

**Canberra Declaration**

PO Box 378

Unanderra NSW 2526

(02) 4272 9100

[www.canberradeclaration.org.au/](http://www.canberradeclaration.org.au/)

NSW Law Reform Commission

Anti-Discrimination Act Review

[nsw-lrc@dcj.nsw.gov.au](mailto:nsw-lrc@dcj.nsw.gov.au)

**Submission to the Review of the  
Anti-Discrimination Act 1977 (NSW)**

14 August 2025



## **Co-Authors**

Warwick Marsh, Co-Founder, Canberra Declaration

Alison Marsh, Co-Founder, Canberra Declaration

Kurt Mahlburg, Programs Director, Canberra Declaration

Samuel Hartwich, Research Consultant, Canberra Declaration

Jean Seah, Managing Editor, The Daily Declaration

Kym Farnik, Prayer Coordinator, Canberra Declaration

# Table of Contents

1.0 Introduction	1
2.0 Executive Summary	2
3.0 International Context for the Proposed Legislation	4
3.1 Universal Declaration of Human Rights	4
3.2 International Covenant on Civil and Political Rights	4
3.3 Declaration on the Elimination of Intolerance and Discrimination	5
4.0 Religious Protections Afforded in the Australian Constitution	6
5.0 The Contribution of Christianity to Australia’s Religious Freedoms	7
6.0 Defining Religious Freedom in the Australian Context	10
7.0 The Need to Protect Religious Freedom in NSW	11
7.1 Commonwealth Government Response	11
7.2 Concerns from Religious Leaders	12
7.3 Case Studies of Discrimination	12
7.4 Calls for a Religious Freedom Act	14
8.0 The Status Quo of Anti-Discrimination Law in Australia	16
8.1 Historical Development	16
8.2 Conflicts with Established Liberties	17
8.3 Examples of Overreach	18
9.0 The Threat to Religious Freedom from Anti-Discrimination Law	18
10.0 The Inadequacy of Religious Exemptions in Anti-Discrimination Law	19
11.0 Recommendations to Reform the Anti-Discrimination Act 1977 (NSW)	21
11.1 Religious Vilification (Part 4BA)	21
11.2 Discrimination on the Ground of Homosexuality (Part 4C)	22
11.3 Prohibition of Sexual Harassment (Part 2A)	23
11.4 General Exceptions and Complaint Mechanisms	23
12.0 Conclusion	24
13.0 References	27

## 1.0 Introduction

Enclosed is a copy of our submission in response to the review of the Anti-Discrimination Act 1977 (NSW). This submission presents our position on the current law and our concerns about the ADA's impact on religious freedom and other fundamental liberties.

The Canberra Declaration is a community of Australians committed to a vision of a society where everyone can enjoy prosperity, peace, and freedom rooted in the values that have historically underpinned our nation. Along with our over 95,000 signatories, we urge the Commission to consider the serious risks posed by aspects of the ADA to religious Australians, particularly those seeking to live according to their sincerely held beliefs.

While the ADA purports to prevent discrimination and vilification, in practice it has often been applied in ways that suppress lawful religious expression. For example, Christian schools and religious organisations have faced investigations and legal challenges for upholding doctrinal beliefs about sexuality. Other Australians of faith have encountered similar pressures, not because they acted maliciously, but because they sought to live consistently with their convictions. These cases demonstrate that the ADA can inadvertently punish lawful religious expression, undermining the very freedoms it should protect.

We urge the Commission to consider the repeal of the Anti-Discrimination Act 1977 (NSW) as the most effective means of protecting fundamental freedoms. If repeal is not feasible, any amendments should prioritise the right to religious freedom, as enshrined in Section 116 of the Australian Constitution, Article 18 of the Universal Declaration of Human Rights, Article 18 of the International Covenant on Civil and Political Rights, and Articles 2–4 of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. Our specific recommendations to that end can be found in Section 11 of this submission.

Thank you for reviewing this submission. We would welcome the opportunity to present our views directly to the Commission.

## 2.0 Executive Summary

The Canberra Declaration, representing over 95,000 signatories, submits this response to the NSW Law Reform Commission's review of the Anti-Discrimination Act 1977 (NSW) (ADA).

While the ADA may seek to prevent unlawful discrimination and vilification, its current provisions, particularly those addressing sexual orientation, transgender status, and vilification, significantly curtail religious freedom, freedom of speech, and institutional autonomy. These restrictions conflict with Australia's obligations under international human rights instruments, such as Article 18 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, as well as Section 116 of the Australian Constitution, which safeguard religious liberty.

The ADA's broad definitions, such as "public act" in Part 4BA (religious vilification) and subjective "reasonable person" tests in Part 2A (sexual harassment), combined with restrictive exemptions under Section 56, create a chilling effect on lawful religious expression. Christian schools and faith-based organisations face legal scrutiny, reputational damage, and social censure for upholding doctrinal beliefs, particularly on sexuality and marriage, despite acting in good faith.

High-profile cases, like that of Israel Folau, alongside others where individuals such as Christian students, medical professionals, and foster parents faced penalties for expressing their faith, illustrate a pattern of discrimination against religious Australians. Internationally, similar cases—such as legal actions against bakers and florists for declining to participate in same-sex weddings—highlight the global tension between anti-discrimination laws and religious liberty.

The ADA also restricts faith-based organisations' autonomy in employment and education, limiting their ability to hire staff or enrol students who align with their ethos. This undermines their capacity to maintain their religious character, a critical aspect of freedom of association. The low threshold for complaints under Part 9, Division 2, facilitates vexatious claims, imposing disproportionate legal and administrative burdens. Proposals to expand the ADA, as raised in the consultation paper, risk exacerbating these harms, further eroding fundamental freedoms.

