination are unprecedentedly and alarmingly increasing in Australia.
- Scientology has been the subject of false reports about our beliefs and practices in the media, and patently false rumours. The prejudices, false ideas and stereotypes created by this give rise to instances of discrimination and even violence against Scientologists.
- In accordance with the *International Covenant on Civil and Political Rights* (“ICCPR”), the right to freedom of religion deserves equal and non-discriminatory treatment and protection, and should never be subjugated to other rights in an unequal or discriminatory manner.
- The Bill will have a significant deterrent effect upon future instances of discrimination, not to mention the cultural and attitudinal shifts this Bill will encourage.

2. **The Terms of the Bill**

- The Church commends the inclusion of the *International Covenant on Civil and Political Rights* (“ICCPR”) and the *UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, and the important role they play in defining objectives and performing functions in the Bill. These instruments recognise that justice, freedom and peace are achievable only where the inherent dignity of all persons is recognised through the universal respect of all human rights. Further, they acknowledge that religion and belief are fundamental elements to one's conception of life, thereby requiring protection from intolerance and discrimination.

- The enhancement to the right to freedom of religion as brought about by the application of the *Siracusa Principles* is not only a step forward for the *Anti-Discrimination Act 1977* (NSW), but will also be of real and practical relevance to people of faith in New South Wales. The people of New South Wales are entitled to the right to freedom of expression on an equal basis with all others. The inclusion of *Siracusa Principles* genuinely helps to realise this.

3. Division 1 – General

- We support the definitions and sections as provided in this division. In particular, we support 22M which is a comprehensive exclusion for religious ethos organisations to act unhindered from the fear of legal action, and act bona fide in accordance with their doctrines, tenets, beliefs and teachings. It is in accordance with the international instruments at clause 3 for freedom of religion to not be subjugated in such instances, and this clause recognises this.

4. Division 2 – Discrimination in Work

- We support this division which provides protection against religious discrimination in a comprehensive manner.
- In particular, we support 22S provision in its entirety.

5. Division 3 – Discrimination in Other Areas

- We support this section in its entirety for the way in which it recognises how discrimination can pervade all facets of one's life.

6. A Vilification Provision: Necessary to Realise the Bill's Objects

- Most importantly, the Church of Scientology Australia calls for the inclusion of a provision making hate-speech and religious vilification or harassment unlawful, thereby promoting tolerance and inclusion, and providing a means of redress for the victims of vilification or harassment.
- Vilification in the media and online world is of growing concern for a number of faiths. Patently false news reports that tarnish the reputation of religious groups do more than just that. They injure the susceptibilities and wellbeing of adherents, and are a strong force acting against tolerance and inclusion of diversity in the community. The damage and injury occasioned is often difficult to repair.
- The preamble to the *Racial and Religious Tolerance Act 2001* (Vic) expresses the effects of vilification well:

Vilifying conduct is contrary to democratic values because of its effect on people of diverse ethnic, Indigenous and religious backgrounds. It diminishes their dignity, sense of self-worth and belonging to the community. It also reduces their ability to contribute to, or fully participate in, all social, political, economic and cultural aspects of society as equals, thus reducing the benefit that diversity brings to the community.⁶

⁶ Preamble to the *Racial and Religious Tolerance Act 2001* (Vic), paragraph 3.

A person must not, on the ground of the religious belief or activity of another person or class of persons, engage in conduct that **incites hatred against, serious contempt for, or revulsion or severe ridicule of**, that other person or class of persons (emphasis added).⁷

- Similar provisions also exist in the Australian Capital Territory, Tasmania and Queensland.
- The *International Covenant on Civil and Political Rights* and the UN's General Comments outline the necessity for protection from discrimination in all its forms, including vilification, as specified below.
- The words of the Expert Panel from the *Religious Freedom Review* (1.344) are particularly applicable:

It is important to distinguish between vilification and other restrictions on speech. Vilification is concerned with advocacy of hatred that incites discrimination, hostility or violence. It is intended to capture speech addressed to an individual or group in society inciting them to discrimination, hostility or violence towards another individual or group.

- The inclusion of a provision for protection against religious vilification would be fair, equitable, and in accordance with the concept that the right to freedom of religion and concomitant protection from discrimination should be treated and protected in a non-discriminatory manner.

⁷ The *Racial and Religious Tolerance Act 2001* (Vic), section 8(1).

OBJECTIVES OF THE BILL

Religious Discrimination in Australia: Protection is Needed

Australia is generally a tolerant nation. The twentieth century saw the rise of anti-discrimination legislation in Australia, and for the most part this has been an important and meaningful progression into a more welcoming, inclusive and tolerant culture. As anti-discrimination legislation has expanded, so too have the categories protected by it. However, one of the most fundamental of these categories, religion, has not been treated equally. Australia now faces a situation where the laws that seek to promote anti-discrimination and equality have been emphasised unequally so as to create a situation of inequality for religion and faith.

Protected categories can clash with one another, and in the adjudication of complaints it is imperative that the competing categories are accorded with the correct degrees of weight and importance so as to arrive at fair and just outcomes. As a free and democratic country, and in recognition of our international agreements, freedom of religion should be accorded an equal degree of importance, and deserves equal recognition in the law, as well as remedies and protection in courts and tribunals.

It is one of the greatest tragedies of the history of human society, from pre-biblical periods to the present, that religious differences have caused great human conflict, wars, genocides, caste-like separation of populations, as well as more common forms of discrimination and hatred. One need only look to the horrors of the twentieth century to confirm this point. The advent of modern technology such as the Internet makes the spreading of such hate speech and exhortations to discrimination and violence exponentially greater. Such inter-religious conflict often begins with acts of derision, harassment, and vilification of “the other”. While our society must treasure and protect ferociously the rights of free speech, this category of extreme harassment and vilification of others should not be permitted to claim protection under the liberal values of freedom of speech, especially when it is directed at denying others their equally sacrosanct right to freedom of religion.

In a richly multicultural society as Australia, those who advocate conflicting viewpoints should be perceived quite factually as a subset of our nation comprised of many different and conflicting viewpoints. Government should be neutral and impartial in determining which viewpoints deserve protection,⁸ so long as they are not violent to public safety. This was expressed well in the “Chair’s Foreword” in the *Interim Report: Legal Foundations of Religious Freedom in Australia*:

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

⁸ See below, “Division 1” on page 20. An explanation is provided there that the definition of “religious activity” in the Bill aids putting the right to manifest one’s religious beliefs on an “equal playing field” with other protected categories in the Act.

