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NSW Law Reform Commission
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Preliminary Submission to the NSW Law Reform Commission on Review of the Anti-Discrimination Act 1977

Who are we?

1. This submission is on behalf of, and co-signed by:

   - Australian Baptist Ministries
   - Australian Christian Churches
   - Anglican Church Diocese of Sydney
   - Seventh-day Adventist Church

2. The submission was coordinated by *Freedom for Faith,* a Christian legal think tank that exists to see religious freedom for all faiths protected and promoted in Australia and beyond. Freedom for Faith is led by people drawn from a range of denominational churches including the Anglican Church Diocese of Sydney, The Catholic Church, the Australian Christian Churches, Australian Baptist Churches, the Presbyterian Church of Australia, and the Seventh-day Adventist Church in Australia. It has strong links with, and works co-operatively with, a range of other faith groups in Australia.

3. We welcome the opportunity to make this submission and we give consent for this submission to be published. Our contact details are as follows.

Freedom for Faith

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Executive Summary

We welcome the review of the *Anti-Discrimination Act 1988* (NSW) and in particular call on the Law Reform Committee to consider how legislative reforms may better protect religious freedoms in NSW.

We comment on just a few top priority issues that are of concern to faith communities at this preliminary stage. For the most part these relate to items in the terms of reference:

- Whether the range of attributes protected against discrimination requires reform; and
- Whether the areas of public life in which discrimination is unlawful should be reformed.

We would want to see any reform of the Act include improvements to protection and promotion of religious freedoms in NSW by:

1. Providing positive rights protections for the free exercise of religious beliefs and activity, rather than protecting religious freedoms through mere exceptions;
2. Protecting the ability of religious institutions, like schools and charities, to make employment decisions in accordance with their doctrines, tenets and beliefs;
3. Protecting the right for faith-based foster-caring and adoption services to operate in accordance with their doctrines, tenets and beliefs;
4. Appropriately balancing the rights of religious schools, and those of students who differ on issues of same sex attraction and gender dysphoria by providing a way for religious schools to continue to provide education and facilities in accordance with their doctrines, tenets and beliefs and in a way that supports the wellbeing of their entire student body.

Our approach to these issues is informed by our understanding of the nature of Australia as a multicultural and multi-faith society. Critical to the continuing success of that multicultural society is not only that people of all faiths be free from discrimination but also that they are free to live out their faith both as individuals and in their religious institutions and organisations.

Australia as a multicultural society

More than 25% of Australians were born overseas, and another 25% have at least one parent born overseas. In Sydney, the relevant proportions may well be much higher. There are suburbs in Sydney such as Fairfield that have more than 150 different ethnic groups in the one local government area, speaking a multitude of languages at home.

In the last three decades, relatively few new migrants have come from Europe or countries of the Anglophone world where religious adherence has declined in recent decades. Many migrants and refugees are devoutly religious and, even if they are not, most have come from cultures with quite conservative views about sex and family life.

The proportion of the population that holds to conservative values on sex and family life will only increase in the next three decades. This is not only because current migration patterns are very likely to continue, but because people from these cultures have much higher birth rates than secular Caucasian Australians.

The role of anti-discrimination laws in a multicultural society

How we 'live and let live' in such a multicultural society is a complex problem that requires wisdom, tolerance, and compromise. The International Covenant on Civil and Political Rights (**ICCPR**) sets an international standard on the rights of freedom of religion, association, and the rights of ethnic minorities. These must be given very careful attention with respect to reforming the Act. Religious communities and individuals do not only need to be protected from discrimination, which is the particular focus of the Act. There is also an equally, if not more important, need for religious communities to be protected from the negative effects of anti-discrimination laws. These laws should not interfere with the manifestation of fundamental freedoms in the public sphere, such as freedom of religion and association, except in extremely limited circumstances as discussed in UN General Comment No.22.[1]

The Law Reform Commission will need to grapple with the paradox of people of faith needing both protection from discrimination, as well as freedom to practice their religion in ways which might otherwise be prohibited by anti-discrimination laws.