We recommend the repeal of the ADA as the most effective solution to restore these liberties. If repeal is not feasible, we propose targeted reforms: narrowing definitions of prohibited conduct, broadening exemptions to protect all faith-based operational decisions, requiring clear intent to harm in vilification and harassment cases, and raising complaint thresholds to deter frivolous claims. These reforms aim to balance protections against discrimination with the preservation of religious freedom, ensuring all Australians can live and work according to their convictions without fear of legal reprisal or social sanction.

### **3.0 International Context for the Proposed Legislation**

The Canberra Declaration strongly supports the international human rights instruments that should guide any anti-discrimination law and to which Australia is a signatory. These agreements uphold human dignity and freedom, balancing protections against discrimination with the right to religious liberty.

In responding to the review of the Anti-Discrimination Act 1977 (NSW), we stress that these instruments protect Australians' rights to live and express their faith without coercion. They ensure anti-discrimination laws respect both individual and communal beliefs. The following subsections outline key agreements shaping the need to safeguard religious freedom in New South Wales.

#### **3.1 Universal Declaration of Human Rights**

Article 18 of the *Universal Declaration of Human Rights* states that:

*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.<sup>1</sup>*

#### **3.2 International Covenant on Civil and Political Rights**

Article 18 of the *International Covenant on Civil and Political Rights* affirms that:

*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.<sup>2</sup>*

### **3.3 Declaration on the Elimination of Intolerance and Discrimination**

The United Nations General Assembly also passed a resolution entitled *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*. Articles 2-4 are especially prescient in the current Australian context:

#### *Article 2*

- 1. No one shall be subject to discrimination by any State, institution, group of persons, or person on the grounds of religion or belief.*
- 2. For the purposes of the present Declaration, the expression "intolerance and discrimination based on religion or belief" means any distinction, exclusion, restriction or preference based on religion or belief and having as its purpose or as its effect nullification or impairment of the recognition, enjoyment or exercise of human rights and fundamental freedoms on an equal basis.*

#### *Article 3*

*Discrimination between human beings on the grounds of religion or belief constitutes an affront to human dignity and a disavowal of the principles of the Charter of the United Nations, and shall be condemned as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and enunciated in detail in the International Covenants on Human Rights, and as an obstacle to friendly and peaceful relations between nations.*

#### *Article 4*

- 1. All States shall take effective measures to prevent and eliminate discrimination on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, economic, political, social and cultural life.*

*2. All States shall make all efforts to enact or rescind legislation where necessary to prohibit any such discrimination, and to take all appropriate measures to combat intolerance on the grounds of religion or belief in this matter.<sup>3</sup>*

## **4.0 Religious Protections Afforded in the Australian Constitution**

Dr Augusto Zimmermann, Professor of Law at Sheridan College in Perth, Western Australia, makes the case that the Australian Constitution itself affords all Australians religious protections that are threatened by the ADA:

*Among these rights deemed implied in the Constitution is a freedom of communication on political and public matters, which the court has found as a means of invalidating legislation on constitutional grounds. This freedom operates as a restriction on federal and state legislative powers, creating a corresponding immunity from legislative control.*

*The implied freedom should be considered in light of the Constitution's explicit protection of religious people and organisations against unwanted intrusions of the Commonwealth Government. Indeed, the provision which is found in section 116 of the Constitution is aimed at establishing a substantive limitation on the powers of federal Parliament to legislate with respect to religion. The object of the section is therefore to preserve the free exercise of religion in all its forms and manifestations, be they political or not. Section 116 provides:*

*The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.*

*In Church of the New Faith v Commissioner of Pay-Roll Tax (Victoria) (1983), Chief Justice Mason and Justice Brennan stated the following about religious freedom:*

*Freedom of religion, the paradigm freedom of conscience, is of the essence of a free society. The chief function in the law of a definition of religion is to mark out an area within which a person subject to the law is free to believe and to act in accordance with his belief without legal restraint. Such a definition affects the scope and operation of s. 116 of the*

*Constitution and identifies the subject matters which other laws are presumed not to intend to affect. Religion is thus a concept of fundamental importance to the law.*

*It cannot be overlooked that religion informs the views of many Australians about politics and government. Professor Adrienne Stone of Melbourne Law School explains that religious speech is in its nature quite often intertwined with 'political opinions, perspectives, philosophies and practices'. According to Professor Nicholas Aroney of Queensland University, indeed, 'religion, religious beliefs and religious practices (as well as irreligious beliefs) not infrequently inform, or are tied up with, political perspectives, philosophies and practices'.*

*If religious and political matters are so often intertwined, then one must conclude that any logical derivation to the limitation imposed on freedom of communication inspired by a religious perspective also amounts to a violation of the broader protection to freedom of political communication implied in the Australian Constitution. After all, as noted by the Rev Dr Robert Forsyth:*

*Religion is rarely simply a matter of private and personal issues alone. It involves communities and institutions and thus the need to give shape to the distinctive identity of those communities and institutions.*

*In other words, since views about religion may so very well influence government policies through Australia's constitutionally-prescribed system of representative and responsible government, section 116's protection of the free exercise of religion should also encompass freely communicating about a religion's perspective of government and/or political matters.<sup>4</sup>*

## **5.0 The Contribution of Christianity to Australia's Religious Freedoms**

There are groups agitating against protections for religious freedom, many of which seem to have a particular distaste for the Christian faith which has played such a vital role in the shaping of modern Australia. This is not only unwarranted—it is unwise, given the unique role that Christianity has played in affording them and all Australians the freedoms we so enjoy.