This is most apparent with the advent of non-discrimination laws which do not allow for lawful differentiation of treatment by religious individuals and organisations. It is also manifested in a decreasing threshold for when religious freedom may be limited.⁹

In New South Wales, religion is not a protected category like race, disability, age, sex, sexual orientation and identity, et cetera. The international instruments that create and promote the protection of these categories call for the equal protection of religion and faith, recognising that it forms an integral part of one's identity and wellbeing, underpinning for many the very reasons they live their lives the way they do.

The Church of Scientology Australia supports the right to freedom of religion for all religious faiths. Freedom of religion recognises the inherent dignity of all people. A violation of human rights is an affront to human dignity for all humankind. We recognise the important role religion plays in the wellbeing of society, on an individual and community level. To expound on the necessity of the Bill's objects, the following will discuss some of the issues facing a number of religious faiths in New South Wales and Australia more generally, followed by the issues facing Scientology.

The lack of laws to provide redress for religious discrimination in New South Wales have limited the ability to collect data on the number of instances of discrimination and vilification. In July of this year the Australian Human Rights Commission and the Victorian Equal Opportunity and Human Rights Commission released a report titled *Freedom of Religion in Australia: a focus on serious harms*.¹⁰

The publication reported statistics from the Executive Council of Australian Jewry who collect and report on instances of anti-Semitism in Australia. Their 2018 report recorded 366 anti-Semitic incidents—an unprecedented 59% increase from the previous year. A similar number of incidents were reported in 2019, though it was noted that “there was a larger increase in certain categories of incidents of a more serious kind, including verbal abuse, harassment and intimidation”.¹¹

Freedom of Religion in Australia: a focus on serious harms also reported on findings from the Islamophobia Register that was launched in 2014. Their report released in 2019 documents 349 verified instances from 2016-17. In the majority of cases, women were the target of discrimination, often when they were unaccompanied.¹²

The Joint Standing Committee on Foreign Affairs, Defence and Trade's Inquiry into the Status of the Human Right to Freedom of Religion or Belief received submissions detailing Islamophobia in Australia. The Islamic Council of Victoria (ICV) noted the issue of prejudice and stereotypes facing Muslims, the role these have played in generating discrimination, and the impacts of this discrimination in work and other areas of life.

⁹ Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Interim Report: Legal Foundations of Religious Freedom in Australia* (Report, November 2017) viii (“*First Interim Report*”)

¹⁰ Australian Human Rights Commission and Victorian Equal Opportunity and Human Rights Commission (Position Paper, July 2020)

¹¹ Ibid 8. See also Victorian Equal Opportunity and Human Rights Commission, Submission No 51 to the Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Anti-Vilification Protections in Victoria* (31 January 2020) 36 [3.4.3] (“*VEOHRC Submission No 51*”).

¹² Ibid 9. See also *VEOHRC Submission No 51* (n 7) 35 [3.4.2].

The Committee reported:

The ICV submission said that Muslims are “more problematically positioned in public policy and media representation than other ethnoreligious communities”. The ICV submission described a rising Islamophobia which defines a Muslim as “less of a person, and more of an idea”.

...

[T]he Victorian Multicultural Commission (VMC) reported that Muslim communities “regularly report instances of ‘Islamophobia’ to the VMC, especially involving women and young girls facing abuse in public places and on public transport due to religious visibility”. This visibility “also has negative impacts when endeavouring to gain and maintain employment”.¹³

Attributable to gaps in research of religious discrimination and vilification in Australia, much of the discrimination to Christians and smaller religious faiths is anecdotal in nature. To this end, an understanding of the prevalence and seriousness of such conduct can come from submissions made to Parliament, such as Freedom for Faith’s submission to the *Religious Freedom Review*.¹⁴ In their submission they noted that the Australian Christian Lobby has reported numerous death threats to its staff in recent years, and some of their female staff had been sent pornographic material.

Their submission also reported that “churches have also been subjected to arson attacks and other criminal damage. In Geelong, for example, five churches were burned down between 2015–16, belonging to different Christian denominations”.¹⁵

The issue facing many Christians in twenty-first century Australia is the growth of a culture that nullifies their input in the discussion of important social and political matters. Though everyone is entitled to have their own viewpoints as to what social and political views they should or should not consider, no one is entitled to promote a culture that ostracises people of faith and isolates them from important discussions merely because they hold differing views. This is discrimination, and paradoxically this discrimination arises in a deviated attempt to facilitate the non-discrimination of other protected categories. *The “pendulum” can swing too far either way*. However, currently it has swung too far and resulted in the discrimination of people of faith.

This concept was captured well in the *Second Interim Report: freedom of religion and belief, the Australian experience*. The Committee quoted the Lutheran Church of Australia’s submission:

Some are attempting to de-legitimise the voice of faith when discussing important changes in society... To delegitimise the religious voice on social, moral, and ethical questions is to devalue the human person and puts the ongoing stability of society at risk.¹⁶

¹³ *Second Interim Report: freedom of religion and belief, the Australian experience*, 28 [3.64, 3.66] (“*Second Interim Report*”).

¹⁴ *Ibid* 12, citing *Freedom for Faith, Protecting Diversity: Towards a Better Legal Framework for Religious Freedom in Australia*, available at <https://freedomforfaith.org.au/library/the-ruddock-review>.

¹⁵ *Ibid*.

The Committee went on to quote a submission that expanded upon this issue:

The Australian Catholic Bishops Conference confirmed this feeling:

Regarding expressing points of view—yes, some are fearful. We’re finding individuals, ordinary folk feel too intimidated to be able to give expression to their faith and beliefs in the public arena.¹⁷

Equal participation in social and political discussions is essential for the effective operation of our system of representative democracy. Importantly, the result of the issue as above is discrimination in other areas of life—work, education, public service, sporting clubs, et cetera. It is important however to note that such discrimination, like all matters of discrimination, is not a generalisation of all Australians. Conversely, where discrimination carries on it promotes a toxic culture, and grows and festers in the absence of a handling.

It should be noted that these issues are not solely the result of the interplay of anti-discrimination legislation for other protected categories. Laws promote the changing of cultural values and norms that are detrimental to the wellbeing of society, and changing cultural norms and values promote the evolution of the law. Protecting the right to freedom of religion in anti-discrimination legislation will give effect to the former. It will put the right to freedom of religion on an equal playing field with other protected categories where it belongs, and crucially, send the message that freedom of religion is equal, valuable and should not be subjugated in a discriminatory manner to other rights.