This is typically achieved in two ways in drafting legislation. The first is in limiting the scope of application of anti-discrimination laws to appropriate fields which are seen as sufficiently public and open to all that the law should limit freedom of association or freedom of religious activity. The second is by providing 'exceptions' or 'exemptions' for religious activity that would be deemed unlawful discrimination but for the exception provided. The term 'exception' is unfortunate, as it fails to signify that it is in fact protecting a legitimate religious right that can be exercised by default and that has been qualified by the anti-discrimination prohibition.

An example of the manifestation of religious beliefs in the public square that would involve unlawful discrimination but for the provision of exemptions in anti-discrimination law (section 56 of the Act) is the doctrine and practice involved in the Roman Catholic priesthood. The Church doctrine on this issue requires it to have exemptions from laws that would otherwise prohibit discrimination on both sex and marital status. Furthermore, it needs to be allowed to say that a person born as female does not meet the criteria for eligibility to the priesthood notwithstanding that the person now identifies as a male.

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[1] UN General Comment No.22: Article 18 (Freedom of Thought, Conscience or Religion), para.8, <https://www.refworld.org/docid/453883fb22.html>.

This is only one example of how anti-discrimination laws must balance different rights and religious freedoms. NSW law has been somewhat successful from a multicultural perspective to date, because the current law only encroaches to a limited degree on the autonomy of faith-based organisations such as Christian schools and welfare organisations to maintain their religious identity, ethos and values. By way of contrast, the State of Victoria is now in a position of continuing conflict with many of its faith communities, Christian, Jewish and Muslim, because it has amended its Equal Opportunity Act to wipe out, or otherwise severely restrict, most religious exemptions.

Laws which fail to allow for a healthy multiculturalism will exacerbate social tensions and create deep divisions. If the law strays too far from the cultural values of those who are governed by it, including the values of religious and cultural minorities, the long-term effect will be to diminish respect for law and for government. Voluntary obedience to law will decline, and this has long-term implications for the society.

Exceptions and exemptions

While to date, NSW law has managed well to protect the religious freedom of faith communities by way of exceptions and exemptions, this is not ideal as a way of legislating for the protection of fundamental human rights. Rights that are said in the ICCPR to be "non-derogable" should not be protected in law only by way of exceptions to otherwise applicable rules.

A particular problem with this reliance on exemptions and exceptions in drafting legislation is that they have come under sustained attack from those who (wrongly) characterize them as a "license to discriminate". Although there are some examples where the claims that religious believers make can be characterised in such terms, it is for the most part a gross distortion of the issue. People of faith want to be able to 'live and let live' with other members of the community, neither claiming privileges not open to the rest of society, nor accepting that their rights be subordinated to those of other members of the community.

The most important issue for Christians, and, we understand, for most other faith groups, is not the right to discriminate, but the freedom to select on the basis of religious belief and practice, and freedom to take adverse action against an employee if necessary, where issues of personal conduct are incompatible with the values of the employing organisation. That freedom to select should be expressed as a right, not an exception.

Employment rights

Of particular importance to faith-based organisations is the right to select, or to prefer, people who adhere to the faith and therefore are likely to be aligned with the mission and ethos of the organisation.

Christian leaders opposed the recommendations of the New South Wales Law Reform Commission in 1999 on religious discrimination because they considered that the Commission had not got the balance right. The Commission, at that time, proposed very significant restrictions on the freedom of religious organisations, such as Christian schools, to select, or prefer to choose, adherents of the faith for employment.[2] The government of the day did not accept this recommendation and a consequence was that NSW still does not have any provisions in the *Anti-Discrimination Act* concerning discrimination on the basis of religious faith.

The ideas advanced by the Australian Law Reform Commission in its recent Consultation Paper on religious exemptions for faith-based schools have also aroused enormous opposition across a broad cross-section of religious organisations and faith-based school groups. Indeed, it is difficult to think of any ALRC Consultation Paper which has been so poorly received by the stakeholders who were most affected by the proposed changes to the law. The thrust of the ALRC's paper seemed to be that it was the purpose of Christian schools to provide employment opportunities for non-Christian teachers, subject only to narrow exemptions. The authors of that paper did not seem to understand the reasons why so many parents who do not have an active religious faith choose Christian schools for their children, nor the importance to faith communities of the schools, through which they seek to educate their children in a context of Christian living and practice.