This is not to say that Christians or Christian belief is to be privileged in Australian society or law. But it is to acknowledge and honour the indispensable contributions of Christianity such that we shouldn't, as a matter of course, be opposed to it. Indeed, without Judeo-Christian values, it is unlikely they or any of us would place the value on human rights that we do:

*Subsequent to white settlement the foundational moral, ethical and cultural influence within Australia has been Christianity. This has resulted in a substantial legacy for our nation in many areas and has shaped the moral and ethical underpinning of our society. Christian beliefs themselves promote tolerance and understanding towards other faiths and views and this has been reflected in the general level of tolerance and acceptance within our society. The great Australian tradition of 'a fair go' itself owes much to our Christian heritage.<sup>5</sup>*

Consider the words of Kevin Donnelly, a senior research fellow at the Australian Catholic University, about the significant ways in which Christianity has shaped this nation—and therefore, why religious faith is worthy of protection to secure a prosperous future for Australia:

*While the figure is now about 62 per cent, at Federation about 90 per cent of the Australian population professed the Christian faith. Our parliaments begin with the Lord's Prayer and the Constitution's preamble includes the words "Almighty God".*

*As shown by the national day of mourning in response to the tragedy involving the shooting down of Malaysia Airlines flight MH17 over Ukraine, with the loss of 28 Australians, it is still customary to turn to religion, especially Christianity, to help deal with loss, grief and pain.*

*As in Britain, Christian organisations in Australia such as the Salvation Army, the Brotherhood of St Laurence, the St Vincent de Paul Society and Caritas Australia work tirelessly to alleviate poverty and suffering, here and overseas.*

*Catholic schools enrol 20 per cent of students around Australia, saving taxpayers and governments millions of dollars, and if Christian hospitals and aged-care facilities did not exist, Australia's health and welfare systems would collapse. Democratic concepts associated with the Westminster parliamentary system — such as one person, one vote; separation of powers; governments being formed in the people's house; and free and open elections — evolved across hundreds of years and ensure our freedom and liberty.*

*Legal concepts such as innocent until proven guilty, the right to a free and timely trial, habeas corpus and the right to be judged by one's peers are also distinctive. Such rights are denied in totalitarian regimes, leading to a situation, as noted by English judge Lord Denning, where "the rulers are not under God and the law. They are a law unto themselves. All law, all courts are simply part of the state machine. The freedom of the individual, as we know it, no longer exists."*

*The reality is that millions across the world — in Africa, South America, the Middle East, Indochina and the former Soviet Union — are denied rights we take for granted. It is also true that extreme interpretations of Islam are hostile to democratic beliefs and values. As noted by US-based watchdog Freedom House, countries such as Saudi Arabia, Syria and Iran are oppressive regimes in which women, in particular, are denied basic rights. The barbaric and evil acts committed by Islamic State in the name of religion, such as beheading 21 Christians, also provides a chilling example of what happens when individuals and groups turn their backs on civilised values.*

*In the same way that 22 Christian leaders are arguing that Judaeo-Christianity is central to British identity, there are Australian religious organisations arguing, in the context of last year's review of the Australian national curriculum, of which I was co-chairman, that religion is central to our way of life.*

*The Catholic Education Commission of Victoria's submission to the review states that Judaeo-Christian beliefs and values are "the foundations of our liberal democracy". The Anglican Education Commission argues: "Our justice, government, education, health and general welfare systems are all established on the Judaeo-Christian foundation of this civilisation."*

*Another submission received, with 1647 signatures, states that students in government and non-government schools should learn about Christianity "in a way that is fair and balanced".*

*Those critical of Judaeo-Christianity often argue that Australia is a secular society as the Constitution states that the commonwealth "shall not make any law for establishing any religion, or for imposing any religious observance". While true, such a statement does not*

*mean that religion should be banished from the public square or ignored by the curriculum.*

*To attempt to do so not only misinterprets the Constitution, it also weakens and undermines the liberal, democratic institutions and values that ensure Australia, compared with many countries, is such a peaceful, prosperous and just society.<sup>6</sup>*

## **6.0 Defining Religious Freedom in the Australian Context**

Religious freedom is best understood as a core expression of freedom of conscience—the right of every person to live in accordance with their deeply held moral convictions. These convictions shape an individual’s sense of right and wrong, and the ability to act and speak according to them is essential to human dignity. Australian courts have recognised religious liberty as the “paradigm freedom of conscience” and “the essence of a free society,” reflecting the value of allowing diverse beliefs to flourish in a pluralistic community.

In practice, religious freedom is not a single, isolated right but a combination of complementary freedoms—including freedom of speech, association, worship, and the ability to teach and live according to one’s faith. It is characterised by the absence of coercion: the state should not compel a person to act against their beliefs, nor should it impose restrictions that prevent individuals or faith communities from expressing their religious worldview.

This freedom extends to both individuals and religious organisations. Faith-based bodies must be able to maintain their beliefs and standards in their operations, such as appointing staff who share their convictions or teaching doctrines consistent with their faith. Restricting this capacity undermines the very purpose of such organisations.

Religious liberty is also inseparable from freedom of speech. The right to hold a belief is meaningless if one cannot express it, even when those views are unpopular. Suppressing lawful expression in the name of preventing offence erodes open debate and fosters resentment. As with other fundamental freedoms, limits to religious liberty may be justified where practices cause direct harm to the life, safety, or property of others. However, mere disagreement, moral disapproval, or the perception of offence should not be grounds for curtailing these freedoms.

Ultimately, the protection of religious freedom requires preserving the broader “ecosystem” of civil liberties. It is not the right to impose beliefs on others, but the right to live faithfully without being forced to abandon one’s convictions—a freedom that benefits the whole of society, religious and non-religious alike.

## **7.0 The Need to Protect Religious Freedom in NSW**

Across Australia, there is growing recognition among people of faith and community leaders that religious freedom must be safeguarded in law to preserve the ability to live and act according to one’s beliefs.