Instances of discrimination do not always appear in tribunals and anti-discrimination boards. This can be attributed to victims being unaware of the remedies available, a misunderstanding of the procedural and substantive availability of the remedies, or a number of other social, cultural and behavioural reasons. As such, the statistics of religious discrimination complaints provide only a glimpse of what is actually occurring in the community.

To this end, it is insightful to look to Victoria where religious beliefs and activities is a protected category. The Victorian Equal Opportunity and Human Rights Commission records data on the number of complainants who request access to dispute resolution. In 2018-19, there were 56 complaints lodged under the *Equal Opportunity Act 2010* (Vic) and the *Racial and Religious Tolerance Act 2001* (Vic).¹⁸

New South Wales has a population of almost two million more than Victoria. A conservative view of the 56 complaints in Victoria demonstrates the number of New South Wales residents who would likely suffer in silence without an adequate legal remedy. The effects of this Bill would be far greater than providing legal recourse to complainants.

Victims of discrimination will be able to more easily resolve disputes privately given the backing of legislation. The Bill would also have a significant deterrent effect upon future instances of discrimination, not to mention the cultural and attitudinal shifts this Bill will encourage. Importantly, these cultural and attitudinal shifts would not only be prohibitive and negative (ceasing discrimination), but also positive: adherents will have the capacity to and feel more comfortable letting their faith be known, engaging in religious activities, and wearing religious symbols.

¹⁶ (April 2019) 17 [3.29].

¹⁷ Ibid 17 [3.31].

¹⁸ 2018-19 Annual Report (2019) 10.

Discrimination Against Scientologists

Scientology is a faith with its origins in the twentieth century. Founded by L Ron Hubbard, Scientology follows a long tradition of religious practice. Its roots lie in the deepest beliefs and aspirations of all great religions, thus encompassing a religious heritage as old and as varied as Man himself.

Though it draws on the wisdom of some 50,000 years, Scientology is a new religion, one that has isolated fundamental laws of life and, for the first time, developed a workable technology that can be applied to help people achieve a happier and more spiritual existence in the here and now.

Scientology considers Man to be a spiritual being with more to him than flesh and blood. We believe Man to be basically good. It is Man's experiences that have led him to commit evil deeds, not his nature.

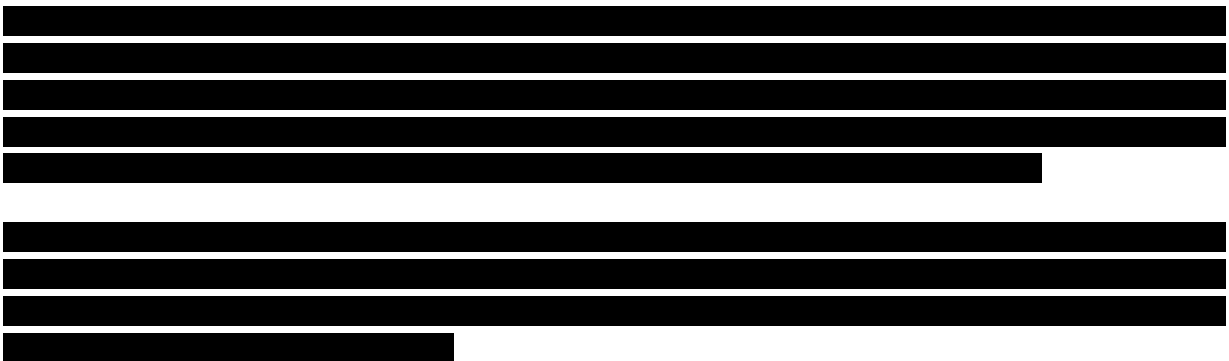
Scientology believes that Man advances to the degree that he preserves his spiritual integrity and values and remains honest and decent. Indeed, he deteriorates to the degree that he abandons these qualities.

Because Man is basically good, he is capable of spiritual betterment. And it is the goal of Scientology to bring him to a point where he is capable of sorting out the factors in his own life and solving his own problems.

Unfortunately, Scientology has been the subject of false reports about our beliefs and practices in the media and social media, and of patently false rumours. The prejudices, false ideas and stereotypes created by these false reports have given rise to discrimination against Scientologists.

As an example of such false reports, an Australian television reporter publicly boasts about having made over 138 shows on Scientology over 13 years, with vexatious and baseless allegations under the protection of the impunity given to media. This reporter has commissioned himself to bring an end to the Church of Scientology, in his own words, with his continuous harassment to incite hatred.

Discrimination has the potential to pervade all facets of life. We have heard of instances of Scientologists being subject to ridiculing jokes, vilification, losing out on promotional opportunities and being ostracised in their workplaces, education and social settings.



This perspective was clearly communicated in *CCPR General Comment No 22: Article 18 (Freedom of Thought, Conscience or Religion)*, “[l]imitations... must not be applied in a manner that would vitiate the rights guaranteed in article 18. The Committee observes that paragraph 3 of article 18 is to be strictly interpreted...”²²

The *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*²³ are used in this Bill in an effort to achieve the objectives of “reconciling human rights and anti-discrimination provisions”²⁴ so as to place freedom of religion on an equal footing with other rights, and make “religious freedoms and fair treatment of believers and non-believers possible”.²⁵ We acknowledge the value and necessity for such objectives, and the advancement they seek for the right to freedom of religion in New South Wales.

- (b) to define religious beliefs and activities in a comprehensive and contemporary way, making religious freedoms and the fair treatment of believers and non-believers possible.²⁶

Religious beliefs inform identity and govern the way in which one leads one’s life. Religious beliefs do not operate in a vacuum. They pervade all aspects of life. In seeking to define religious beliefs and activities, it is essential for this to be recognised. Manifestations of faith are not limited to churches or places of worship.

This object will help to recognise the equality of the right to freedom of religion with other rights. This object is necessary and has our support.

- (e) to provide that a religious ethos organisation is taken not to discriminate on the ground of religious beliefs or religious activities by engaging in certain conduct because of the doctrines, tenets, beliefs or teachings of the religion of the organisation, so as to recognise that religion is integral to the existence and purpose of these organisations; and that religious and associational freedoms are fundamental to a free and democratic society.²⁷

The work provided by religious ethos organisations is vital in caring for society’s vulnerable and facilitating environments of personal betterment, growth and development. Religious charities, schools, care facilities and other religious bodies should be able to conduct their organisations in accordance with the beliefs and tenets of their faith. Where faith is integral to an organisation, one should not be expected to abandon this, and unfairly subjugate this right in order to accommodate those who dispute them.

