Submission to the Law Reform Commission review of the *Anti-Discrimination Act 1977 (NSW)*.

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Thank you for this opportunity to make a submission to the Law Reform Commission (LRC) Review of the *Anti-Discrimination Act 1977 (NSW),* henceforth "the Review", due by 29 h September, 2023. I hope that the Review will not be used as a tool to diminish the rights of some citizens in order to unfairly enhance those of others. Indeed, I urge the Commissioner and his team to carefully read and consider all the submissions made, and sincerely seek to represent the range of public views expressed in the LRC recommendations, in order to strengthen the rights of every NSW resident.

Point 1.
Terms of Reference 1. "Whether the Act could be modernised and simplified to better promote the equal enjoyment of rights and reflect contemporary community standards."

There are many problems (legislative and linguistic) with the terms "modernised", simplified", "better promote the equal enjoyment of rights" and "reflect contemporary community standards". Without giving clear legal definitions of all of these terms, Terms of Reference 1 could mean a wide range of things or, indeed, nothing much at all.

"Equal enjoyment of rights" *should* mean, that all NSW citizens have their rights to freedom of speech, of association and of raising their families according to their beliefs protected by our state laws. This phrase should also mean that people of faith are able to teach and speak openly, and associate freely, with others of faith (or no faith) in our communities, just as any others are entitled to do. This would not be the case, however, if people of faith had their religious rights overruled by those who disagreed with them, or felt "offended" by their teachings, and therefore sought to suppress their rights to freedom of speech, belief and association.

In addition, if this Term of Reference means that modern beliefs and practices "trump" ancient beliefs and practices, then this is not a legitimate use of the Review process. Afterall, numerous important human rights are based on the ancient Judeo-Christian texts, namely the Torah and the Bible, including: the presumption of innocence, individual rights and responsibilities; the sanctity of human life including prior to birth, the elderly and disabled; care for the disadvantaged; providing for the poor; and so on. Very few Australians would wish to change laws based on these provisions simply because of their ancient origin. In fact, the "tried and true" consequences of these practices grants them greater validity over many "modern beliefs" that could well have unexpected or damaging outcomes that are so far unforeseen.

When considering Terms of Reference 1, it would be fair to apply it equally across all sub-groups in our society. One could ask if political organisations or interest groups in NSW are forced to employ people who do not agree with their position statements or codes of behaviour? For example, would the Labor Party of NSW be required to employ support staff who do not agree with the Labor Party's position on climate change, financial support by unions, or the "Voice to parliament" referendum? Would indigenous groups be required to modify their "ancient beliefs" in order to "reflect contemporary community standards" if the two came into conflict? If other racial or societal groups in NSW are free to express their beliefs (ancient or modern) in our pluralistic nation, then people of faith should also share

this “equal enjoyment of rights” and not have theirs diminished under the guise of “reforms” that “modernise” or “simplify” our current laws.

Most serious of all, this Term of Reference could indicate a determination by the Review process to remove the rights of individuals, schools and institutions to express and promote their religious beliefs, or employ staff who also support these beliefs, simply because some in the Review process think they may not “reflect contemporary community standards”. Such a loss of religious protections would represent considerable overreach by the Review. However, such outcomes have already occurred through similar legislative reviews in other states. This could be seen as a cynical misuse of legislative powers and would be very disturbing for many citizens if it were to occur in NSW as well.

In addition, if this were the outcome, the Review of the *Anti-Discrimination Act 1977 (NSW)* would, in fact, actively discriminate against people of faith, especially individuals and institutions with Christian, Jewish or Muslim beliefs, by prioritising those who hold “modern” philosophies over those with ancient beliefs regarding sexuality, ethics and behaviour. The basis for making these enormous changes (i.e. in the name of “modernising” or “simplifying” the law) is not sufficiently valid to make such unilateral and sweeping changes to the current religious rights of so many citizens in our pluralistic “modern” society. This outcome also works against the international Syracusa Principles based in international law.

I would therefore conclude that the first Term of Reference does not provide a genuine legal or moral basis for changing the current *Anti-Discrimination Act 1977 (NSW)* nor the exemptions contained in *Section 38* of the *Sex Discrimination Act 1984.*

Point 2.

Terms of Reference 2. “Whether the range of attributes protected against discrimination requires reform.”

