

SUBMISSION TO
THE NSW LAW REFORM COMMISSION
REVIEW INTO THE *ANTI-DISCRIMINATION ACT 1977* (NSW)

29 SEPTEMBER 2023

Introduction

The Catholic Archdiocese of Sydney is pleased to provide this submission for the NSW Law Reform Commission's review of the *Anti-Discrimination Act 1977 (NSW) (Act)*.

The Act aims to protect individuals against unjust discrimination based on one or more personal attributes. At their best, anti-discrimination laws enhance human rights and freedoms, shielding people from unfair treatment based on certain unchangeable characteristics. However, there is a risk that anti-discrimination laws can be used as a sword, allowing the law's provisions to be used as 'lawfare' to prevent reasonable and reasoned public discourse, and to limit individual freedoms. Any amendments made to anti-discrimination law must take this into account.

The terms of reference for this inquiry invite proposals for the enrichment of human rights and freedoms, but also foreshadow the restriction of these, in some instances in a way that does not accord with Australia's international human rights obligations. It is hoped that any amendments to the Act recommended by this inquiry will only improve the recognition of rights and freedoms.

This submission focuses on those terms of reference that affect religious communities and people of faith, and makes the following recommendations:

- The Act should be amended to include the provision found in Schedule 1[1] of the *Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 (NSW)*.
- The Act should be amended to include the provision to prohibit on discrimination on the basis of religious belief or activity found in Schedule 1[2] of the *Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 (NSW)*.
- Existing religious exemptions within the Act should be retained.
- Existing provisions within the Act that offer protections to institutions conducted in accordance with, or for the furtherance of, the doctrines, tenets, beliefs or teachings of a particular religion should be retained.
- No amendments should be made to the Act to remove rights recognised in the ICCPR on the basis that such rights are unpopular in contemporary culture.
- The Act should be amended to include the provisions of the *Anti-Discrimination Amendment (Complaint Handling) Bill 2020*.

Yours faithfully

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Discussion

Siracusa Principles

The UN Economic and Social Council's Principles on the Limitation and Derogation Provisions in the ICCPR (**Siracusa Principles**) provide guidance on the interpretation of rights recognised in the International Covenant on Civil and Political Rights (**ICCPR**), particularly when it comes to limitation to, or derogation from, those rights.

The Expert Panel on Religious Freedom (**Ruddock Review**) recommended that Commonwealth, State and Territory governments should have regard to the Siracusa Principles in the drafting of laws that would limit the right to freedom of religion.¹ While the Ruddock Review focused on religious freedoms, the applicability of the Siracusa Principles extends beyond the freedom of religion and should be the starting point for the drafting and interpretation of anti-discrimination laws.

To ensure this occurs, it would be appropriate to insert a provision into the Act that specifically references Australia's international obligations, including the Siracusa Principles. An example of such a provision is found in Schedule 1[1] of the *Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020* (NSW).

Recommendation: The Act should be amended to include the provision found in Schedule 1[1] of the *Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020* (NSW).

Discrimination on the basis of religious belief and activity

Currently in NSW, the Act does not prohibit discrimination on the basis of religious belief or activity. This is despite the gap in NSW law being widely acknowledged, and state and federal inquiries recommending that this be altered. For example, the Expert Panel on Religious Freedom recommended that:

*"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

The lack of protection of religious belief or activity is a lacunae in the law that must be filled in any review of the Act. It is appropriate that the law also protects a person's right to not hold a religious belief, and to change their religious beliefs.

¹ Expert Panel on Religious Freedom (2018). Religious Freedom Review. Available at: <https://www.ag.gov.au/RightsAndProtections/HumanRights/Documents/religious-freedom-review-expert-panel-report-2018.pdf>, recommendation 2.

² Ibid, recommendation 16.

People who hold religious beliefs often manifest those beliefs in community with others. For this reason, any protection against discrimination on the basis of religious belief or activity must also acknowledge that an organisation conducted in accordance with, or for the furtherance of, the doctrines, tenets, beliefs or teachings of a particular religion does not discriminate if it gives preference to those who share the religious beliefs in accordance with which the organisation is conducted.