²² Human Rights Committee, *General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, 48th sess, CCPR/C/21/Rev.1/Add.4 (30 July 1993).

²³ United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 41st sess, UN Doc E/CN.4/1985/4 (28 September 1984) (“*Siracusa Principles*”).

²⁴ Explanatory Note (n 21) 1 [(a)].

²⁵ See page 16 below for an in-depth discussion of the *Siracusa Principles*.

²⁶ Explanatory Note (n 21) 1 [(b)].

²⁷ *Ibid* 1 [(e)].

When one sincerely holds religious beliefs, they form an inseparable part of that person's identity. This is also true for religious organisations; they should not be expected to dispense with their very identity. Religious ethos organisations deserve certainty and predictability of their rights so they can conduct their organisation in accordance with their faith.

This object addresses a current inequality. This object is necessary, fair and equitable having regard to the importance of non-discriminatory treatment and protection of all rights under the *ICCPR*.

The Human Rights Committee acknowledged this concept in *General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)*, and in doing so drew attention to the community aspect of article 18 of *the ICCPR*:

The freedom to manifest religion or belief may be exercised "either individually or in community with others and in public or private". The freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts... In addition, the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications.²⁸

- (f) to make it unlawful for an employer, qualifying body or educational authority to restrict, limit, prohibit or otherwise prevent people from engaging in a protected activity, or to punish or sanction them for doing so, or for their associates doing so,
- (g) to ensure the provisions of the Bill extend to discrimination concerning applicants and employees, commission agents, contract workers, partnerships, industrial organisations, qualifying bodies, employment agencies, education, goods and services, accommodation, registered clubs and State laws and programs.²⁹

The instances and prevalence of discrimination reported above emphasise the importance and necessity of prohibiting discrimination predicated on religious beliefs and activities. Another significant area of concern is the erosion of freedoms in employment.

Employees, and an increasing number of contractors in our growing gig economy, are having their freedoms eroded by the imposition of oppressive unilateral contractual policies. Freedom of expression is limited by employers in circumstances wholly disconnected from the employee's duties or places of work. This intrusion on individual liberty undermines participation in discussions fundamental to our democratic processes. These same issues also pertain to qualifying bodies and industrial organisations. The private lives of employees must remain private.

In recognising that discrimination has the potential to pervade all facets of life, and given the prevalence of these issues, this objective is essential to achieving fairness for people of religious faith.

²⁸ UN Doc CCPR/C/21/Rev.1/Add.4 (n 18) art 4.

²⁹ Explanatory Note (n 21) 1 [(f)-(g)].

THE TERMS OF THE BILL: DO THEY GIVE EFFECT TO THE OBJECTIVES?

Principles of the Act: The ICCPR and UN Declaration

Fundamental to the objects of the Bill are the *ICCPR* and the *UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* (“*Declaration*”). These instruments recognise that justice, freedom and peace are achievable only where the inherent dignity of all persons is recognised through the universal respect of all human rights. They recognise that those rights should be protected and guarded equally, without distinction as to religion or belief.³⁰ Further, they acknowledge that religion and belief are fundamental elements to one’s conception of life, thereby requiring protection from intolerance and discrimination.

The Church of Scientology Australia commends the inclusion of these two instruments, and the important role they play in defining objectives and performing functions in the Bill. As demonstrated in the commissioning of major reviews in the last decade, consistency amongst states and territories, and legal certainty in those schemes are important in anti-discrimination legislation that seeks to protect the right to freely manifest one’s religious beliefs. The adoption of widely recognised international instruments such as the *ICCPR* and *Declaration* give effect to established principles, thereby aiding the unification and hence certainty of anti-discrimination law in Australia.

Principles of the Act: The *Siracusa Principles* and the Limitation of Rights

The objects of the Bill are defined as follows:

- (a) to establish principles of the Act for the purpose of reconciling conflicting human rights and anti-discrimination provisions, using international conventions and other instruments
- ...
- (c) to prohibit discrimination on the ground of a person’s religious beliefs or religious activities in work and other areas, so that religion has protections equal to other forms of discrimination in NSW³¹

The decision-making process at clause 3 of the Bill seeks to give effect to these objects. Subclause 3(1) directs that fundamental regard must be had to certain international instruments in making decisions and performing functions under the Act. At subclause 3(2), article 18(3) of the *ICCPR* and principles 10 and 11 of the *Siracusa Principles* define the decision-making process for limiting the right to freedom of religion. It states:

In particular, in interpreting the requirement of the *International Covenant on Civil and Political Rights*, Article 18(3), that limitations upon a person’s right to manifest their religion or belief must only be made where such are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others, the *Siracusa*

³⁰ See next section for a discussion of art 18(3) limitations as applied in the context of the *Siracusa Principles*.

³¹ Explanatory Note (n 21) 1 [(a), (c)].

Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights provide that limitations must, amongst other matters—

- (a) be prescribed by law,
- (b) respond to a pressing public or social need,
- (c) pursue a legitimate aim and be proportionate to that aim, and
- (d) be applied using no more restrictive means than are required for the achievement of the purpose of the limitation.

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

Importantly, as recognised in subclause 3(2), article 18(1) of the *ICCPR* acknowledges that the freedom to adopt and hold religious beliefs is an absolute right. In accordance with article 18(3), it is the manifestation of religious belief that is subject to limitation.

The Church of Scientology Australia has serious reservations about the broad scope of limitations upon the right of persons to manifest their religion or belief. When undertaking balancing acts as to whether to limit freedom of religion, decision-making involves considering “public safety, order, health or morals or the fundamental rights and freedoms of others”³² with regard to a “pressing public or social need”.³³ A decision-making process that involves considering an interest, determining whether it is a “pressing public or social need”, and then attributing it weight according to its relative importance in matters of “public morals”, “public order” or the “rights and freedoms of others” is inherently and unavoidably, a rather political one.

Assigning weight to the relative importance of differing opinions as to what is a “pressing public or social need” or a “legitimate aim” with regard to “public morals” or the “rights and freedoms of others” can be insidiously affected by political and social viewpoints as promulgated by a subset of our diverse nation. These views do not necessarily accord with societal norms, or the viewpoints of the majority.

This gives rise to more questions: Who does the balancing, and what weights do they use in this exercise? How should a decision-maker objectively assess and determine with legal certainty what is a “pressing public or social need”? At what point is a conflicting interest considered “pressing”? How should a decision-maker objectively determine what is a “legitimate aim” in the context of “public morals”, “public order” and the “rights and freedoms of others”? Further, what information must they consult in order to be objective?

Quite simply put, the clause “limitations upon a person’s right to manifest their religion or belief must only be made where such are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others” can render the right at stake meaningless. Any government seeking to restrict or prohibit the free exercise of religion by a disfavoured group can and historically will seek to justify its repression on the basis that its purpose is to protect public safety, order, health, morals or the fundamental rights and freedoms of others, from Diocletion’s reign of terror against Catholics, to the War against the

³² *ICCPR* (n 1) art 18(3).

³³ *Siracusa Principles*, UN Doc E/CN.4/1985/4 (n 19) principle 10(b).

Vendee, to the Alien and Seditious Acts of 1798 in the United States, to the imprisonment of Dreyfus, to the religious wars of the middle ages, to the genocides against the Armenians and the Jews, to the Chinese actions in Tibet. We strongly urge a more protective standard, to wit:

No person's or organization's rights to manifest their religious practices or beliefs shall be burdened by any branch of government, whether executive, administrative, legislative, or judicial, except when essential to an overriding and compelling government interest, and any such limitation shall be by the least restrictive means possible.

This test, in our view, significantly buttresses the *Siracusa Principles* and article 18(3) of the *ICCPR*. This is a higher threshold than “reasonable” or “reasonably necessary”. We urge a stronger standard, as set forth above, that a limitation be essential to an overriding and compelling government interest.

At clause 3 of the Bill, the *Siracusa Principles* in concert with the “necessary” matters at 18(3) of the *ICCPR* have as their primary objective the equal treatment of the right to freedom of religion. This is a welcome and beneficial advancement for New South Wales. Taking into account the equality of the right, *General Comment No 22: Article 18 (Freedom of Thought, Conscience or Religion)*, paints a picture of what limitations should look like:

In interpreting the scope of permissible limitation clauses, States parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination on all grounds specified in articles 2, 3 and 26. Limitations imposed must be established by law *and must not be applied in a manner that would vitiate the rights guaranteed in article 18*. The Committee observes that *paragraph 3 of article 18 is to be strictly interpreted*: restrictions are not allowed [except consistent with the strict scrutiny standard we have suggested], even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner. The Committee observes that the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition (emphasis added).³⁴

The *Siracusa Principles* are widely recognised in this realm. When applied in a vigorous manner, this system has the capacity to produce fair and just outcomes.

On the proportionality test in section 7 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), Heydon J expressed strong views in the High Court case *Momcilovic v The Queen*:

But the things to be balanced or weighed are not readily comparable—the nature of a right and various aspects of a limitation on it, the nature of a right and other rights, the nature of a right and “all relevant factors”, which could include many matters of practical expediency of which courts know nothing, social interests about which it is dangerous for courts to speculate and considerations of morality on which the opinions

³⁴ UN Doc CCPR/C/21/Rev.1/Add.4 (n 18) art 8.

of the governed may sharply differ from those of the courts. It is for legislatures to decide what is expedient in practice, what social claims must be accepted, and what moral outcomes are to be favoured—not courts... It will lead to debates in which many different positions could be taken up. They may be debates on points about which reasonable minds may differ. They may be debates in which very unreasonable minds may agree.³⁵

These views were however made in the context of a different provision—one that requires the balancing of legislatively enacted limitations. The task provided for in clause 3 of this Bill differs in that decisions would be being made for one right, that is, the right of a religious believer or non-believer to manifest their belief or non-belief under the Act, as against another right, interest or protected category. Fundamentally, the task is the resolution of disputes and instances of discrimination, and not determining the validity of law. Consequently, the views expressed by Mason J are worthy of consideration with regard to the assessment in subclause 3(2), though discrete in some respects.

These concerns may be somewhat unavoidable in anti-discrimination law, given the primary function of decision-makers is the resolution of disputes and instances of discrimination. Subclause 3(1) of the Bill states, “[i]n *carrying out functions and making determinations under the Act*, the Minister, Board, President, Tribunal and Courts shall have fundamental regard to... the *Siracusa Principles*... (emphasis added)”. As such, limitations would *predominantly* (though not necessarily exclusively) be for the purposes of resolving disputes involving discrimination, and would, save as to the limited application of precedent, pertain to specific fact scenarios (not legislative restrictions affecting the populous more generally as was the context of Heydon J’s concerns). Nevertheless, such concerns are valid and important ones, and are still very much applicable. In reflecting on religious discrimination within Australia and internationally, and across the ages, they are well-founded concerns too, worthy of deliberation.

In spite of these concerns, we recognise, value and are thankful that the use of the *Siracusa Principles* is a meaningful and beneficial step forward in the protection of religious freedom in New South Wales. The way in which the *Siracusa Principles* employ the “necessity” threshold temper these concerns to a degree, however they still subsist. Despite these concerns, their implementation realises a significant enhancement to religious freedom.

Principles 1-14 of the *Siracusa Principles* provide an in-depth mechanism for considering the least restrictive way to limit the right for people to manifest their religious beliefs. They state that any limitations shall be compatible with the objects and clauses of the *ICCPR*, and must observe the equality of all rights—that one right should not be discriminatorily subjugated to another. They give a strict and preferential interpretation to any limitations, constrain the application of any limitations to their purpose, and give effect to the rule of law.

The enhancement to the right to freedom of religion, more specifically the right to freely manifest one’s religious beliefs as brought about by the application of the *Siracusa Principles* is not only a step forward for the Anti-Discrimination Act 1977 (NSW), but will also be of real and practical relevance to people of faith in New South Wales. These people are entitled to the right to freedom of expression on an equal basis with all others. The inclusion of *Siracusa Principles* genuinely helps to realise this.

³⁵ (2011) 254 CLR 1, 171-2; HCA 34.

Division 1 – General

We support the definitions and sections as provided in this division.

The definitions provided acknowledge the important role religion and faith play in one's life. They acknowledge that faith is not a compartmentalised aspect of one's life, rather, it is an aspect of one's identity and interacts with and influences the way in which one conducts one's affairs. The definition of "religious activity" aids in putting the right to manifest one's religious beliefs on an equal playing field with other protected categories in the Act.

The definitions recognise the right of persons to adopt and change their faith and beliefs at their own determination, in accordance with article 18(1) of the *ICCPR*.

The definition of "religious ethos organisation" acknowledges the rights of people of faith to conduct the affairs of their organisation in the manner they see fit with respect to their faith. The definition recognises that the right to freedom of religion in article 18 of the *ICCPR* applies to individuals and as well as groups of individuals in the community.³⁶ This definition once again correctly acknowledges that faith does not operate in a vacuum.

