

1 March 2022

Queensland Human Rights Commission  
Level 20  
53 Albert Street  
BRISBANE CITY QLD 4000

**BY E-MAIL:** [adareview@qhrc.qld.gov.au](mailto:adareview@qhrc.qld.gov.au)

Dear Sir/Madam,

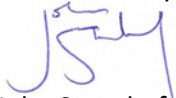
**REVIEW OF QUEENSLAND'S ANTI-DISCRIMINATION ACT – DISCUSSION PAPER**

We refer to the Queensland Human Rights Commission's invitation for submissions in response to the 'Review of Queensland's Anti-Discrimination Act: Discussion Paper'. HRLA welcomes the opportunity to provide submissions to the Commission.

HRLA is Australia's only religious freedom law firm specialising in the areas of freedom of thought, speech and conscience. We regularly have carriage of matters in all States and Territories under Anti-Discrimination and Equal Opportunity Acts and legislation equivalent to the *Anti-Discrimination Act*.

We enclose our submission with this letter. We are happy to appear for any oral hearing to speak to our submission.

Yours sincerely,



John Steenhof  
Principal Lawyer

# Human Rights Law Alliance Submission on ACT Discrimination Law Reform

## Summary Submission

1. HRLA does not support the law reform proposals in the Queensland Human Rights Commission's 'Review of Queensland's Anti-Discrimination Act: Discussion Paper' (**Discussion Paper**). While beneficial reform of the *Anti-Discrimination Act 1991* (QLD) (**Act**) would be welcome, many of the suggested changes in the Discussion Paper are counterproductive and will further erode protections for the fundamental human rights of freedom of thought, speech, expression, religious belief and religious activity.
2. Protections for religious freedom contained in the Act are out of step with Australia's international treaty obligations and in particular those contained in the *International Covenant on Civil and Political Rights* (**ICCPR**) and the *Siracusa Principles on the Limitation and Derogations Provisions in the International Covenant on Civil and Political Rights* (**Siracusa Principles**).<sup>1</sup> Any changes to Discrimination Law in Queensland must ensure that all human rights are provided equal protection under the law.
3. HRLA is concerned that the proposed changes put forward in the Discussion Paper undermine religious freedom rights and would remove essential protections from Queensland's discrimination law regime:
  - 3.1. **Narrowing protections for religious schools will undermine the rights of parents.** Discrimination law currently falls far short of Australia's commitment to the international standard of protection for religious freedom as set by Article 18 of the ICCPR. Parents have the fundamental right to educate their children in accordance with their religious convictions under Article 18(4). Existing protections should be replaced by positive measures that recognise schools prima facie do not unlawfully discriminate when they operate in accordance with their doctrines, tenets and beliefs according to the wishes of parents.
  - 3.2. **The Act must effectively protect religious freedom rights.** Existing protections in the Act are inadequate to effectively protect freedom of religious belief and activity to the requisite standard set by the ICCPR. The Act requires:
    - (a) An improved definitions for religious belief and activity;
    - (b) An improved test for establishing the content of a religious belief;
    - (c) Extended coverage of protections to religious organisations; and
    - (d) Protections for reasonable statements of religious belief against employer sanction that strike a better balance for free speech;

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<sup>1</sup> American Association for the International Commission of Jurists, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* (April 1985) <<https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf>>, last accessed 18 January 2022.

- 3.3. **The proposed objects clause and its content are inappropriate.** The proposed objectives cover ideological perspectives and contested theories about the nature of equality and its relationship to liberty and non-discrimination that are only shared by a minority intelligentsia within elite academia. The Act should include objects that reflect key findings from the Expert Panel Report: Religious Freedom Review (**Ruddock Review**):
- (a) A statement reflecting the equal status of all human rights, including freedom of religion; and
  - (b) A clause that requires the Act to be interpreted in accordance with key international human rights instruments, including the ICCPR.
- 3.4. **Changes to the nature of the burden of proof under the Act should be rejected.** It is a fundamental principle of justice that the plaintiff bears the onus of proof. Not-for-profit organisations such as churches, charities and schools would be placed in a uniquely burdensome position considering their limited resources if the burden of proof were shifted to the respondent.
- 3.5. **Contested ideology should be kept out of the Act.** The Act should not incorporate controversial theories and ideology, such as ‘systemic discrimination’, ‘intersectionalism’ and ‘substantive equality’. These ideas are not widely shared within the Queensland community, are not likely to be socially or politically sustainable and should therefore not be an intrinsic part of Queensland anti-discrimination law.
- 3.6. **The Human Rights Commission’s powers should not be expanded, but should be reformed.** The Commission’s role and investigative powers should be reformed and aligned with recommendations made by the Commonwealth parliamentary Joint Committee on Human Rights in Freedom of Speech in Australia. Current proposals in the Discussion Paper contradict principles underlying the separation of powers and concentrate in the Commission the ability to create and regulate legal rules, handle disputes according to those rules, and enforce those rules through quasi-legislative sanctions. All these abilities should not rest in one institution.
- 3.7. **Positive duties to eliminate discrimination should not be included in the Act.** The suggested inclusion of positive duties gives too much power to the Commission to investigate and compel compliance with ideologically motivated objectives. Without the introduction of appropriate balancing provisions this would negatively affect the ability of religious individuals and groups to conduct their affairs in accordance with their religious beliefs and encourages vexatious abuse of duties and complaints procedures by activists.
4. We address significant areas of concern below, with reference to questions put by the Discussion Paper.