This urgency stems from increasing tensions between anti-discrimination laws, such as the Anti-Discrimination Act 1977 (NSW), and the fundamental rights of individuals and faith-based organisations to express their convictions without fear of legal or social penalty. High-profile cases, like that of Israel Folau, have highlighted how current laws can penalise lawful expressions of faith, sparking widespread concern among Australians who value the freedom to hold and share their beliefs.

These concerns, echoed by religious leaders, legal experts, and ordinary citizens, underscore the need for legislative reforms that protect religious liberty while maintaining fairness for all. The following subsections explore government responses, voices from religious communities, real-world examples of discrimination, and calls for stronger legal protections in New South Wales.

### **7.1 Commonwealth Government Response**

The Commonwealth Government acknowledged the need for stronger religious freedom protections in their response to the Religious Freedom Review in 2018:

*Freedom of religion is not subordinate or secondary to the other rights which it will necessarily be balanced with. Ultimately, in consideration of the best manner in which to frame, balance and protect co-existing rights, the Australian Government considers there is a requirement to ensure some enhanced standing protection for Australians’ right to freedom of religion, by giving it more weight in our community than it currently receives.*

*As the Religious Freedom Review noted, respecting diversity, including with respect to religious belief, is not only fundamental to recognising the inherent dignity of the individual, but also contributes to the democratic life of our community. The Religious Freedom Review further noted that there is no standalone law that gives comprehensive effect throughout Australia to the human right to freedom of religion.<sup>7</sup>*

## **7.2 Concerns from Religious Leaders**

The Government is not alone in this observation. Archbishop Anthony Fisher, the Catholic Archbishop of Sydney, has expressed significant concern at the present state of affairs in Australia:

*We cannot take the freedom to hold and practice our beliefs for granted, even here in Australia... Powerful interests now seek to marginalise religious believers and beliefs, especially Christian ones, and exclude them from public life. They would end funding to faith-based schools, hospitals and welfare agencies, strip us of charitable status and protections.<sup>8</sup>*

John Steenhof, Managing Director of the Human Rights Law Alliance, which is aligned with the Australian Christian Lobby, joins the chorus of those calling for a legal framework that better protects religious freedom:

*The fundamental freedoms of Christians as individuals and as groups to speak, think, exercise conscience and associate in public and private are increasingly under threat as Australian society becomes more fragmented and moves away from its Christian roots, as the volumes of federal and state legislation expand at an exponential rate and as employment contracts morph into manifestos of groupthink.<sup>9</sup>*

## **7.3 Case Studies of Discrimination**

A document released in conjunction with the Human Rights Law Alliance expressed similar concerns, and provided a list of recent cases in Australia that highlight the pressing need for Australia's laws — including the ADA — to undergo reform in order to strengthen religious freedom:<sup>10</sup>

*In the recent Federal election, ordinary voters spoke and told Scott Morrison that religious freedom is an important issue. The sacking of Israel Folau for sharing his faith on social media has roused the public, both Christian and non-Christian. Churches need to know that Israel's case is not an isolated incident. Religious freedom is under threat.*

*Christians throughout Australia are increasingly facing discrimination because of their religious beliefs and being dragged through tribunals and courts, disciplined by governing bodies, investigated by government departments, losing their jobs and being branded as intolerant and bigoted. Examples of cases throughout Australia in which the Human Rights Law Alliance has assisted include the following (no real names used):*

**Andrew** is a Christian student at a large Australian university. Andrew was suspended from university for expressing a Biblical view of sexuality when asked by a classmate. This decision was only reversed through time consuming and stressful legal action.

**Jared** is a GP. An anonymous complaint was made to the medical board by someone who was not a patient. Jared's crime was that he had posted orthodox Christian beliefs and scientific facts about sexuality and gender issues. Jared is currently fighting an investigation by the medical board and may lose his ability to practise medicine.

**Chris and Mary** are Christian parents who made an application to foster children between the ages of 0 -5 with a fostering agency. They were rejected as "unsafe" as foster parents because of their orthodox Christian views on sexuality and gender.

**Dan** is a teacher. Dan posted links to articles about homosexual marriage leading up to the marriage postal vote. Dan was reported to the Department of Education who subjected Dan to a long investigation which was only terminated when he obtained legal help.

**Barry** is a tertiary lecturer. Barry was disciplined for responding to blasphemy by asking students "Oh, do you know Jesus? Because I do". Barry has been officially warned by his employer not to share his religious beliefs and has been threatened with discipline and termination. He is getting legal assistance to ensure his job is protected.

**Clara** is a mental health counsellor. She lost her teaching qualification when a progressive political activist reported her Christian views on sexuality and gender that had been shared

*on social media videos. Despite the fact that Clara has never had a complaint from anyone, she has been stripped of her livelihood.*

#### **7.4 Calls for a Religious Freedom Act**

Senator Concetta Fierravanti-Wells, Federal Senator for New South Wales, has voiced her disquiet about the growing issue of religious discrimination:

*I believe that the recent election has reinforced the need for more immediate legislative action. This is vitally important to not only address our concerns but afford protection against these constant incursions from Labor, the Greens and their acolytes.<sup>11</sup>*

Indeed, so great are her concerns about the state of religious freedom in Australia that Senator Fierravanti-Wells stood before the Federal parliament to call for a petition for a Religious Freedom Act, explaining that:

*The Israel Folau matter has hardened my resolve on this issue. Whilst this situation relates to employment issues, the greatest story—with far-reaching ramifications—is about freedom of speech and freedom to express one's beliefs. Indeed, I'm heartened to see the extensive financial support given to Israel Folau. It not only demonstrates the overwhelming support in the community for him but also shows that there are Australians who may not agree with his views but are prepared to support his fundamental right to express those views.*

