

Submission to the NSW Law Reform Commission

Anti-Discrimination Act 1977

Wesley Mission

Wesley Mission is grateful for the opportunity to respond to the Consultation Paper: *Review of the Anti-Discrimination Act 1977 (NSW) - Unlawful Conduct* (May 2025). This submission is confined to a response on possible reforms to s.56 of the Act.

About Wesley Mission

Wesley Mission is structured in a somewhat unique way which gives rise to particular issues concerning the scope of religious exemptions in the Act. It is a church, with its main centre in Pitt St, Sydney but also congregations in Sylvania, Ryde and Surry Hills. It has 8 congregations with about 1200 attending in all. Its congregational membership is very diverse, with many people who have come from the Pacific Islands and others from various countries in Asia. Wesley Mission is affiliated with the Uniting Church in Australia.

Wesley Mission is also a large community services organisation, with more than 2000 staff and over 1100 volunteers. Its work includes Lifeline, suicide prevention, gambling counselling, family preservation work, foster care services, helping victims of domestic violence, assisting people who are homeless, and a range of other services.

The community services work is delivered by Wesley Community Services Limited (WCSL), a public company limited by guarantee, governed by an independent Board. The church and spiritual community, Wesley Congregational Life, is governed by a Mission Council.

While, to this extent the two are structurally separated, they are also closely integrated. Rev'd Stuart Cameron is both the Superintendent (senior pastor) of the Church and is the CEO leading the community services work.

Together, the two arms of Wesley Mission are united by a core purpose: to continue the work of Jesus Christ in word (by creating and maintaining supportive church communities) and deed (by doing good in service to others). Wesley Mission, then, in all its aspects, is an explicitly Christian ministry.

Wesley Mission has a very diverse workforce. It is committed to inclusivity. However, to maintain its Christian identity, it insists that the Executive Leadership Team are all committed and active Christians. The Executive Leadership Team members are not just managers, but ministers, engaging in Christian work through the particular roles to which they are appointed. This is reflected, inter alia, in the expectation that they will join in bible study and prayer during leadership team meetings and be able to lead devotions. They are also expected to live out their faith in their daily lives and in the way they fulfil their roles in the organisation.

Wesley Mission's funding

Wesley Mission's extensive work in providing much needed community services involves a partnership between governments, philanthropic organisations, individual donors and an army of volunteers.

In 2024, Wesley Mission received \$5.5 million in donations and bequests.¹ While no doubt the religious character of Wesley Mission would have been irrelevant to the motives of many donors, other donations and bequests would not have been received but for the fact that Wesley Mission is an explicitly Christian organisation.

More than 1,100 volunteers donated more than 88,000 hours to supporting and helping people in need through Wesley Mission in 2024. The value of this contribution to the organisation is very much more than its value in money's worth, but it is worth noting that were this volunteer time to be paid, it would have cost around \$4.5 million.² Again, it is important to at least some volunteers that Wesley Mission is a Christian organisation.

The importance of s.56 to Wesley Mission

Section 56, in its current form, supports the work of the Mission in a variety of ways.

(a) the ordination or appointment of priests, ministers of religion or members of any religious order

Wesley Mission's work is led by ordained ministers of religion. Section 56(a) is of course, a necessary exemption for religious bodies to ensure that they can give effect to their religious beliefs, whatever they may be, concerning eligibility for ministry leadership roles. The language of the Act is most appropriate to the Christian religion. In any update of the legislation, it needs to have a broader compass. This could be achieved by adding the words "or other religious practitioners" at the end to be more inclusive of the range of faiths in modern Australia.

(b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order.

Again, this is a necessary provision for faith-based organisations such as Wesley Mission. Again, it would be appropriate to add the words "or other religious practitioners" at the end.

(c) the appointment of any other person in any capacity by a body established to propagate religion

This may at first seem like a broad exemption; but in reality it is a very practical one and absolutely necessary if the Parliament were to add religious belief, or the absence thereof, as a protected attribute.

Paragraph 7.22 of the Consultation Paper observes that the "exception in the ADA is wide enough to cover appointments to roles that do not have a religious character." The Paper does not explain how the Commission defines "a religious character".

¹ 2024 Annual Report, p.42.

² Ibid, p.40.

From Wesley Mission's point of view, no sharp line can be drawn in the work of Christian ministry between roles that are "religious" and those that are something other than "religious". Churches don't just employ ministers of religion. Larger churches, of which Wesley is one, also need other staff involved in administrative or support roles. A busy minister, for example, may have a personal assistant or parish administrator who looks after a range of functions in the life of the church. All church staff work together as a team in the service of Christ, as do those undertaking volunteer roles. The people volunteering to serve the coffee after the morning service are as much involved in work of "a religious character" as the minister who preached the sermon.

The structure of Wesley Mission's Executive Leadership Team³ reflects this unity of purpose between those who have clearly defined pastoral and preaching roles and those who have more administrative or managerial roles. There is no distinction between the 'sacred' and the 'secular'. All of the team support the one ministry of making Jesus known through word and deed. Their roles may differ, but not their purpose.