We support the comprehensive definition of what constitutes discrimination on the grounds of religious beliefs or activities, and recognise the concert of this section with article 2(2) of the *Declaration*. We support paragraphs 22L(1)(b) and 22L(2)(b) for the manner in which they recognise how discrimination can be effected indirectly.

We support clause 22M. It is a comprehensive exclusion for religious ethos organisations to act unhindered from the fear of legal action, and act bona fide in accordance with their doctrines, tenets, beliefs and teachings. This clause acknowledges the equality of the right to freedom of religion, and permits groups of individuals to exercise their individual rights as a unified body of persons in accordance with their faith. It is in accordance with the international instruments at clause 3 for freedom of religion to not be subjugated in such instances, and this clause recognises this.

Division 2 – Discrimination in Work

We support this division which provides protection against religious discrimination in a comprehensive manner. It respects the autonomy of the employee and their ability to conduct their private lives in private, without the discriminatory intrusion of unfair unilateral contracts.

In particular, we support 22S provision in its entirety.

Division 3 – Discrimination in Other Areas

We support Division 3 for the manner in which it recognises how discrimination can pervade all facets of one's life. The comprehensive protection offered by this division provides equal protection to other protected categories in the Act. However, to completely achieve this object we make the following recommendation.

³⁶ See "General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion)" 13.

A Vilification Provision

For the text of the Bill to secure its objectives, the Church of Scientology Australia calls for the inclusion of a provision making vilifying or harassing religious speech unlawful, thereby promoting tolerance and inclusion, and providing a means of redress for the victims of vilification. Victoria has a similar provision in their *Racial and Religious Tolerance Act 2001* (Vic), discussed below.

Vilification in the media and online world is of growing concern for a number of faiths. Patently false news reports that tarnish the reputation of religious groups do more than just that. They injure the susceptibilities and wellbeing of adherents, and are a strong force acting against tolerance and inclusion of diversity in the community. The damage and injury occasioned is often difficult to repair. The preamble to the *Racial and Religious Tolerance Act 2001* (Vic), at paragraph 3, expresses the effects of vilification well:

Vilifying conduct is contrary to democratic values because of its effect on people of diverse ethnic, Indigenous and religious backgrounds. It diminishes their dignity, sense of self-worth and belonging to the community. It also reduces their ability to contribute to, or fully participate in, all social, political, economic and cultural aspects of society as equals, thus reducing the benefit that diversity brings to the community.

The following are three reasons for the adoption of such a provision:

1. The Indivisible Secondary Objective

This Bill seeks to prohibit discrimination on the ground of a person's religious beliefs or activities in many facets of life. An indivisible secondary objective to the realisation of the former principal objective is a cultural change toward greater tolerance and acceptance of the diverse number of religious faiths in Australia. This is of course a generalisation, acknowledging the tolerance already demonstrated by many Australians. Suffice to say, media reports inciting hatred and vilification is a serious impediment to this cultural change and thereby the realisation of the objectives of this Bill.

The introduction of a provision to make vilifying or harassing speech and vilification of religious ethos organisations, and the religious beliefs and activities of adherents, would go a long way to addressing this issue.

Freedom of speech is fundamental to many other rights. It is the basis for one being able to freely express one's religious beliefs. To this end we do not advocate for a provision on harassing and vilifying speech to be a broad-reaching ban on any negative media coverage, however, it should prohibit the making of harassing or vilifying communications, where such information is based on a desire to cause contempt, hate or ridicule.

2. The Equal Protection and Treatment of Protected Categories Under the Act, and the Non-Discriminatory Protection of All Human Rights

An important purpose of the Bill was enunciated by the Hon. Mark Latham MLC in his Second Reading Speech:

[to] extend protections against discrimination beyond existing categories of citizenship and identity in New South Wales to people of religious faith and non-faith... to reflect the equal standing to be given to matters of faith and spirituality in the coverage of the State's anti-discrimination laws.³⁷

This was reflected in the Explanatory Note:

(c) to prohibit discrimination on the ground of a person's religious beliefs or religious activities in work and other areas, so that religion has protections equal to other forms of discrimination in NSW³⁸

In the text of the Bill, this object of equal protection is implied in the comprehensive protection from discrimination in divisions 1-3 of part 2B when compared to an examination the *Anti-Discrimination Act 1977* (NSW) as a whole, and is encompassed in clause 3(1)(a)-(b) and 3(3). The international instruments there recognise the necessity for the universal respect and equal and non-discriminatory protection of all human rights without any distinctions as to religion, or any other identifying factors or protected categories. Article 2(1) of the *ICCPR* communicates this concept:

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.

Further, articles 2 and 3 of the *Declaration* demonstrate that protection from discrimination is a concomitant right to the right of freedom of religion. In other words, article 18 of the *ICCPR* must be afforded protection on an equal basis with all other rights.

A number of other protected categories enjoy the protection of unlawful vilification provisions in the Act where the conduct in question incites hatred towards, serious contempt for, or severe ridicule of the injured person or members of the group:

- s 20C - Racial vilification unlawful
- s 38S - Transgender vilification unlawful
- s 49ZT - Homosexual vilification unlawful
- s 49ZXB - HIV/AIDS vilification unlawful

The inclusion of a provision for protection against religious vilification would be fair, equitable, and in accordance with the concept that the right to freedom of religion and concomitant protection from discrimination should be treated and protected in a non-discriminatory manner.

³⁷ New South Wales, *Parliamentary Debates*, Legislative Council, 13 May 2020, 41 (Mark Latham).

³⁸ Explanatory Note (n 17) 1 [(c)].

3. Equal Protection of the Law: The Inequality of Remedies and Enforcement

Article 2.3 of the *ICCPR* states:

- (a) To ensure that any *person whose rights or freedoms as herein recognized are violated shall have an effective remedy*, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have his right thereto *determined by competent judicial, administrative or legislative authorities, or by any other competent authority* provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies when granted (emphasis added).

Article 4 of the *Declaration* states:

1. All States shall *take effective measures to prevent and eliminate* discrimination on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, economic, political, social and cultural life.
2. All States shall make all efforts to enact or rescind legislation where necessary to prohibit any such discrimination, *and to take all appropriate measures to combat intolerance on the grounds of religion or belief in this matter* (emphasis added).