*The results of the election had their antecedents in the same-sex marriage debate. During that debate I warned that religious freedom issues needed to be considered before we enacted same-sex marriage. My warning was prescient. Many Australians voted yes on the understanding that religious freedoms would be protected. Today we are seeing the ramifications of not having sorted out these issues at that time.*

*The Israel Folau issue has heightened already existing concerns about incursions on religious freedom. Ordinary people of faith are now, understandably, asking the question: if I quote the Bible, will it get me into trouble? This is now the discussion at the kitchen table for Australians who hold religious beliefs. We need to make sure that religious persecution of Israel Folau does not happen again.*

*Although religious freedom is a right enshrined under international law, there has been a continued push—especially by Labor, the Greens, and their acolytes—for laws to take away rights of Australia's faith based communities. I continue to work with religious leaders and faith based communities and advocate strongly for standalone religious freedom protection legislation.*

*I believe that the recent election has reinforced not only the need for more immediate legislative action but also the need for a more amplified and comprehensive referral...*

*A religious discrimination act is not sufficient. It would be defensive in nature and limited to protecting against acts and practices by others which are discriminatory on the grounds of religion. A religious discrimination act would fall well short of the expectations of the 'quiet Australians' who voted for us. We cannot let them down.*

*I conclude by thanking those many Australians who continue to support my push for a religious freedom act and who are supporting the petition. I quote one who recently wrote to me:*

*Understanding and tolerance are fostered in an environment where ideas can be shared. As one of the quiet Australians who voted for the Liberal government, this issue is much broader than who will go to hell or not.*

*This is about the ability for all sectors of the community to think independently; speak and share ideas—popular and unpopular; for the ability to listen to alternate views and be listened to; for an environment where all Australians can think, speak and listen to diverse views.*

*Does that mean we will always agree? No. But it does mean that we should always be able to have a mature conversation and public debate without silencing or punishing the other side. This, is what we're at risk of losing as a nation. This, is what we need to fight for.*

*Today it is me as a Christian, tomorrow it could be you or those close to you. And this is why so many Australians are weighing in to support Israel Folau. This is not just about freedom of religion for a select group, but freedom of thought, conscience and belief for all Australians.*

*In conclusion, I urge you to go forth and ensure we collect as many signatures as possible, to keep the pressure on this Senate and this parliament to take decisive and long-term action to protect religious freedom once and for all.<sup>12</sup>*

Though Senator Fierravanti-Wells' proposal for a Religious Freedom Bill is outside the scope of the proposed NSW ADA before us, her concerns provide important context for this issue.

Finally, speaking of the importance of religious freedom, policy analyst Dr. Jennifer Oriel has correctly observed that:

*Religious freedom is the subject of private conscience and a public good that provides for civil society by limiting state authority over family, friendships and faith. It is essential to liberal democracy and the flourishing of liberty. In the Western context, religious freedom empowers citizens to live according to their innermost beliefs while respecting the basic rules that govern open society. Without it, we would be unfree.<sup>13</sup>*

## **8.0 The Status Quo of Anti-Discrimination Law in Australia**

Anti-discrimination law now influences almost every area of Australian life, shaping the way businesses operate, how children are educated, how goods and services are provided, and the extent to which people can freely express their views.

### **8.1 Historical Development**

Despite its broad impact, the first Commonwealth anti-discrimination statute was introduced only in 1975, and some protections—such as those under the Age Discrimination Act 2004—are relatively recent.

The growth of these laws has been driven by the rise of identity politics, increasing demands for protection of particular groups, and a legislative tendency to draft broad, open-ended provisions that courts and regulatory agencies later interpret expansively.

Yet the record of anti-discrimination provisions (ADPs) in achieving their intended goals is mixed. For instance, the gender pay gap narrowed significantly before the Sex Discrimination Act 1983 came into force, but has remained largely static since. Similarly, disability

discrimination laws, both in Australia and overseas, have sometimes correlated with a decline in workforce participation among people with disabilities.

## **8.2 Conflicts with Established Liberties**

These newer statutory rights often conflict with older, well-established liberties such as property rights, freedom of association, and freedom of speech. In some cases—such as under the Fair Work Act 2009—the burden of proof is reversed, placing it on the respondent rather than the complainant.

In recent years, the Commonwealth Attorney-General has twice proposed consolidating and harmonising state and federal ADPs. The legalisation of same-sex marriage has also sharpened tensions between anti-discrimination protections and religious conscience rights, heightening calls for legislative reform.

Any such reform should learn from the shortcomings of the past four decades. ADPs should be drafted narrowly and directed toward specific, measurable policy objectives rather than broad symbolic aims. Lawmakers should also preserve space for civil society to resolve complex social disputes through dialogue and voluntary arrangements, rather than relying solely on legislative or judicial intervention, which can often be blunt and coercive tools for addressing deeply contested issues.

Moreover, anti-discrimination laws often create distinct classes of citizens with special legal protections, which can conflict with the principle of equality before the law. For example, the New South Wales Anti-Discrimination Act 1977 explicitly forbids discrimination on the basis of homosexuality, whereas other states rely on broader, more generic protections against sexual orientation discrimination. This illustrates a general feature of such laws: certain groups receive privileges that others do not.

Historian and legal scholar James Q. Whitman traces a similar logic in European hate speech laws, linking modern concepts of protected minorities to the old aristocratic notion of those “capable of being insulted.” In both cases, some members of society are legally set apart, creating classes with special rights.

This approach conflicts with the traditional Anglosphere principle that the law should apply equally to everyone, regardless of status or circumstance. Under the Fair Work Act, for

instance, employees in one of the 13 protected classes can challenge adverse workplace actions through federal channels, while others cannot. Similarly, most Australians may experience poor treatment from service staff, but only members of protected classes can seek legal redress.