The range of attributes that may be impacted by changes to anti-discrimination laws should also include “ religious beliefs and freedoms”. People of faith and religious organisations currently have no specific positive protections despite repeated attempts to provide these in Federal and NSW state laws.

With the 2017 same-sex marriage plebiscite determining support for same-sex marriage, there were serious concerns expressed by many Australians that the rights to freedom of religious expression for individuals and entities would be infringed by further anti-discrimination legislation, since the ‘Yes’ campaign for the plebiscite was strongly based on ‘anti-discrimination’ and ‘equal rights’ platforms. In response, the Federal Coalition government set up a review into the possibility of recommending “religious freedom” legislation to ensure these concerns were addressed.

The Ruddock Expert Panel on Religious Freedom received over 15,000 submissions in 2018 and recommended that the NSW and Federal Parliaments should amend their anti-discrimination laws to prohibit discrimination on the basis of a person’s “religious belief or activity (or lack of belief)” and that the law provide for the appropriate accommodations for religious bodies, religious schools and charities.

Additionally, in July 2021, an all-party NSW Parliamentary Joint Select Committee Report made detailed recommendations for a NSW Government Bill**,** the *Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 (NSW)*[1]*,* to protect people and

[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

organisations from discrimination based on their religious beliefs or activities. The Bill's definition of "religious activities" included activities motivated by religious belief and the test for "religious belief" had regard to the claimant's "sincerely held religious convictions", thus avoiding judges having to act as theologians to determine if a belief "conformed to an identified religious doctrine". Importantly, the Bill recognised that the right not to be discriminated against for holding and expressing religious beliefs and activities should be protected through positive provisions as a right, not as an "exemption" from other anti-discrimination rights.

Clearly, both the Ruddock Expert Panel on Religious Freedom and the NSW Parliamentary Joint Select Committee, including its proposed Bill, recommended strong and urgent protections for the religious rights and freedoms of individuals and organisations in NSW. Unfortunately, however, this has not yet been implemented.

Given the bipartisan support demonstrated thus far for legislation that positively promotes freedom of religious belief and expression, the *Anti-Discrimination Act* Review should similarly support this outcome for all NSW citizens and this could occur if Term of Reference 2 added "religious beliefs and freedoms" to the range of attributes protected against discrimination.

Point 3.

Terms of Reference 3: "Whether the areas of public life in which discrimination is unlawful should be reformed."

Areas of public life that are impacted by anti-discrimination law presently include public educational institutions, workplaces, health facilities, agencies that provide goods and services and a range of clubs. Currently, private schools, places of worship and religious organisations are protected from complying with certain anti-discrimination laws through exemptions contained in *Section 38* of the *Sex Discrimination Act 1984.* However, these religious entities could be impacted by any attempts to weaken such protections of freedoms of speech and religious expression in NSW.

As mentioned in Point 2, there has already been demonstrable bipartisan support for legislation that positively supports freedom of religious belief and expression in NSW. In fact, the above-mentioned *Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 (NSW)* carefully detailed elements that, far from removing protections of religious belief and expression from NSW law, intended to strengthen such protections for individuals, schools and organisations with religious affiliations.

Currently, Australia has ratified the *International Covenant on Civil and Political Rights (ICCPR)*[2]*,* in which *Article 18* recognises religious freedom and the right of parents to educate their children in accordance with their values and beliefs as fundamental human rights. *Article 18* also requires states to respect the liberty of parents to ensure the religious and moral education of their children is in conformity with their own convictions. This right cannot be restricted. It is an important right that goes to the heart of freedom of religion, conscience and association; and recognises the primary role of parents as educators and guardians of their children.

[2] Article 18, International Covenant on Civil and Political Rights (ICCPR)

The exemptions contained in *Section 38* of the *Sex Discrimination Act 1984* also entitle private schools to employ staff who support their religious ethos, and to require both staff and students to respect the school's religious standards and beliefs.

Currently, approximately 150,000 (about 35% of total) students in NSW attend independent religious schools. The families of these students have demonstrated that they are prepared to pay for their children to receive a religious education, in keeping with their rights under the above-mentioned Australian and international laws.