We now support the need for prohibitions on religious discrimination. They are necessary to protect people of all faiths in the changed environment that has developed since the NSW Law Reform Commission last considered these issues in 1999. However, for the reasons given, it is important that the law is drafted carefully so as not to interfere with appropriate religious freedoms insofar as faith-based organisations are concerned. They need to be able to maintain their identity and ethos through the freedom to select staff appropriate to the mission of the organisation, or to give preference to the employment of such staff.

This approach gains support from the Human Rights and Equal Opportunity Commission report on religion and belief which commented in 1999 that "special provision for religious institutions is appropriate. It is reasonable for employees of these institutions to be expected to have a degree of commitment to and identification with the beliefs, values and teachings of the

[2] NSW Law Reform Commission Report 92, Review of the Anti-Discrimination Act 1977 (NSW) (1999) at [4.128] and [6.433].

particular religion…Accommodating the distinct identity of religious organisations is an important element in any society which respects and values diversity in all its forms."[3]

Similarly, it is supported by the UN's Special Rapporteur on freedom of religion and belief. In 2014, Heiner Bielefeldt, the Special Rapporteur at that time, wrote an important report on religious freedom in the workplace. He argued that discrimination on the basis of religious belief in the workplace should be unlawful, but "religious institutions constitute a special case. As their raison d'être and corporate identity are religiously defined, employment policies of religious institutions may fall within the scope of freedom of religion or belief, which also includes a corporate dimension."[4]

Such legislative provisions confer what Hohfeld called a liberty right[5] for a faith-based organisation to select staff on the basis of religious belief should it choose to do so. This is an appropriate application of the rights of freedom of religion and association.

Foster care services and discrimination law

Another issue concerns the involvement of Christian organisations in helping to provide out-of-home care to children within the context of the child protection system.

We recognise entirely the sensitivity and difficulty of discussion on any area where the rights of same-sex attracted people may be limited in the name of religious freedom. However, we do need to draw to your attention the difficulties that will be created if the decision of the NSW Court of Appeal in *OW & OV v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293 is overturned by legislation.

The Wesley Mission and Anglicare both run foster care services funded by the NSW Government. These organisations do outstanding work. They play a vitally important role in the network of foster care services on which the NSW government relies in order to provide much needed out of home care services for children in NSW. Demand for foster homes already outstrips supply. There are, in all probability, many Christian foster carers who would not volunteer for such an arduous role unless they were recruited and supported by a trusted Christian organisation.

Since the decision in the landmark case against Wesley Mission, the NSW Government has accepted the position of these organisations not to accept applications by same-sex couples to be foster carers. These couples can become foster carers through a number of other organisations such as Barnardos, so there is no practical impediment for them to become

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[3] Human Rights and Equal Opportunity Commission, Article 18: Freedom of Religion and Belief, (1999) p.109.

[4] Interim Report of the Special Rapporteur on Freedom of Religion or Belief, 5 August 2014 at [68].

[5] Wesley Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Essays (WW Cook, ed, Yale UP, 1923).

involved in out-of-home care, supported by an organisation which does not have issues about their same-sex relationship.

We believe that it is in the public interest to continue to allow diversity of opinion and practice in this area. Same-sex fostering and adoption raises complex issues. There are different views about whether children are best fostered by a male and female together, who can bring complementary but different attributes to the care of children. Religious views on these issues should be accepted as part of our commitment, as a society, to pluralism and multiculturalism.

Gender identity and school students

Another issue which is likely to be of importance to all faith communities – but not just faith communities – is to clarify what legal obligations flow from the law prohibiting discrimination on the basis of gender identity for those people or organisations that cannot rely upon an exemption.

This is of particular importance in school communities, where a child, without or without support from both of their parents, wishes to be called by a new name and to be recognised as being of a gender different from their natal sex. As large numbers of children and teenagers, and particularly teenage girls, are now identifying as 'transgender' or 'non-binary', demands on schools to recognise their new identity have increased beyond what could ever have been imagined when these provisions were introduced into the *Anti-Discrimination Act*. For most of these children and teenagers, the changed gender identity is likely to be transient, as is other experimentation in adolescence; but medical experts around the world are now expressing concern about the 'affirmation' approach to this issue as it may concretise and lock in an otherwise quite temporary identity, causing long-term harm to the child.

Other children at school are also being impacted by the claims of some students to have a gender identity different to natal sex. For girls in particular, there are issues about having to share bathrooms and changing rooms with natal males, issues about sleeping accommodation at camps, and safety concerns when physically larger and stronger males want to participate in female-only sports.

Religious communities, as well as ethnic minorities,[6] have generally been consistent in holding to the scientific position that, despite natural human variation and abnormalities such as

[6] For example, the Chinese-Australian population in New South Wales circulated a petition against the Safe Schools program in 2016, complaining that it promoted a particular ideology which was contrary to their culture and beliefs. It attracted over 17,000 signatures https://www.abc.net.au/news/2016-08-23/safe-schools-mp-lodges-petition-against-program-signed-by-17000/7777030 (last accessed, July 31st 2023).

disorders of sex development, there are just two sexes.[7] This accords with the teaching of the Abrahamic faiths. They have sought to hold onto this core truth while adopting a caring and pastoral approach to anyone in their congregations or communities who experiences gender incongruence.

These issues could be handled sensibly by schools and religious organisations, were it not for the fact that some activists claim that the *Anti-Discrimination Act* requires them to act in ways which they consider to be detrimental to the best interests of the child or other children in the school. It is far from clear that this is so. NSW requires sex reassignment surgery for legal recognition as a different gender.[8] There must also be a point at which a child is deemed too young or immature to have a legally protected 'gender identity'.

However, legal guidance for state schools in NSW generally encourages or requires school principals to act as if the child is of the gender with which the child identifies. There is scant recognition of the rights and concerns of other children who may be affected by the child's identification. The focus is on the rights of the gender diverse child only and the assessment of risk relates to him or her alone, not to other children who may be affected. This, for example, is an extract from the NSW legal guidance:[9]

> Where reasonably practicable, the student should be treated on the same basis as other students of the same identified gender….
>
> Toilets, showers and change rooms are specific to each school. An assessment of the risk posed to the student by using the toilets of their identified gender must be undertaken. If an identified risk to the student cannot be satisfactorily eliminated or minimised then other arrangements should be made. The need for the student to be safe is a paramount concern in these circumstances.
>
> Students should not be required to use the toilets and change rooms used by persons of the sex they were assigned at birth if they identify as a different gender. Alternative arrangements may include using staff toilets or unisex toilets where possible. The exclusion of students who identify as transgender from the toilet or change rooms of their identified gender must be regularly reviewed to determine its continuing necessity.

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[7] Congregation for Catholic Education, *'Male And Female He Created Them': Towards A Path Of Dialogue On The Question Of Gender Theory In Education* (2019); Anglican Diocese of Sydney, Social Issues Committee, *Gender Identity* (2017).

[8] *Births, Deaths and Marriages Registration Act 1995* (NSW) s.32C.

[9] Transgender students in schools – legal rights and responsibilities', Legal Issues Bulletin No 55, December 2014: https://education.nsw.gov.au/about-us/rights-and-accountability/legal-issues-bulletins/transgender-students-in-schools (last accessed, July 31st 2023.

> If other students indicate discomfort with sharing single-sex facilities (toilets or change rooms for example) with a student who identifies as transgender, this should be addressed through the school learning and support team.

This minimises the concerns of girls about sharing toilets or change rooms with boys and the safety risks that might, albeit rarely, arise therefrom. The discomfort of other children is to be addressed by educating them (presumably to think differently). A similar approach is adopted in relation to overnight excursions. This has ramifications for all schoolchildren, but it is reasonably likely that girls from socially conservative backgrounds, including those with an active faith, will be most concerned about issues of modesty and bodily privacy.

Anti-discrimination laws can be a blunt instrument for addressing complex issues, and some clarification of the scope of the law is needed if the exemptions currently applicable to independent schools are to be limited or removed, insofar as they concern students. However, the issues apply to all children, including those in State schools.

Conclusion

Freedom for Faith and the undersigned look forward to further consultations with the Commission in due course.

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