At clause 3 of the Bill, the executive and judiciary must, “have fundamental regard to certain international instruments in carrying out functions under the Act and that the provisions of the Act are used in a way that is consistent with the purpose and meaning of those international instruments”.³⁹

The “purpose and meaning” of the international instruments is acquired by interpreting the instruments as a whole—surrounding articles inform the meaning, purpose and performance of other articles. Consequently, the correct performance of functions in accordance with the international instruments depends upon following the instruments as complete documents communicating interconnected concepts, not articles in isolation of one another. Each of the articles are interrelated and depend on one another for meaning and effective implementation. The implementation and realisation of articles 1, 2, 5 and 6 of the *Declaration* depend upon articles 3, 4 and 7. Article 18 of the *ICCPR* depends upon the complete implementation of articles 1, 2 and 3, and especially article 26:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and *guarantee to all persons equal and effective protection against discrimination on any ground* such as race, colour, sex, language, *religion*, political or other opinion, national or social origin, property, birth or other status (emphasis added).

³⁹ Ibid 2, sch 1[1].

This viewpoint is emphasised in article 10 of the Human Rights Committee *General Comment No 18: Non-discrimination*:

...the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant.⁴⁰

Article 20(2) of the *ICCPR* states that “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”.

The Commonwealth entered a reservation with respect to article 20, it states:

Australia interprets the rights provided for by articles 19, 21 and 22 as consistent with article 20; accordingly, the Commonwealth [sic] and the constituent States, having legislated with respect to the subject matter of the article in matters of practical concern in the interest of public order (*ordre public*), the right is reserved not to introduce any further legislative provision on these matters.⁴¹

The reservation does not prohibit legislating in accordance with article 20 of the *ICCPR*, rather it removes the obligation. As such article 20 shall not be a focus here, however its meaning and sentiment is nevertheless ever-present.

The performance of the duties and functions at clause 3 of the Bill depends upon decision-makers being legislated with the power to perform such functions in accordance with the *ICCPR* and the *Declaration*. As seen above, fundamental to these international instruments is not only the non-discriminatory treatment of all rights, to all identity categories, but also the *equal protection and enforcement* of each right. This necessitates the inclusion of an unlawful religious vilification provision.

The foregoing three reasons illustrate how the complete realisation of the purposes and objectives of the Bill would be facilitated by the inclusion of such a provision. If unaddressed, vilification in the print, television and online media will continue to impede remedying the mischief and attaining the objectives of the Bill.

A model for such a provision can be seen in the *Racial and Religious Tolerance Act 2001* (Vic), notably section 8(1):

A person must not, on the ground of the religious belief or activity of another person or class of persons, engage in conduct *that incites hatred against, serious contempt for, or revulsion or severe ridicule of*, that other person or class of persons (emphasis added).

Similar provisions exist in the Australian Capital Territory, Tasmania and Queensland.⁴²

⁴⁰ Human Rights Committee, *General Comment No. 18: Non-discrimination*, 37th sess, UN Doc CCPR/C/21/Rev.1/Add.1 (10 November 1989).

⁴¹ United Nations Treaty Collection, Depository: Status of Treaties, Chapter IV.4 – *International Covenant on Civil and Political Rights*.

⁴² *Discrimination Act 1991* (ACT) s 67A(1); *Anti-Discrimination Act 1998* (Tas) s 19; *Anti-Discrimination Act 1991* (Qld) s 124A.

The *Religious Freedom Review* reported an issue with similar religious vilification provisions. The Expert Panel found that such provisions have been construed too narrowly to give effect to their purpose:

The Panel also heard that anti-vilification legislation in Australia was inadequate due to a lack of universal coverage for vilification with respect to religion. The Panel heard concerns that, even where protections did exist, they had been interpreted narrowly by courts and tribunals, rendering them of little practical effect.⁴³

To ameliorate this issue, the provision we propose for this Bill should accord a lesser threshold of hate, contempt, ridicule or revulsion, et cetera in circumstances where public communications and reports are also false and unsubstantiated or false and not based upon a factual foundation that is considered reasonably sufficient to justify the communication having regard to the purposes of the Bill, and the importance of freedom of speech. This would recognise the significant role ignorance and assumptions based on stereotypes play in perpetuating religious discrimination.

The purpose of such a provision should not be to limit free speech, but to enhance the purposes of the Bill having regard to the value of freedom of speech in a free and democratic society. Attention is also drawn to the state of the law with respect to other protected categories, and their recognised yet permitted effect upon freedom of speech. The words of the Expert Panel from the *Religious Freedom Review* are particularly applicable here:

It is important to distinguish between vilification and other restrictions on speech. Vilification is concerned with advocacy of hatred that incites discrimination, hostility or violence. It is intended to capture speech addressed to an individual or group in society inciting them to discrimination, hostility or violence towards another individual or group.⁴⁴

The inclusion of an unlawful conduct provision to be determined by the NSW Anti-Discrimination Board, or subsequently the New South Wales Civil and Administrative Tribunal (NCAT), on the application of the injured party provides an efficient system for promoting tolerance and equality that is more cost and time effective for the State and the complainant than other legal remedies such as defamation and the like.

It should also be noted that such a provision would not “open the floodgates” to litigants seeking relief. States and territories with relatively comparable provisions such as Victoria have not seen an overwhelming number of complaints, in fact, the number of applications has been relatively low.⁴⁵

⁴³ *Religious Freedom Review* (n 19) 86 [1.349].

⁴⁴ *Ibid* 85 [1.344].

⁴⁵ *Ibid* 97-8.

EXPERT PANEL REPORT: RELIGIOUS FREEDOM REVIEW (2018)

With respect to item 3(b) of the “Terms of Reference”, the Church of Scientology Australia welcomes “Recommendation 16” from the *Religious Freedom Review*.⁴⁶ We draw attention to the advice from the Expert Panel at 1.394 and 1.436 that reforms to New South Wales anti-discrimination law should be undertaken, *as well as* Commonwealth reforms:

The Panel *also takes the view* that anti-discrimination laws in South Australia and New South Wales should be amended so as to include religion as a protected attribute (emphasis added).

...

New South Wales and South Australia should amend their anti-discrimination laws to render it unlawful to discriminate on the basis of a person’s “religious belief or activity” including on the basis that a person does not hold any religious belief. In doing so, consideration should be given to providing for the appropriate exceptions and exemptions, including for religious bodies, religious schools and charities.⁴⁷

At 1.389 the Expert Panel highlighted the issues many stakeholders expressed with the anomalies of protection between New South Wales and South Australia, and other states and territories of Australia that recognise religious activities and beliefs as a protected category. The issue of inconsistency in anti-discrimination legislation is not exclusive to religion, however religion is one of the most affected categories. The protection afforded by this Bill helps to close this gap thereby elevating New South Wales to be in-line with other states and territories.