In short, while anti-discrimination law aims to protect certain groups, they often inadvertently create unequal legal treatment and new forms of privilege.

### **8.3 Examples of Overreach**

There have also been cases where the application of anti-discrimination laws have extended into surprisingly minor or unexpected areas. For example:

- In Victoria, an employer was ordered to pay \$2,500 after making remarks about an employee's weight, highlighting that "physical appearance" is considered a protected attribute under state law.
- An auto-electrician in Victoria filed a complaint under protections for "lawful sexual activity" after being teased by colleagues as "Romeo" for talking about his romantic life.
- The Tasmanian Anti-Discrimination Commission initially found that the Archbishop of Hobart had a case to answer when a Greens activist challenged a pamphlet stating the Catholic Church's views on marriage, though the complaint was later withdrawn.
- Employers are now advised against asking female job applicants about marital status or family plans, as the Sex Discrimination Act forbids collecting such information if it could be used to treat someone less favourably.

In short, anti-discrimination law often extends well beyond preventing racial or gender bias, sometimes regulating matters that might seem minor or personal, and often favouring certain groups while leaving others unprotected from similar mistreatment.

## **9.0 The Threat to Religious Freedom from Anti-Discrimination Law**

Religious freedom is intrinsically linked to other fundamental liberties, including freedom of conscience, freedom of association, and freedom of speech. As a result, laws that regulate behaviour in the name of equality—particularly anti-discrimination laws—can unintentionally restrict the exercise of religious freedom.

Anti-discrimination instruments, such as the ADA, establish broad prohibitions on conduct that are discriminatory against certain protected attributes. While these protections are important, they can come into tension with the rights of faith-based organisations and individuals acting according to their beliefs.

For example, in 2014, Christian Youth Camp Limited in Victoria was found to have unlawfully discriminated under the Equal Opportunity Act 1995 (Vic) by refusing to rent its camp facilities for a program involving same-sex attracted young people. The case illustrates how anti-discrimination law can limit the ability of religious organisations to make decisions consistent with their faith.

Similar conflicts have arisen internationally. In the UK, a small bakery faced penalties under Northern Irish sexual orientation laws for refusing to decorate a cake promoting same-sex marriage. In Canada, Trinity Western University temporarily lost accreditation due to a covenant requiring students to uphold traditional Christian marriage principles. In the United States, florists, bakers, photographers, and wedding venue operators have faced legal action for declining to participate in same-sex weddings. These examples highlight the practical pressures on religious individuals and institutions when anti-discrimination laws impose upon sincerely held beliefs.

While the ADA includes limited exemptions for religious purposes, these have often proven to be insufficient to fully protect religious freedoms. Cases in Australia and abroad demonstrate that, without careful safeguards, broadly framed anti-discrimination provisions can inadvertently restrict religious expression, employment choices, and business operations.

This tension underscores the need for the ADA to balance protections for religious liberty in a way that avoids penalising individuals or organisations for acting consistently with their faith.

## **10.0 The Inadequacy of Religious Exemptions in Anti-Discrimination Law**

Religious exemptions in the ADA generally apply only where an act or practice is “reasonable” to comply with the doctrines, tenets, or teachings of the relevant religion, or where it is necessary to avoid offending the religious sensitivities of adherents. While these exemptions are necessary, they are insufficient in several respects.

Exemptions are vital for religious institutions and for the wider community. Faith-based organisations operate schools, hospitals, and social services that provide essential support to society, particularly to vulnerable populations. If such organisations were required to conform to particular views on gender identity, sexual orientation, or other social norms, they could be forced out of public service provision altogether.

Beyond operational concerns, exemptions are critical for preserving the religious character of institutions. Faith-based schools, for example, must maintain control over employment and association decisions to ensure that they can pass their beliefs and values to students as intended. Removing these protections risks eroding the public presence of religious communities and undermining the fundamental right to freedom of religion.

Current exemptions, while necessary, have significant limitations:

**Scope Restricted to Institutions:** ADA exemptions do not adequately extend to individuals or proprietors of commercial enterprises seeking to operate in accordance with their religious beliefs. Even incorporated religious bodies may fail to meet the legal criteria for protection, as illustrated by *Christian Youth Camp Limited v Cobaw Community Health Service*, where the faith-based organisation could not rely on the exemption despite being established for religious purposes. Though it occurred in a different jurisdiction, the same principle applies in NSW.

**Judicial Determination of Religious Doctrine:** Current ADA exemptions require courts to assess what constitutes a legitimate religious belief or practice. In the *Christian Youth Camps* case, the majority of the Supreme Court of Victoria effectively limited the definition of Christian doctrine to the historic Apostles' and Nicene Creeds, disregarding the organisation's understanding of its own faith. Such determinations force secular tribunals to make theological judgments, creating a very real risk that sincerely held religious beliefs are ignored and thus invalidated.

**Vulnerability of Exemptions:** The structure of the ADA as it stands inherently reverses the presumption of liberty. Conduct is broadly declared illegal, and the burden falls on religious actors to justify their exemptions. This makes exemptions politically fragile and vulnerable to attack. Proposals to remove or review religious exemptions at the Commonwealth level, including by major parties, highlight the ongoing risk. Characterising these exemptions as "loopholes" or privileges is misleading; they are not special legal rights, but protections preserving freedoms that existed prior to the introduction of anti-discrimination laws.

In sum, while exemptions in the ADA are essential to safeguard religious freedom, their current form leaves faith-based institutions and individuals exposed to legal, social, and political pressures that can undermine their ability to act according to their beliefs.

## **11.0 Recommendations to Reform the Anti-Discrimination Act 1977 (NSW)**

In light of the NSW Law Reform Commission's review of the Anti-Discrimination Act 1977 (NSW), we consider it essential to examine how particular provisions of the Act affect the exercise of religious freedom, freedom of speech, and institutional autonomy, and offer recommendations to repair these inadequacies.

While the ADA was originally conceived to prevent unjust treatment and foster social cohesion, its current form contains sections that enable overreach, creating tension between anti-discrimination objectives and the fundamental rights of individuals and faith-based organisations.

The following analysis identifies specific provisions of the ADA, explains their practical and legal implications, and offers targeted recommendations for reform to restore a fair balance between protecting against harm and safeguarding freedom of belief and expression.

### **11.1. Religious Vilification (Part 4BA)**

The religious vilification provisions, particularly Section 49ZE, make it unlawful to incite hatred, serious contempt, or severe ridicule of a person or group based on their religious beliefs or lack thereof through a broadly defined "public act" (Section 49ZD). While intended to prevent harmful conduct, these provisions risk constraining lawful religious expression. The expansive definition of "public act" includes sermons, newsletters, or social media posts by religious organisations, potentially capturing doctrinal teachings on matters such as sexuality or marriage. For example, a Christian school articulating its beliefs in a newsletter could face complaints if perceived as offensive, even when expressed respectfully.

Vilification laws like Section 49ZE can create a chilling effect, discouraging open discussion because "hatred" or "ridicule" can be subjectively interpreted. The burden of proof for exceptions under Section 104, which requires respondents to demonstrate good faith, further increases legal exposure for religious organisations, risking costly proceedings. This tension

highlights how the ADA can inadvertently restrict lawful religious expression, undermining freedom of speech and religion as protected by Section 116 of the Australian Constitution and Article 18 of the ICCPR.

Recommendations:

1. Narrow the definition of “public act” in Section 49ZD to exclude internal religious communications, such as sermons or school policies, unless they intentionally target or harm others.
2. Amend Section 49ZE to require clear intent to incite harm, reducing subjective complaints against non-malicious religious expression.
3. Expand good faith exceptions to explicitly protect religious teachings, shifting the burden to complainants to demonstrate malicious intent.

### **11.2. Discrimination on the Ground of Homosexuality (Part 4C)**

Part 4C prohibits discrimination based on homosexuality in areas including employment, education, and services (Sections 49ZH–49ZN), while Section 49ZT addresses homosexual vilification. These provisions, though aimed at protecting individuals from unfair treatment, can conflict with the ability of religious organisations to operate according to their doctrines. For instance, a Christian school declining to employ a teacher in a same-sex relationship due to its faith-based ethos may face complaints under Section 49ZH, as observed in cases reported by the Australian Christian Lobby.

The exemption for religious bodies in Section 56 is narrow. Courts have interpreted it restrictively, often excluding non-ministerial roles or broader activities such as student enrolment. Such provisions compel religious organisations to compromise their autonomy, infringing on freedom of association. Section 49ZT’s vilification provisions can similarly capture religious sermons or teaching that expresses traditional views on sexuality, even when delivered without malice.

Recommendations:

4. Broaden Section 56 to cover all activities of religious organisations, including employment and enrolment, provided decisions align with doctrinal beliefs and are not malicious.
5. Introduce a balancing test in Sections 49ZG and 49ZT to weigh anti-discrimination protections against religious freedom, ensuring neither right is disproportionately prioritised.

6. Exempt internal policies of religious institutions from discrimination or vilification complaints unless they directly and deliberately harm external parties.

### **11.3. Prohibition of Sexual Harassment (Part 2A)**

Section 22A defines sexual harassment as unwelcome conduct of a sexual nature that a reasonable person would expect to cause offence, humiliation, or intimidation. While protecting individuals from harassment is important, the subjective “reasonable person” test risks capturing religious discussions on topics like modesty, sexual ethics, or biblical sexuality, particularly in educational settings. Religious schools teaching traditional sexual ethics could inadvertently face complaints if content is perceived as offensive.

Unlike vilification provisions, Part 2A contains no specific exemption for religious expression, intensifying the chilling effect on educators and religious leaders, who may self-censor to avoid complaints.

#### Recommendations:

7. Introduce an exemption in Part 2A for conduct arising from sincerely held religious beliefs, provided it is not intended to offend or humiliate.
8. Refine the “reasonable person” test in Section 22A to account for the context of religious settings, protecting doctrinal discussions within faith-based institutions.

### **11.4. General Exceptions and Complaint Mechanisms**

The exemptions framework under Section 56 (religious bodies) and Section 126 (Presidential exemptions) is inadequate for protecting religious freedom. Section 56’s narrow scope leaves organisations exposed in areas such as employment or education, while Section 126’s discretionary, time-limited exemptions generate uncertainty and legal costs. These constraints undermine institutional autonomy and impose excessive regulatory burdens.

The complaint process in Part 9, Division 2, allows broad access for lodging complaints, including representative actions under Section 87C, which can facilitate vexatious claims against religious organisations. Tribunal powers under Section 108, including damages up to \$100,000 or orders for apologies, further exacerbate the risk, potentially penalising good faith religious expression. These laws can enable legal overreach, chilling both free expression and religious practice.

### Recommendations:

9. Expand Section 56 to cover all faith-based operational decisions, ensuring organisations can maintain their ethos without legal risk.
10. Simplify Section 126 to allow permanent exemptions for religious activities, reducing administrative burdens.
11. Raise the threshold for complaints under Sections 89A–89B to require prima facie evidence of harm, deterring frivolous claims.
12. Limit Section 108 remedies to cases of clear malicious intent, protecting good faith religious expression.

In summary, while the ADA may be well-intentioned, its current provisions risk undermining religious freedom by imposing legal exposure on individuals and organisations acting according to sincerely held beliefs.