### **The Act must protect the religious freedom rights of schools and parents**

*Question 44: Should the religious educational institutions and other bodies exemption be retained, changed or repealed? If retained, how should the exemption be framed, and should further attributes be removed from the scope (currently it does not apply to age, race or impairment).*

5. Broad protections for religious schools are necessary in the Act. Protections that ensure religious educators can conduct their affairs in accordance with their organisational doctrines, tenets and beliefs ensure that religious communities and parents can exercise their rights under Article 18(4) of the ICCPR. Parents must be able to send their children to schools that provide the educational environment to educate their children in accordance with their religious convictions.
6. The Act currently allows religious schools to refuse applications from prospective students that are not of the same religion as the school.<sup>2</sup> These protections are inadequate. It is unsatisfactory that religious schools are carved out of the general exceptions for religious bodies in section 109(2).
7. General protections in line with the standard set by the *Sex Discrimination Act 1984*<sup>3</sup> are necessary for religious schools to be able to continue to provide an education that reflects the religious mission and identity that parents have specifically chosen for their children.
8. The right to freedom of religious belief and activity must be treated as equal to other attributes protected under the Act. If further attributes are removed from the scope of the exemptions for religious bodies this effectively deems religious belief and activity as subordinate to any other competing right under the Act. This will cause religious freedom to be a 'second tier' right.
9. It should be recognised that when religious schools and other religious bodies act in accordance with their doctrines, tenets and beliefs they are exercising their religious freedom rights under the ICCPR and are prima facie not unlawfully discriminating.

### **The Act must effectively protect religious freedom rights of individuals and organisations**

*Question 29: Does the terminology used to describe any existing attribute need to be changed? For attributes that have a legislative definition in the Act, do those definitions need to change?*

10. The definition of religious belief and religious activity needs to be updated to more accurately reflect the complex nature of the freedom of religion.
11. The act currently sets out "religious belief or religious activity" as a protected attribute in section 7(i) and defines religious belief and activity in Schedule 1 as:
  - 11.1. **religious activity** means engaging in, or not engaging in or refusing to engage in a lawful religious activity;

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<sup>2</sup> *Anti-Discrimination Act 1991* (QLD), s 41(a).

<sup>3</sup> *Sex Discrimination Act 1984* (Cth), s 38(3).

11.2. **religious belief** means holding or not holding a religious belief.

12. This definition leaves religious belief and activity largely undefined. It is likely that Courts will restrict this definition to private personal observances of religious worship.
13. The definition should be expanded to capture every dimension of religious belief and activity, in private, public, individual and corporate observance as set out in Article 18 of the ICCPR and has been discussed above:

**Proposed definition of religious activity**

*religious activity* includes:

- (a) engaging in religious activity of worship, observance, practice or teaching; and
  - (b) conduct, refusal, omission, expression, and association carried out in accordance with, in connection with, based upon, constitutive of, supportive of or a corollary of a religious belief; and
  - (c) seeking, receiving and imparting religious beliefs either orally, in writing or in print, in the form of art or through any other media; and
  - (d) any activity or manifestation motivated by a religious belief,
- whether in public or in private, and whether individually or in community with others.

14. Where someone is required to establish the nature of their religious belief under the Act, the Act should include a test of sincerity or genuineness:

**“Genuineness” test to include in the Act**

*genuinely believes* in relation to a person means the person’s holding of the religious belief is sincere and is not fictitious, capricious or an artifice.

- (1) For the purposes of this Act, a person holds a religious belief (inclusive of the person’s beliefs as to the actions, refusals, omissions or expressions that are motivated or required by, conflict with, accord or are consistent with, that belief):
  - (a) in relation to an individual, if the person genuinely believes the belief;
  - (b) in relation to a religious body, where the religious belief is consistent with the doctrines, tenets and beliefs or teachings adopted and practiced by that religious body.

15. