

Family First

worth fighting for



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NSW Law Reform Commission

By email to: nsw-lrc@justice.nsw.gov.au

Re: Preliminary-submission regarding Anti-Discrimination Act (Act) Review

Introduction

Family First Party welcomes the opportunity to make a preliminary-submission to the NSW Law Reform Commission's review of the NSW Anti-Discrimination Act.

The Family First Party is a political movement of 32,000 supporters nationwide including 4,000 party members seeking to stand women and men who will fight for and sustain the social and economic well-being of the nation by promoting family, life, faith, freedom and enterprise in the parliaments of Australia. Family First is a political party for Australians of all faiths and none but recognises that the Judeo-Christian ethic best provides freedom and tolerance for all. This ethic underpins the party's policy-making for the common good.

The Law Reform Commission has been asked to consider whether the Act could be modernised and simplified to better promote the equal enjoyment of rights and reflect contemporary community standards.

Comments provided are numbered in accordance with the Review's Terms of Reference (TOR)

1. TOR 1: whether the Act could be modernised and simplified to better promote the equal enjoyment of rights and reflect contemporary community standards

- 1.1 Whether The Act is amended or modernised and simplified, to ensure that there is fair and equal treatment it is important that the Act incorporates protections against discrimination on the basis of religion, which mirror the anti-discrimination provisions provided in respect to each of the other attributes covered under the Act.
- 1.2 There also needs to be careful consideration and implementation of strong safeguards to ensure that the rights of some are not prioritised over the rights of many others.

1.3 Australia is a democracy, and freedoms of thought, conscience, religion, speech, assembly and association are important freedoms for citizens of democracies and need to be protected alongside protecting citizens against discrimination and vilification.

2. TOR 2: whether the range of attributes protected against discrimination requires reform

2.1 As indicated above, The Act should be expanded to provide people of faith, including those with no faith, with protections against discrimination on the basis of religion for the following reasons:

2.2 Religion is a key diversity attribute, and Australia is a multi-cultural, multi-faith, diverse community. This diversity should be encouraged, supported and protected.

2.3 Discrimination on the basis of religion is the missing piece in the jigsaw in the current legislation.

2.4 Each of the other attributes protected under the Act has protection against both discrimination and vilification. The Act should provide equal protections for all, not better protections for some. The NSW Parliament recently passed amendment to the Act to prohibit “public vilification on the grounds of religion or belief”, however did not legislate against discrimination on the basis of religion or belief. So people of faith in NSW are not afforded the same or equal protections to those of all the other attributes covered in the legislation. This lower protection is, in itself, discriminatory.

2.5 Australia is a signatory to the United Nations ‘UN’ Declaration of Human Rights. Article 18 of the UN Declaration of Human Rights (UNDHR) states: *Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.*

2.6 NSW is one of only two states that does not provide protection against discrimination on the basis of religion. Recommendation 16 of the Report of the Expert Panel appointed to conduct the Religious Freedom Review (The Ruddock Review), was “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.”

2.7 In 2020 the NSW Parliament considered amendments to the Act to prohibit discrimination on the grounds of religious belief or activity. The Joint Select Committee into the Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 (the Bill) found that there was a strong need for and recommended that the NSW Government introduce a Government Bill inserting discrimination on the grounds of religious belief or activity, where that activity is lawful, as a protected attribute in the Act. ¹

3. TOR 4, 5, and 6:

- **TOR 4: whether the existing tests for discrimination are clear, inclusive and reflect modern understandings of discrimination;**
- **TOR 5: the adequacy of protections against vilification, including (but not limited to) whether these protections should be harmonised with the criminal law; and**
- **TOR 6: the adequacy of the protections against sexual harassment and whether the Act should cover harassment based on other protected attributes:**

¹ [https://www.parliament.nsw.gov.au/ladocs/inquiries/2603/Report%20on%20JSC%20on%20the%20Anti-Discrimination%20Amendment%20\(Religious%20Freedoms%20and%20Equality\)%20Bill%202020.pdf](https://www.parliament.nsw.gov.au/ladocs/inquiries/2603/Report%20on%20JSC%20on%20the%20Anti-Discrimination%20Amendment%20(Religious%20Freedoms%20and%20Equality)%20Bill%202020.pdf)

- 3.1 Any legislative test for discrimination should be objective, with a clear 'serious' materiality threshold, subject to a robust 'reasonable person' test.
- 3.2 There should be no subjective 'harm' tests that rely on a person's personal opinion, or tests based on 'potential' impact that may occur rather than actual impact. This leaves it open to serious abuse and misuse. Subjective tests can be easily weaponised and used to silence genuine debate on social policy issues in the public sphere or to punish political enemies or advocates who hold different perspectives.
- 3.3 All tests should be based on serious conduct.
- 3.4 It is critically important that the Act itself does not become a weapon of activists to harass and intimidate others, and to silence free speech and public debate.
- 3.5 There are already a number of cases in Australia where activists for particular ideologies are using legislation to claim they have felt 'harmed' by a comment made by an advocate with an alternative perspective as part of genuine debate and discussion on current and complex social issues. This creates enormous cost, stress and expense for the subjects of such complaints. For example, currently a number of women raising concerns regarding women's rights and opportunities due to the unfair advantage and safety issues of males who identify as women competing in women's sporting competitions have had legal action taken against them.

4. TOR 7: whether the Act should include positive obligations to prevent harassment, discrimination and vilification, and to make reasonable adjustments to promote full and equal participation in public life

- 4.1 No, positive obligations are unnecessary. Whilst it is important for the Act to prevent and respond to actual cases of incitement to violence, it is unnecessary to add another layer of material costs, liability and red tape associated with positive obligations, especially at a time when the State Government is trying to reduce red tape, overlap and unnecessary costs with legislation. Whilst Government and big businesses with large compliance units can implement the never-ending array of governance requirements being introduced, small businesses and volunteer-based organisations do not have the resources and expertise to cope with all the additional burdensome regulatory requirements being imposed on them, and the stress and legal liabilities deter volunteer participation.

5. TOR 8: Exceptions, special measures and exemption processes

5.1 Exceptions must be included for religious practices, texts and teaching

5.1.1 To ensure equal treatment for all, the Act must provide protections from discrimination on the basis of religion, and also incorporate clear protections for:

- the pursuit of religious practices by churches, mosques, temples and other places of worship and their associated institutions so they can be guaranteed freedom to operate under their own rules and traditions;
- recognised religious texts, such as the Bible, the Torah, the Koran and other faith-based texts, and quotes and excerpts from these texts, plus teachings based on and aligned with these texts so this legislation cannot be used by activists to attack people of faith and their beliefs and to have all or part of their precious religious texts banned.

- 5.1.2 There have already been cases in Australia where there have been serious consequences for having religious beliefs or quoting from religious texts. One high-profile example is Israel Folau who lost his job for a post quoting a passage from the

Bible on his personal social media. Another is former National Australia Bank Executive, Andrew Thorburn, who was excluded from an AFL opportunity, not through anything he personally said or did, but merely because he belonged to an Anglican church and holds mainstream Christian beliefs.

- 5.1.3 There is also discrimination in the way people of different faiths are treated. For example, in relation to the wearing of so-called Pride jerseys in certain rounds of competition in various sporting codes, Muslim athletes have been able to refuse to wear the jersey and have been praised in the media, whilst Christian athletes like the 'Manly Seven' in the NRL have been subjected to considerable public vitriol in the media for refusing to wear a Pride jersey.

5.2. Women's and girl's safety and opportunities in sport and other forums need to be exempt and actively protected

- 5.2.1 The Act needs to actively and robustly protect women's sporting competitions to ensure that women and girls continue to have equal opportunity to compete in female-only sport safely. They need to have their representative and competition opportunities protected from male-born trans athletes competing in women's sporting codes.
- 5.2.2 A large amount of Government resources has been allocated in recent decades to encouraging women's and girls' participation and facilitating their opportunities in sport.
- 5.2.3 Traditionally separate men's and women's sporting competitions have operated in most sports due to the scientifically proven performance advantage that males, or those with a 'Y' chromosome, have over females, or those with an 'X' chromosome, in the sporting arena, due to their genetic makeup which enables them to be generally stronger and faster.
- 5.2.4 This is evident across all age groups, including in children, as evidenced by the results from 2023 Australian Athletics Championships and the Australian All Schools results. Men and boys can run faster, jump further and higher, and throw further and higher than women and girls in the same age groups, and the differences can be significant.
<https://www.athletics.com.au/national-track-field-results/2023-australian-track-field-championship-results/>
- 5.2.5 In recent years in some sports codes biological males appropriating female identity have been allowed to compete as "women" in women's sporting competitions. This has raised concerns because of:
- 5.2.6 safety, risk, and injury issues to female competitors due to the strength and size advantage of biological males generally have over women and girls.
- 5.2.7 some representational and associated financial opportunities meant for women are now being taken by men who identify as women, who have a significant physical competitive advantage. Given the significant financial, reputational and representational opportunities that can exist in sport, there can be significant incentives for some male athletes to identify as female and compete in the women's category in competition. This issue will grow if not adequately addressed, potentially excluding women from the very opportunities that were created to give them equal opportunities!
- 5.2.8 Some of these male-born competitors, who may only be second or lower-tier athletes if competing in the male category of their sport, may be top-tier in the women's category and displace women from these opportunities. However displace women from opportunities wherever they are in the representational levels.
- 5.2.9 Male and female competitions were separated for valid reasons, including to give women opportunities and to protect them from injury from bigger, stronger players. It is not providing 'equal opportunity' when the rights of individuals who were male by birth and still

have that genetic makeup, override the rights of women and girls to participate safely in sport, and take their opportunities to win medals and represent their community, State or Nation.

5.3 Protections for faith-based schools must continue

- 5.3.1 Australia has a diverse, multicultural, multifaith population. This is one of the strengths of our society. Faith-based schools have been one of the factors contributing to this success, supported by an exception in the Act (which in effect acts as a protection for religious freedom) which has enabled them to hire staff who share the faith and values of the school. To be able to maintain their identity and ethos, these schools require this exception to be retained, or replaced with a positive right to religious freedom.
- 5.3.2 Many parents actively choose to send their children to faith-based schools because of the faith-based teaching, values and culture they expect their children to receive. The core principle of all school education anywhere in the world is known as *'in loco parentis'* which means "in the place of" in Latin. It is used to describe a situation where someone is acting as a substitute or taking on the responsibilities of another person. For example, a teacher who is in loco parentis is acting as a parent while the child is at school. This means that the operation of all schools must be 'acting as a parent' for the children entrusted to them.
- 5.3.3 Australia is a signatory to The International Covenant on Civil and Political Rights (ICCPR), a treaty which provides at Article 18:
- *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.*
 - *No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.*
 - *Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.*
 - *The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.²*
- 5.3.4 It is therefore important for faith-based schools to continue to be able to employ staff who share and practice the beliefs, values and culture of their particular faith. This is no different to political organisations or advocacy organisations hiring staff who have beliefs and values that align with the political party or advocacy organisation. Any amendment to the Act to remove this exception would likely impact materially on a school's culture over time, and would also potentially be contrary to Article 18 of the ICCPR and a parent's human right to choose faith-based schooling for their children, and may impact negatively on Australia's rich cultural heritage over time.
- 5.3.5 Just like political parties hire staff that adhere to the values and beliefs of the political party, so faith-based schools and organisations should continue to have the right to hire staff whose values and beliefs align with their values and beliefs.

6. TOR 9, 10, 11 and 12

- **TOR 9: the adequacy and accessibility of complaints procedures and remedies; and**

² <http://www.austlii.edu.au/au/other/dfat/treaties/ATS/1980/23.html>

- **TOR 10: the powers and functions of the Anti-Discrimination Board of NSW and its President, including potential mechanisms to address systemic discrimination**
- **TOR 11: the protections, processes and enforcement mechanisms that exist in other Australian and international anti-discrimination and human rights laws, and other NSW laws**
- **TOR 12: the interaction between the Act and Commonwealth anti-discrimination laws**
 - 6.1 It is important to have effective protections against incitement to violence.
 - 6.2 The appropriate way to address identified systemic discrimination issues is through the Parliament. Additional powers should not be granted to the Anti-Discrimination Board or its President, who are un-elected.
 - 6.3 In the interests of certainty, fairness and cost, given the considerable stress and other impacts on those who are subject to a complaint, if a complaint is made under State legislation, this should preclude a complaint on the same matter being made under Commonwealth or other State's anti-discrimination laws and vice versa. There should not be the ability to take numerous actions in respect to the same matter under different legislation as this would be an unreasonable burden and punitive for respondents.
 - 6.4 The Act should not cover types of matters that are already covered in other legislation at a state or Commonwealth level, as this creates red tape, uncertainty and costs. There should not be numerous legal options under different legislation.
 - 6.5 Large groups like trade unions or advocacy groups should not be empowered to bring 'test cases' under the Act. Unions already have workplace and industrial relations legislation and mechanisms to use.
 - 6.6 There should be mechanisms in place to ensure that all matters are handled and resolved in a timely, fair, efficient, and cost-effective manner.
 - 6.7 It is noted that there can already be a significant imbalance of power in matters, particularly where one side is being funded by the Government. This power imbalance in proceedings needs to be addressed for the system to be fair and equitable, particularly when the one with the relatively least power is the respondent.
 - 6.8 As recommended by the 2020 Joint Standing Committee, complaints handling staff at the Board should be qualified lawyers, not clerical staff, given the significant distress and costs that complaints can cause for respondents.³
 - 6.9 Those appointed to the Anti-discrimination Board should reflect the diversity of the community, be required to undertake their duties in an impartial manner and not use the board's powers inappropriately to promote a particular personal agenda. Those with a long track record of advocating for a particular position may not be suitably impartial when considering matters and therefore should not be appointed.
 - 6.10 There needs to be robust protections built in to ensure that the Act is not weaponised to shut down public debate, punish or silence those with different views, which is increasingly occurring in Australian jurisdictions.

³ [https://www.parliament.nsw.gov.au/ladocs/inquiries/2603/Report%20on%20JSC%20on%20the%20Anti-Discrimination%20Amendment%20\(Religious%20Freedoms%20and%20Equality\)%20Bill%202020.pdf](https://www.parliament.nsw.gov.au/ladocs/inquiries/2603/Report%20on%20JSC%20on%20the%20Anti-Discrimination%20Amendment%20(Religious%20Freedoms%20and%20Equality)%20Bill%202020.pdf)

6.11

Conclusion

Law reform is required to protect freedom of speech and religion from activists weaponising subjective provisions within the Anti-Discrimination Act. Freedom of religion should be included as a protected attribute. “Exemptions” for religious freedom should be converted into positive rights to bring New South Wales into line with Australia’s international law obligations.

Yours sincerely,

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