The Expert Panel also drew attention to the disparity of protection currently offered to people of different faiths in New South Wales:

In New South Wales, religious belief and activity are not protected attributes under the Anti-Discrimination Act 1977, although that Act does protect against discrimination on the ground of race, which is defined to include “ethno-religious” origin.¹⁵¹ This has meant that some people of faith are protected, while others are not. For example, ethno-religious origin has generally been interpreted to include Jewish people but not Muslim people, and accordingly the New South Wales legislation does not protect Muslim people against religious discrimination.⁴⁸

This problem is contrary to the principle of equal and non-discriminatory treatment and protection of rights as promoted in the *ICCPR* and the *Declaration*, and also in the Explanatory Note and the Bill as a whole.

⁴⁶ Ibid 91-6.

⁴⁷ Ibid 95-6.

⁴⁸ Ibid 93 [1.383].

THE INTERACTION BETWEEN COMMONWEALTH AND NEW SOUTH WALES ANTI-DISCRIMINATION LEGISLATION

Consistency

Item 3(c) of the “Terms of Reference” for this Bill addresses the interaction between Commonwealth (especially the *Religious Discrimination Bill 2019* (Cth)) and New South Wales anti-discrimination laws, and the desirability of consistency between those laws.

The issue of consistency turns to the uniformity of their operation—the rights and responsibilities each bill creates. Though a detailed examination of the terms of each bill is beyond the scope of this submission, despite their differences, many parallels can be drawn in their terms and operation. As such, their harmonious operation in this respect brings about a degree of consistency.

The following is an instance where the two Bills do differ, however it is a tribute to the New South Wales Bill, and for that reason it should encourage, not deter, the enactment of the Bill:

The objects of the NSW Bill, namely, the equal treatment of all rights and the non-discriminatory protection of all protected categories in the *NSW Anti-Discrimination Act 1977* is best achieved through the terms of the NSW Bill as opposed to the Commonwealth *Religious Discrimination Bill 2019*. The definitions provided for “religious beliefs”, “religious activities” and “religious ethos organisations” in the New South Wales Bill better achieve this object when compared to how those terms are defined in the Commonwealth Bill. As such, noting the fairness and necessity of this object, we recommend that the New South Wales Parliament enact this Bill.

There are a number of other protected categories covered by both Commonwealth *and* state and territory legislation. The laws generally overlap and prohibit the same type of discrimination, though some differences and gaps in protection are widely acknowledged. Nevertheless, simultaneous compliance with both is a well-established practice. The concurrent operation of Commonwealth and state and territory anti-discrimination legislation on religious freedom is in-line with the approach taken in protecting other categories.

Addressing and resolving issues of consistency and ease of compliance, clause 62(2)-(4) of the *Religious Discrimination Bill 2019* (Cth) resolves many of the practical issues of concurrent operation. Clause 62(2)(b) clearly provides for the operation of the *Anti-Discrimination Act 1977* in instances where complaints were lodged under it first.

Given the potential for the *Religious Discrimination Bill 2019* (Cth) to not be enacted, the New South Wales Parliament should not be deterred from taking responsibility for a fundamental right, and bring NSW anti-discrimination legislation into a position of equality with other Australian states and territories.

In discussing item 3(c)(ii) of the “Terms of Reference”, there is the potential for the Commonwealth to make further reforms in this area following the enactment of this Bill and in addition to the current *Religious Discrimination Bill 2019* (Cth), such as those that accord with the updated “Terms of Reference” for the Australian Law Reform Commission’s *Review into the Framework of Religious Exemptions in Anti-discrimination Legislation*. Should such further reforms occur, they *could* affect the *Anti-Discrimination Act 1977* as amended by this

Bill. Importantly however, any change, potential and uncertain, would be in a relatively similar manner to other state and territory legislation that is similar to this Bill.

Restating the aforementioned point, the potential for Commonwealth reforms in this area of religious exemption should not deter the New South Wales Parliament from taking responsibility for this fundamental right. The uncertainty of when or even if the ALRC's recommendations would be implemented is another compelling reason for the New South Wales Parliament to not be deterred. This is especially so given this Bill addresses an inequality between New South Wales and other states and territories.

Constitutionality

The second matter pertaining to the "Terms of Reference" that demands consideration is the consistency between this Bill and the *Religious Discrimination Bill 2019* (Cth), in accordance with s 109 of the *Australian Constitution*, as was raised by the Hon. Mark Latham MLC in his Second Reading Speech of 13 May 2020. The concurrent operation of Commonwealth and state and territory anti-discrimination legislation on a range of protected categories demonstrates the constitutionality of such arrangements, providing a clear framework for the two bills being considered here.

Clause 62(1) of the *Religious Discrimination Bill 2019* (Cth) "clears the field" for the concurrent operation of state/territory and Commonwealth legislation to operate on the same subject matter, in accordance with established doctrine. To merely restate a well-known case and principle, in *R v Credit Tribunal; Ex parte General Motors Acceptance Corp* (1977) 137 CLR 54, at 563 Mason J addressed the Commonwealth's intention to clear the field as a valid exercise:

[A] Commonwealth law may provide that it is not intended to make exhaustive or exclusive provision with respect to the subject with which it deals, thereby enabling State laws, not inconsistent with Commonwealth law, to have an operation. Here again the Commonwealth law does not of its own force give State law a valid operation. All that it does is to make it clear that the Commonwealth law is not intended to cover the field, thereby leaving room for the operation of such State laws as do not conflict with Commonwealth law.

The High Court has considered section 109 issues in relation to the *Anti-Discrimination Act 1977* (NSW) in *Viskauskas v Niland* (1983) 153 CLR 280, and subsequently in *University of Wollongong v Metwally* (1984) 158 CLR 447 ("*Metwally*"). In *Metwally* the Court decided that the section 6A 1983 amendment to the *Racial Discrimination Act 1975* (Cth) could prospectively clear the field, thereby permitting the concurrent operation of Part II of the *Anti-Discrimination Act 1977* (NSW).

Though these two cases addressed just one matter, and the matter currently being addressed by this Joint Select Committee has its differences, it should serve to reassure of the potential for a valid constitutional arrangement, as is created by section 62 of the *Religious Discrimination Bill 2019* (Cth).

END