In determining the content of provisions to be included in the Act for this purpose, regard should be had to the *Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020* and the March 2021 report of the Joint Select Committee on the *Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020*.

Recommendation: the Act should be amended to include the provision to prohibit on discrimination on the basis of religious belief or activity found in Schedule 1[2] of the *Anti-Discrimination Amendment (Religious Freedoms and Equality) Bill 2020 (NSW)*.

Exemptions

In recent times, there has been a concerted lobbying effort to see existing religious exemptions contained in anti-discrimination laws either limited or removed altogether. Such lobbying misunderstands the nature and purpose of religious exemptions, incorrectly viewing these exemptions as special concessions for religious bodies.

Rather than being special concessions, exemptions are a legislative tool used to define the limits of the proscriptions contained in anti-discrimination law³ in order to protect and preserve other legitimate rights and freedoms and ensure these are not restricted in a way that is contrary to the intention of international human rights instruments.

The religious exemptions currently contained in the Act safeguard the freedom of thought, conscience and religion provided for in Article 18 of the International Covenant on Civil and Political Rights (**ICCPR**).

As the Expert Panel on Religious Freedom noted:

“A key aspect of the right to manifest one’s belief in article 18(1) of the ICCPR is a right for religious groups to establish their own private schools conducted according to the beliefs of their religion. As the Special Rapporteur put it in 2010, ‘private schools constitute a part of the institutionalised diversity within a modern pluralistic society’... Australia additionally has obligations under article 18(4) of the ICCPR to respect the liberty of parents and legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.”⁴

³ *Bropho v Human Rights & Equal Opportunity Commission* [2004] FCAFC 16 at [73].

⁴ Expert Panel on Religious Freedom (2018). Religious Freedom Review. Available at: <https://www.ag.gov.au/RightsAndProtections/HumanRights/Documents/religious-freedom-review-expert-panel-report-2018.pdf>, para. 1225-1227.

While Article 18.3 of the ICCPR acknowledges that some limitations may be made on the right of a person to manifest their religion or beliefs, it provides that any such limitations must be “prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”

The Siracusa Principles offer guidance on the way this limitation in Article 18.3, and other limitations contained within the ICCPR, should be interpreted. The Siracusa Principles assert that limitation clauses shall be interpreted strictly and in favour of the rights at issue, that is, that the limitations should be narrowly defined, and the corresponding rights broadly interpreted. The Siracusa Principles also state that the reference to “necessary” implies that the limitation:

- (a) “is based on one of the grounds justifying limitations recognised by the relevant article of the Covenant,*
- (b) responds to a pressing public or social need,*
- (c) pursues a legitimate aim, and*
- (d) is proportionate to that aim.”*

The Siracusa Principles reaffirm the position outlined in Article 4.2 of the ICCPR that the right to freedom of thought, conscience and religion is a non-derogable right. They also address the issue of conflict of rights, stating in Article 36:

When a conflict exists between a right protected in the Covenant and one which is not, recognition and consideration should be given to the fact that the Covenant seeks to protect the most fundamental rights and freedoms. In this context especial weight should be afforded to the rights from which no derogation may be made under article 4 of the Covenant.

For this reason, it is more accurate to consider provisions that provide exceptions for religious institutions and faith-based private educational authorities as ‘balancing clauses’ rather than exemptions, because this language recognises that these clauses balance rights that have the possibility of coming into conflict in a way that accords with Australia’s international human rights obligations, rather than characterising one right as an exemption against another. Balancing clauses, when drafted correctly, do not detract from human rights; rather, these clauses enhance them.

Recommendation: existing religious exemptions within the Act should be retained.

Institutional rights

Connected to the necessity of balancing clauses is the need to offer protections for institutions conducted in accordance with, or for the furtherance of, the doctrines, tenets, beliefs or teachings of a particular religion.

“Institutional” protections are often misunderstood to be granting ‘human’ rights to ‘non-human’ entities. However, this is not the case. In its report on traditional rights and freedoms, the Australian Law Reform Commission noted that the exercise of freedom of religion directly involves the freedom of association.⁵ Institutional rights are a means of protecting an individual’s freedom of association and serve as a legislative acknowledgement that it is through institutions that individuals often manifest these rights.

Any amendments to the Act must continue to protect institutional freedoms, to the extent they support an individual’s right to freedom of association.

Recommendation: existing provisions within the Act that offer protections to institutions conducted in accordance with, or for the furtherance of, the doctrines, tenets, beliefs or teachings of a particular religion should be retained.

Contemporary community standards

Anti-discrimination laws must hold two competing principles in balance.

The first is the universal nature of human rights. The United Nations Special Rapporteur in the field of cultural rights defined “universality” as meaning “that human beings are endowed with equal human rights simply by virtue of being human, wherever they live and whoever they are, regardless of their status or any particular characteristics.”⁶ While not stated, the universality of human rights must also extend across time; human beings must equally enjoy human rights, regardless the time period into which they were born. A person born in 2023 should have no fewer rights than a person born a century prior.

Competing with this principle, however, is the need for human rights frameworks to be updated over time to ensure that they adequately protect individual and collective rights in a contemporary context.

In items 1 and 4, the Terms of Reference propose amending the Act to reflect “contemporary community standards” and “modern understandings of discrimination,” respectively. While the Act may be amended to reflect modern examples of discrimination, any proposed changes to the Act under these terms must not result in any existing rights, whether protected as attributes or through exemptions, being limited or removed on the basis that they do not have majority support in the community at present time. Indeed, any rights labelled as unpopular in contemporary culture should enliven additional protections, not fewer.

Recommendation: no amendments should be made to the Act to remove rights recognised in the ICCPR on the basis that such rights are unpopular in contemporary culture.

⁵ Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws*, ALRC Report 129 (2015).

⁶ UN. Human Rights Council. Special Rapporteur in the Field of Cultural Rights. Universality, cultural diversity and cultural rights : note / by the Secretary-General. [New York] : UN, 25 July 2018. Available from: <https://www.refworld.org/pdfid/56f174dd4.pdf>

Complaint handling processes

This inquiry should also take into consideration the report of the inquiry into the *Anti-Discrimination Amendment (Complaint Handling) Bill 2020 (Complaint Handling Bill)* conducted by the Legislative Council Portfolio Committee No. 5 – Legal Affairs (**Committee**).

This Committee noted several issues with the complaint handling process.

One of these was that, while the complaint process comes at no cost to the complainant, the respondent must pay their own costs in the process. This is particularly burdensome for those individuals who are subject to numerous and/or frivolous and vexatious complaints. This was noted by the Committee, which wrote:

“The committee is concerned that some individuals have the ability to use the complaints process inappropriately, in situations where they may not have been personally impacted and/or where the acts of potential discrimination are not even occurring in New South Wales. We are concerned about the unfair pressure this places on respondents, and how this goes against the very principles of fairness anti-discrimination legislation aims to achieve.

“Despite stakeholders having different views on some of the amendments... the committee agrees that there are improvements that could be made to the Anti-Discrimination Act 1977 to minimise the potential abuse of the complaints process...”⁷

The cost to the respondent is incurred even if their alleged conduct falls clearly within an exception.

Under current practice, the President of the Anti-Discrimination Board assesses whether an exception applies after evidence has been provided by the respondent, and perhaps even after this. Such a process risks exposing a respondent to unnecessary financial and other burdens.

Amendments to the Act that would shield a respondent from unnecessary expense, either due to frivolous and vexatious complaints or the applicability of exceptions.

Recommendation: the Act should be amended to include the provisions of the *Anti-Discrimination Amendment (Complaint Handling) Bill 2020*.

Conclusion

This inquiry has the opportunity to make recommendations that would enhance and enrich the enjoyment of rights and freedoms across this state, and to ensure that rights are appropriately balanced in the rare circumstances when they conflict. It is hoped that the recommendations in this submission will assist in that goal.

⁷ *Ibid*, paragraphs 2.100-2.101.