This view is deeply grounded in our faith, going back to the words of Jesus in Matthew 25:35-40. He spoke of the time when He will return and divide the sheep from the goats. Those who were to be welcomed into the Kingdom of God were those who fed the hungry, gave a drink to the thirsty, showed hospitality to strangers, cared for the poor and the sick, and visited people in prison. Whatever they did for the least of Jesus' brothers and sisters, they did for Him. Inspired by that teaching, Christians have provided what we now call "community services" from the very earliest days of the Church, sharing their resources with people in need and helping them in a range of practical ways.

(d) any other act or practice of a body established to propagate religion that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of the adherents of that religion.

Many protected attributes in anti-discrimination law command widespread acceptance in the community; but on some matters there are differences of view. How those differences should be recognised and respected in anti-discrimination laws is one of the most difficult issues when it comes to reform.

At times, some of these differences have been characterised as a conflict between religious rights and "LGBTQI+" rights. However, the position in 2025 is much more complex. There are sharp differences of view, for example, among gay and lesbian groups concerning transgender rights, with some seeing their rights to freedom of association unnecessarily diminished by overly broad anti-discrimination provisions. Natal women's rights may also clash with the rights of those, born male, who identify as female.

There are also differences of view on such issues within Churches. These differences may be between denominations, or within different branches of the same denomination – for example different dioceses or even different local churches. Many of these differences are quite nuanced and cannot be reduced to binary "for or against" propositions on any given issue.

As a large, multicultural congregation, and with a diverse workforce in its community services programs, Wesley Mission is particularly aware of these differences of view within its own community. It endeavours to be sensitive to the range of viewpoints represented among its staff, volunteers, congregational members, donors and other stakeholders. Since so much of its work is in Western

³ Ibid, pp. 48-49.

Sydney, it is also conscious of differences of view within the communities it serves. Those differences arise not only from the different religious beliefs represented across Sydney, whether Christian, Jewish, Muslim, Hindu or other; there are also differences arising from cultural values and upbringing.

It is in this context, that the Board of Wesley Mission, then led by our former Superintendent and CEO, Keith Garner, thought it necessary to defend a lawsuit brought by a same-sex couple who wanted to foster children through Wesley's foster care service many years ago.⁴ This case was ultimately resolved in Wesley's favour. The defence of that lawsuit on the basis, particularly of s.56(d), was seen as necessary to ensure that Wesley Mission remained entitled to maintain its identity, values and ethos even when difficult conflicts of rights, beliefs and values arise in the course of its work. This was not simply a conflict between the rights of the claimant and the organisation. The Board had to take into account also the impact on the whole organisation, including not only its staff but also volunteers, donors and members of its congregations, if it changed its practices in ways that some felt would not be in conformity with Wesley Mission's doctrinal beliefs and values.

This difficult case illustrates how the law can successfully balance different rights and interests in areas where matters of belief and values arise. The same-sex couple were not prevented from fostering children. They could do so through other organisations, and indeed were fostering children at the time of the NSW Court of Appeal hearing. What the court denied was that they had a right to require every foster care organisation in the State to assess them for suitability to foster children, even if that went against the beliefs and values of the organisation.

The intent of section 56 was upheld, and its meaning helpfully clarified by the Court of Appeal. In a multicultural and multi-faith society, faith-based organisations must be allowed to maintain their identity and ethos and to organise themselves in accordance with their beliefs and values. Different rights must be balanced with one another. Just as religious freedom rights are not absolute – they may be limited according to Article 18 of the ICCPR by reference to the need to protect the fundamental rights of others – so the corollary of that is that the rights of others may need to be limited to protect the right of religious freedom.

There can be no "winner takes all" when it comes to these disputed issues within a multicultural society. There can be no hierarchy of rights, particularly one in which the core value of freedom of religion is trumped by all kinds of other rights. Diversity requires respecting and permitting difference in appropriate circumstances.

Responses to the Consultation Paper

(1) Why amend s.56?

The consultation paper canvasses a range of options for reforming s.56. However, a prior question is whether any reform is needed at all, and if so, to what extent? Section 56 has served the NSW community well over more than three decades. It seems to have generated comparatively little litigation. Despite different reviews and amendments to the Act over time, it has remained unaltered. This is no doubt in recognition of the fact that NSW is a multi-faith society in which appropriate liberty must be given to religious groups, of a great many varieties, to maintain their religious identities and to have some degree of autonomy about how they run their own organisations, consistently with whatever faith they profess.

⁴ *OV & OW v Members of the Board of the Wesley Mission Council* (2010) 270 ALR 542.

Certainly, there could be reforms without undermining or limiting the essential purpose of s.56. There do seem to be unintended consequences from the way s.56 operates in the context of the rest of the Act. It is not necessary for it to apply to all aspects of the Act, including for example, remedies for sexual harassment.

It could also be that, without controversy, the range of protected attributes could be narrowed to those few in which clashes of values could arise. The difficulty with that is it singles out people with certain protected attributes as subject to religious exemptions when others are not. This could be divisive and cause unnecessary offence. No faith-based organisation needs to rely on religious exemptions. The legislation simply permits them to do so if one or more of the s.56 criteria are satisfied in circumstances where fidelity to the beliefs or religious purpose of the organisation require it.

(ii) The special position of mission-focused organisations

The need for such exemptions is not confined to religious bodies. Other groups also need to be able to maintain their beliefs, values and ethos. For example, political parties and environmental groups ought to have the right to select staff and volunteers who adhere to the mission of these organisations. It would be curious if a political party could be sued for discrimination against a potential candidate or staff member who did not support its platform, or hold to its values.

Any organisation established with a particular mission or purpose, whether religious or not, must be treated, for the purposes of anti-discrimination law, in a different way to those operating generally in commerce, education or other fields of endeavour. This is in recognition of freedom of association as a human right. It may be limited, as all human rights can be, but these limitations must be cogently justified.

(iii) The position of religious organisations in international human rights law

The special position of religious organisations has long been recognised in the international discourse on human rights. The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief is particularly clear on the issue. This Declaration has been described by the Human Rights and Equal Opportunity Commission (as it was then known) as “the most comprehensive international statement of the right to freedom of religion and belief”.⁵ It was adopted unanimously by the United Nations General Assembly in November 1981. In February 1993, following consultations with State and Territory governments, the Declaration was declared to be a ‘relevant international instrument’ for the purposes of what is now known as the *Australian Human Rights Commission Act 1986*.

The Declaration sets out what is involved in protecting religious belief and practice. Article 6 provides that, subject to relevant limitations, the right to freedom of thought, conscience, religion or belief shall include, inter alia, the following freedoms:

- (a) To worship or assemble in connexion with a religion or belief, and to establish and maintain places for these purposes;
- (b) To establish and maintain appropriate charitable or humanitarian institutions;

⁵ Human Rights and Equal Opportunity Commission, *Article 18: Freedom of Religion and Belief*, (1999), p.3.

- (c) To make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief;
- (d) To write, issue and disseminate relevant publications in these areas;
- (e) To teach a religion or belief in places suitable for these purposes;
- (f) To solicit and receive voluntary financial and other contributions from individuals and institutions;
- (g) To train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief;
- (h) To observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief;
- (i) To establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels.

Wesley Mission is such a religiously-based charitable and humanitarian institution.

The Human Rights and Equal Opportunity Commission report 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 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.”⁶

The UN's Special Rapporteur on freedom of religion and belief echoes this view. 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.”⁷

(iv) The position of religious organisations in a multicultural society

The reforms canvassed in the Consultation Paper concerning s.56 will all have the effect of diminishing the religious freedoms currently protected in the law of NSW. In considering what new limitations are justified, Wesley Mission would urge the Commission to bear two things in mind.

First, NSW is a diverse multicultural society containing people of many different cultures and faiths. About 27% of Australians were born overseas, and another quarter at least have a parent born overseas. Our newer migrant and refugee communities, in particular, tend to come from culturally conservative societies – many from the Middle East, Asia and the Pacific Islands. The law must respect the fact that a great many people in NSW have views on the nature of marriage, issues concerning sexual conduct, and other controversial matters that derive from their religious faith and/or cultural upbringing.

⁶ Ibid, p.109.

⁷ Interim Report of the Special Rapporteur on Freedom of Religion or Belief, 5 August 2014 at [68].

Anti-discrimination laws can coerce but they cannot persuade. Laws which are drafted in such a way as to disrespect people's religious values may do more to undermine community harmony than to promote it. The law must find ways to accommodate the diversity of views and beliefs in the NSW population. This can be done by allowing for diversity and freedom of association in religious and cultural groups while prohibiting discrimination in the mainstream of community life.⁸

Second, the law must be clear and easy to apply without huge legal costs. One of the problems with general tests such as whether it is a genuine occupational qualification to hold a religious faith for a particular role, or whether some such discrimination is 'reasonable' and 'proportionate', is that they can create a lot of uncertainty when first enacted. They require a judge to determine the matter on an individual basis in each case.

This uncertainty may take many years to resolve. Because very few such cases go to trial and judgment, it can take decades for a sufficient body of precedent to be established "on a case by case basis" sufficient for organisations to understand what the courts think Parliament intended. Developing a body of precedent on a case by case basis is a very poor way to make law, but a very expensive one for the organisations that may be subjected to legal claims. Some of these legal claims may be meritorious, but others are likely to be unfounded or vexatious.

At Wesley Mission, we are committed to care for some of the poorest and most vulnerable people in our society. We want to spend our resources on that work, and not to have to divert substantial sums to defend legal claims which could have been avoided if the law were clearer. We consider this to be a real and substantial risk to community services organisations if some of the ideas canvassed in the Consultation Paper were to make their way into legislation. Section 56 is certainly broad; but it has the merit of being clear, and its scope is well-defined as applicable only to organisations that have a clear religious purpose.

⁸ Joel Harrison and Patrick Parkinson, 'Freedom Beyond the Commons: Managing the Tension Between Faith and Equality in a Multicultural Society' (2014) 40 *Monash University Law Review* 413.