

SUBMISSION OF THE WILBERFORCE FOUNDATION TO THE PARLIAMENTARY JOINT COMMITTEE ON HUMAN RIGHTS AND THE SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS IN RELATION TO THE *RELIGIOUS DISCRIMINATION BILL 2021* (BILL)

Introduction

1. The Wilberforce Foundation is a coalition of practicing lawyers and legal academics who are committed to upholding the ethical and moral foundations of the common law and of its freedoms.
2. The Foundation is pleased to provide this submission to the Committees in relation to the Bill.
3. The Foundation submits that the Committees recommend that the Bill be passed by both Houses of Parliament with no substantial amendments save for which will enable employees to exercise their inherent rights to speak freely on matters of their faith outside of work hours without facing sanctions by their employers.

The Effect of the Bill

4. The Bill does 5 substantial things:
 - 4.1. It makes it unlawful to discriminate based on religious belief or activity in areas of work (including qualifying bodies and registered organisations), education, access to goods or services, access to premises and such like. These are stock standard anti-discrimination law provisions. There can be no objection to them. Further and very importantly, they plug the gaps in New South Wales and South Australian law, where there is no protection at all from religious discrimination;
 - 4.2. It creates balancing clauses which say that certain conduct is not discrimination and so is not affected by the Bill. These provisions are meant to stop problems which the Bill, by prohibiting discrimination on the ground of religion, may create. For example, if a person of one faith seeks to join a faith based organisation which promotes a different faith and is refused for that reason, the Bill would allow the person to say they have been discriminated against. The Bill would therefore create, and not alleviate, problems for faith based institutions. The balancing clauses fix that problem. This is unexceptional and is equivalent to the Labor Party being able to refuse membership to the PM, Scott Morrison;
 - 4.3. It says that statements of belief which are not intimidating, threatening, harassing or vilifying do not constitute discrimination under state or federal acts and do not contravene section 17 of the *Tasmanian Anti-Discrimination Act*. This section, “has a demonstrated ability to limit the right to freedom of expression, including the expression of religious beliefs (Explanatory Memorandum to the Bill).” The Bill, in providing that moderate statements of belief do not contravene section 17, ameliorates some of the burden that the Tasmanian Act imposes on religious expression.
 - 4.4. it also allows religious educational institutions to give preference in employment to persons who hold a particular faith. This again is entirely unexceptional. Political parties exercise a similar right every day.
 - 4.5. It establishes the Religious Discrimination Commissioner, whose task will be to promote acceptance and understanding of and compliance with the Act. Australia has a Sex Discrimination Commissioner, a Disability Discrimination Commissioner, a Race Discrimination Commissioner, and a Human Rights Commissioner, to name a few. The new Commissioner will fill the gap in relation to religious discrimination.
5. The Bill recognises for the first time in Commonwealth law “the freedom of all people to have or adopt a religion or belief of their choice, and freedom to manifest this religion or belief either individually or in community with others”. This is a codification of Article 18 of

the *International Covenant on Civil and Political Rights (ICCPR)* which is the premier international human rights covenant. The Bill goes on to say:

“In giving effect to the objects of this Act, regard is to be had to:

- (a) the indivisibility and universality of human rights, and their equal status in international law; and
- (b) the principle that every person is free and equal in dignity and rights.”

6. This provision is critical, as to date the only part of the ICCPR that has been substantially legislated federally is the covenant against non-discrimination. That has contributed to imbalance in Australian law and the stifling of religious freedom by anti-discrimination laws. The Bill does a little way to correct that imbalance.
7. The above analysis demonstrates that the Bill is a modest, indeed anodyne Bill, which should be passed by Parliament.

Amendments

8. It has rightly been said that:
“[T]he broad right to ‘practice’ or ‘manifest’ (to use the wording of the European Convention on Human Rights) one’s religion or belief would seem to embrace a huge variety of activity if one takes the view — as many religions do — that all life is inspired by or generated by faith and belief. The most mundane of human behaviours can be ‘spiritualized’ and take on a religious connotation. One is practising one’s religion when one eats, drinks, works, plays and gardens, as much as when one reads scripture, prays or meditates. In Christianity, ‘the righteous will live by faith’, ‘everything that does not come from faith is sin’, and ‘whether you eat or drink or whatever you do, do it for the glory of God’. On this view there is no activity which is not generated by one’s obedience (or disobedience) to God. Countless schools, hospitals, orphanages and shelters have been run by religious organizations as part of their religious mission. Running a café, gymnasium or bookshop could equally be part of one’s religious calling.”¹
9. In *Christian Youth Camps Ltd v Cobaw Community Health Services Limited*² Redlich JA (the dissentient) noted, the major religions reject any separation of religious duty by requiring that conduct in the marketplace carries with it moral responsibility. This is because religious faith is just as much a central tenet of the identity of a person of faith as any other protected attribute in discrimination law.³
10. The all-pervading nature of faith and belief means that protection of discrimination based on faith and belief necessarily involves the protection of a person’s religious speech, within reasonable bounds.
11. This is one area in which the Bill may be improved by limiting the ability of employers to sanction employees for genuinely held statements of religious belief outside work hours. This may be done best by providing that any employer directives as to what a person may say outside of work hours based on their faith is *prima facie*, unreasonable.

Conclusion

12. Religious freedom (and in the context of the Bill, freedom from religious discrimination) as Mason ACJ and Brennan J said in *The Church of the New Faith v Commissioner for Pay-roll Tax (Vic)* is “the paradigm of freedom of conscience, is of the essence of a free society”.⁴
13. This Bill is therefore fundamental to the strengthening of Australia as a free society.

¹ Rex Adhar and Ian Leigh, *Religious Freedom in the Liberal State*, Oxford University Press (2005), 155.

² [2014] VSCA 75.

³ Ibid at [563].

⁴ (1983) 154 CLR 120 at [130].

14. The Foundation is willing to provide oral evidence to the Committees if required.

Dated 16 December 2021

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Barrister