As it stands, the Act prioritises anti-discrimination over fundamental liberties, creating a chilling effect on religious expression and institutional autonomy. Implementing the proposed reforms would better balance equality with the protection of religious freedom, enabling Australians to live according to their convictions without fear of legal reprisal.

## **12.0 Conclusions and Recommendations**

While the Anti-Discrimination Act 1977 (NSW) may have been enacted with the laudable goal of preventing unjust treatment and fostering social cohesion, its current provisions enable significant overreach. Broad definitions, narrow exemptions, and subjective tests create tension between anti-discrimination objectives and fundamental freedoms, particularly freedom of religion, freedom of speech, and institutional autonomy. Religious organisations, educators, and individuals acting according to sincerely held beliefs may face legal exposure for expressions or decisions that are non-malicious and consistent with doctrinal values.

A key pattern emerges from this analysis: anti-discrimination protections, when framed too broadly or without clear limits, constrain lawful expression and compromise equality before the law. Sections governing vilification, employment and enrolment in faith-based institutions, and sexual harassment illustrate this tension. Excessive regulatory reach and low thresholds for complaints not only risk chilling religious expression but also impose disproportionate administrative and legal burdens on organisations acting in good faith.

Given the extent of overreach and the constraints imposed on fundamental freedoms, the most effective reform would be the complete repeal of the Anti-Discrimination Act 1977 (NSW). While we acknowledge that outright annulment is unlikely in the current political and social climate, such a step would fully remove the legal exposure faced by individuals and religious organisations acting in good faith.

In the absence of repeal, the targeted recommendations outlined above provide a second-best approach to restore balance between protection from harm and safeguarding core liberties. Any reforms of the ADA that do take place should be guided by three overarching principles:

1. **Clarity and precision:** Definitions of prohibited conduct, such as “public act” or “reasonable person,” should be narrowly framed to prevent over-broad interpretation.
2. **Balancing rights:** Anti-discrimination objectives must be weighed against fundamental liberties, ensuring that protection from harm does not disproportionately restrict freedom of religion, speech, or association.
3. **Targeted, context-sensitive protections:** Exemptions and procedural safeguards should recognise the unique role of faith-based institutions and the internal context of religious expression, limiting exposure to complaints to genuinely harmful conduct.

Building on these principles, the following reforms are recommended:

- Expand religious exemptions to cover all faith-based operational decisions, including employment, enrolment, and internal policies, provided they are exercised in good faith.
- Refine vilification and harassment provisions to protect doctrinal teaching and internal religious communications, and clarify that intent to cause harm is required for liability.
- Raise thresholds for lodging complaints and limit remedies to cases of clear malicious intent, reducing frivolous or vexatious claims.
- Simplify administrative mechanisms for permanent exemptions, giving organisations certainty and reducing regulatory burden.

In conclusion, any reform of the ADA must restore balance that is currently lacking, ensuring that all Australians of faith can live and work according to their beliefs without fear of legal reprisal.

In conclusion, the most effective reform would be the repeal of the Anti-Discrimination Act 1977 (NSW). If repeal is not feasible, narrowing definitions, broadening exemptions in good

faith contexts, and applying proportional remedies would create a framework that better safeguards the fundamental freedoms of the people of Australia.

## 13.0 References

- <sup>1</sup> <https://www.un.org/en/universal-declaration-human-rights/>
- <sup>2</sup> <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>
- <sup>3</sup> <https://www.ohchr.org/EN/ProfessionalInterest/Pages/ReligionOrBelief.aspx>
- <sup>4</sup> <https://www.spectator.com.au/2018/03/religious-freedom-of-political-communication-a-constitutionally-protected-freedom/>
- <sup>5</sup> [https://www.alrc.gov.au/sites/default/files/subs/45\\_0rg\\_christian\\_schools\\_australia\\_ltd.pdf](https://www.alrc.gov.au/sites/default/files/subs/45_0rg_christian_schools_australia_ltd.pdf)
- <sup>6</sup> <https://www.theaustralian.com.au/opinion/christianity-the-cornerstone-of-democratic-values/news-story/615b2c0ae575c476c7e5c86a7d159e83>
- <sup>7</sup> <https://www.ag.gov.au/RightsAndProtections/HumanRights/Documents/Response-religious-freedom-2018.pdf>
- <sup>8</sup> <https://www.catholicnewsagency.com/news/australian-government-proposes-religious-discrimination-bill-58475>
- <sup>9</sup> [https://www.hrla.org.au/news\\_gbu1](https://www.hrla.org.au/news_gbu1)
- <sup>10</sup> [https://www.airborne.org/content/6\\_Flyer\\_intro\\_to\\_Senate\\_Petition\\_-\\_Senator\\_Concetta\\_Fierravanti-Wells.pdf](https://www.airborne.org/content/6_Flyer_intro_to_Senate_Petition_-_Senator_Concetta_Fierravanti-Wells.pdf)
- <sup>11</sup> <https://www.smh.com.au/politics/federal/fo-lau-s-law-coalition-mps-push-for-bolder-action-in-a-new-dawn-for-religious-freedom-20190529-p51s9m.html>
- <sup>12</sup> [https://www.aph.gov.au/Parliamentary\\_Business/Hansard/Hansard\\_Display?bid=chamber/hansards/a202374b-d880-4e8a-8342-9c78f73c4014/&sid=0101](https://www.aph.gov.au/Parliamentary_Business/Hansard/Hansard_Display?bid=chamber/hansards/a202374b-d880-4e8a-8342-9c78f73c4014/&sid=0101)
- <sup>13</sup> <https://billmuehlenberg.com/2018/12/17/the-battle-for-religious-freedom-in-australia/>