In 2022, *The Australian* newspaper published national polling conducted by a coalition of Christian schools that confirmed the public consider these rights to be very important. 86% support the rights of parents to choose a school that reflects their strongly held values and beliefs and a further 75% of respondents concurred with the rights of religious schools to employ staff who support the school's stated values and beliefs.[3]

At the very least, the current protections of religious rights for individuals and religious organisations should be protected, and not diminished, by the Review. If any further reform is recommended, it should include positive and specific protections of religious beliefs and practices for individuals and entities in NSW based on the previous recommendations of other inquiries and panels.

In summary, therefore, Terms of Reference 3 should not add private schools, places of worship and religious organisations to the "areas of public life in which discrimination is unlawful."

Point 4.

Terms of Reference 4: "whether the existing tests for discrimination are clear, inclusive and reflect modern understandings of discrimination."

Term of Reference 4 fails to adequately define what is meant by "clear, inclusive and reflect modern understandings of discrimination" which makes this Term of Reference very *unclear.* The term "inclusive" in this context is also ambiguous – does it mean that "existing tests for discrimination" apply equally across all areas of legal discrimination attributes, or that a wide range of citizens within the state of NSW would agree with the "existing tests for discrimination"?

The current *Anti-Discrimination NSW* website defines "unlawful discrimination" as being "treated less favourably than somebody else because of your: disability, sex, race, age, marital status, homosexuality, or transgender status." Discrimination is further qualified by stating that "[it] is against the law if it happens at work, in education, where goods and services are provided and within registered clubs." Presumably, this definition outlines the "existing tests for discrimination", but no attempt has been made in the Terms of Reference to define what constitutes "modern understandings of discrimination".

Such ambiguity and uncertainty are not helpful when the Review is meant to be addressing so many important aspects of public life and the protection of freedoms for people in NSW. I would suggest that the LRC provides an additional document outlining the specific definitions (including examples that would be clear and meaningful for people without legal training) so that this submission process could be more understandable and accessible for a wide range of citizens who wish to express their views, but who find the Terms of Reference confusing.

[3] Human Rights Law Alliance Newsletter, John Steenhof – 18/11/2022.

Point 5.

Terms of Reference 5: "the adequacy of protections against vilification, including (but not limited to) whether these protections should be harmonised with the criminal law".

"Vilification" is defined on the *Anti-Discrimination NSW* website as "a public act that could incite hatred, serious contempt or severe ridicule towards a person or group. Vilification of certain characteristics is against the law. These characteristics include: race, homosexuality, being transgender, having HIV or AIDS."

In this definition, the term "vilification" should only be applied to statements or acts of "severe" hatred, ridicule and contempt towards another person or social grouping. However, it appears that what has occurred in reality is that people who have sought to use their business or social media platforms to promote what they support (but also what they refuse to support), has been deemed to be "vilifying" of certain sub-groups in society when, in fact, they have not expressed "severe hatred, ridicule and contempt towards persons or social groups" at all. By simply declining to affirm specific groups, such individuals have been aggressively targeted by media, special interest groups and activists to try to force these individuals to change their beliefs, conform to the behaviour that activists deem is "affirmative", or to be silenced at the very least, when these individual's behaviour does not meet the legal definitions of "vilification" or "discrimination" in the first place.

There is a very big difference between feeling "hurt" or "offended" because someone says something I disagree with, and actual "vilification". This latter term should be reserved for serious deliberate attacks on a person's reputation or attributes, and not for statements that are no more than a difference of opinion about a contested point. Those who live in modern democracies should have the capacity to hear a range of views about controversial ideas, express their own position respectfully, and resist any attempts to change the law to forcibly silence anyone who has a viewpoint that differs from their own. This latter action is a misuse of legal and political power, and should not be the intention of the LRC Review process.

In recent years, there have been repeated attempts to remove the rights of some individuals or groups to express their sincerely held beliefs about sexuality, gender ideology, abortion, euthanasia, and other disputed topics when, in a pluralistic culturally-diverse society like Australia, citizens should have their democratic rights protected by law. Where there are currently inadequate protections for people of faith, this is the time for protections to be positively reinforced, not further weakened.

Many people are concerned that the LRC Review will prove to be another step in taking advantage of the lack of positive protections against discrimination for people of faith in NSW, in the same way that it has in other jurisdictions. I would exhort the LRC Review to provide stronger protections for people of faith in NSW, and not the reverse.

Point 6.

Terms of Reference 6: "the adequacy of the protections against sexual harassment and whether the Act should cover harassment based on other protected attributes."

The *Anti-Discrimination NSW* website defines "sexual harassment" as "any unwelcome behaviour of a sexual nature that makes you feel offended, humiliated or intimidated. Sexual harassment can be physical, verbal or written. Sexual harassment is against the law in NSW when it occurs in certain public places" such as workplaces, when accessing goods or services, public education facilities, registered clubs, accommodation, and sporting competitions.

It is possible that the Review's intention with this Term of Reference is to counter-balance the protections of citizens from "sexual harassment" versus the current inadequate protections provided for religious organisations and individuals to hold and express their beliefs regarding what they would consider to be "acceptable sexual practices".

Improperly leveraging the rights of some, especially those in the LGBTQI community, over the rights of people of faith is not an appropriate use of the Review's judicial power. By using undefined terms such as "offended', "humiliated" and "intimidated" in their broadest meaning, some in the LGBTQI community have sought to silence those who do not agree with them. This behaviour is not in the best interests of Australians, when our laws should protect the liberties of *every* individual and sub-group within our communities as far as possible.

As mentioned previously, private schools, places of worship and religious organisations are protected from complying with certain anti-discrimination laws through exemptions contained in *Section 38* of the *Sex Discrimination Act 1984.* However, this Term of Reference could be used to address *hypothetical* examples of "sexual harassment" in religious establishments as a reason to remove even the second-rate religious protections that currently exist.

Neither the Australian Law Reform Commission (ALRC), in their review in early 2023, nor the media have found any cases where ""sexual harassment" has occurred against students or staff members on the basis of their sexuality in NSW religious schools.

Having had both my children and grandchildren attending Christian schools, I have seen overtly gay students at the school being treated with the same courtesy and compassion that all other students at the school receive. Far from being expelled, "vilified" or "sexually harassed" by such schools, if anything, they have received a higher level of pastoral care and support than other students. Some members of the public or media have implied that LGBTQI students are currently the object of damaging discrimination when there is no evidence that this is occurring at all. This is a dishonest tactic which, I am sure, the Review will not pursue.

Since there is no evidence-base of "sexual harassment" that delineates the "need" for a substantial loss of religious rights and freedoms by religious organisations in this state, the Review should assert this publicly, and strengthen the rights of religious schools and institutions to continue to offer the compassionate and safe environment that they currently do for all their students and staff. In other words, currently there *are* adequate "protections against sexual harassment" in NSW without the need to diminish the rights of some community members through this Review.

Point 7.

Terms of Reference 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."

Once again, this Terms of Reference does not adequately define the terms "positive obligations" and "make reasonable adjustments to promote full and equal participation in public life." The *Anti-Discrimination NSW* website does not define "harassment", only "sexual harassment" which makes this Term of Reference less clear than it should be. "Sexual harassment" is already defined in Point 6.

Sadly, at this time in the life of our nation, many people of faith have experienced harassment, discrimination and vilification for holding or expressing their sincerely held religious beliefs in public life or through on-line forums. Some citizens have lost their jobs,

been de-platformed from on-line sites, been subject to humiliating and expensive court procedures, or sanctioned in other ways, for expressing their religious beliefs.

Given the lack of "positive obligations to prevent harassment, discrimination and vilification", I believe it would be very important to add "religious belief and practice (including no religious belief)" to the list of attributes that should receive additional protections in the Review. As previously mentioned, international law, large-scale inquiries and all-party committee reports have strongly recommended positive protections for people of faith, so this is an excellent opportunity for the Review to affirm such recommendations and thereby "promote full and equal participation [by all people, including people of faith] in public life" in NSW.

Point 8.

Term of Reference 8: "exceptions, special measures and exemption processes".

The ALRC reviewed Federal laws relating to religious freedoms and limitations in religious education in Australia in early 2023. Unfortunately, despite receiving thousands of submissions to the contrary, the ALRC's paper was heavily and unjustifiably weighted against the religious freedoms of independent schools and in favour of "non-discrimination", particularly in areas of sexuality and gender identity. If these proposals were to become law in NSW, religious schools may face legal action from activists who are opposed to conservative Christian, Muslim and Jewish beliefs about marriage, sexuality and gender identity.

These proposals would make it difficult for Christian schools to maintain their religious ethos and culture through staff recruitment and retention. They would also force schools to allow the promotion of sexual ideologies which may contradict the schools' religious beliefs.

Under the current exemptions, religious schools are *not* seeking the right to discriminate against staff and students who identify as LGBTQI because of their identity. They simply want to be able to employ staff who are willing to uphold the religious beliefs of the school. As mentioned earlier in this submission, the freedom to establish religious schools, and the right of parents to educate their children in accordance with their religious values, are enshrined in international law[4] so, as such, they should also be supported by reviews of Australian laws.

Currently, as mentioned in Point 3, private schools, places of worship and religious organisations are protected from complying with certain anti-discrimination laws through exemptions contained in *Section 38* of the *Sex Discrimination Act 1984.* However, these religious entities could be severely impacted by any attempts to remove the protections of their freedoms of speech, religion and religious expression by the Review.

In addition, since Australia is a signatory to the ICCPR United Nations document, the Siracusa Principles should apply to changes in law that impact human rights. These Principles state that restrictions on human rights must meet standards of legality, evidence-based necessity and proportionality; and hence changes to the law should only be justified when they support a legitimate aim and are strictly necessary, proportionate and subject to review against abusive applications.

Consequently, removing the current exemptions contained in *Section 38* of the *Sex Discrimination Act 1984* should only occur if there are legitimate reasons to do so, following

[4] Article 18, International Covenant on Civil and Political Rights (ICCPR)

democratic investigations of the reasons for these recommendations. They should also be proportionate, minimally disruptive, and ensure that any changes were subject to review to ensure they are not being used to abuse the human rights of one group of citizens for the sake of others'.

Point 9.
Term of Reference 10: "the powers and functions of the Anti-Discrimination Board of NSW and its President, including mechanisms to address systemic discrimination."

I don't intend to present a lengthy response to this Term of Reference, except to say that, once again, the term "systemic discrimination" is not defined, leading to confusion and possible misuse of this term. While many Australians, including myself, do not wish to see sub-groups of our fellow citizens sexually harassed or vilified (as per the definitions above), I think the term "systemic discrimination" should only be applied to repeated acts of serious harassment or vilification towards individuals and organisations due to their specific attributes. The term "systemic discrimination" should not be applied to individuals or organisations who, within the functions of their civic life, maintain their current legal rights to hold and practise their religious beliefs and customs.

As previously mentioned, there is a very big difference between "feeling hurt or offended" because someone says something I disagree with, and actual "vilification" or "discrimination". Likewise, lawful "discrimination" occurs regularly in public life where only certain people can access specific goods and services: e.g. only people over 55 years of age can live in certain retirement facilities; only people of one sex can use certain health services such as obstetric units or women's refuges; only people with specific disabilities can access services through the NDIS. It would be entirely inappropriate to accuse these service providers of "systemic discrimination".

Once again, it would be a misuse of the Review to improperly leverage the rights of some in the community over the rights of people of faith through hypothetical or unsubstantiated claims that those of religious backgrounds are practising "systemic discrimination" towards others by simply maintaining and practising their religious beliefs.

Any other matters.

With the ALRC review in early 2023, the report of the commissioner, the Hon Justice Stephen Rothman AM made very controversial recommendations. Despite the Review receiving thousands of submissions in support of the protection of religious rights, he stated he was "not moved" by the intent of these numerous submissions.

It is inappropriate and undemocratic for a commissioner to invite public submissions about a contested area, and then apparently pursue his own agenda after all. That would be a misuse of the judicial power of law reviews by denying the democratic rights of individuals and organisations to express their positions and have those opinions respectfully considered; and by failing to ensure that the human rights of all Australians are protected. Such a manipulation of position and power results in a loss of confidence in democratic, judicial and legislative processes. In addition, "cutting and pasting" from recommendations of other state and federal reviews to insert into the NSW Review would undermine the integrity and intent of this specific Review process if it were to take place.

In conclusion, I urge the Commissioner and his staff to carefully read and consider all the submissions made, and to sincerely seek to represent the range of public views expressed in their recommendations, in order to enhance the anti-discrimination rights of all NSW citizens as far as possible.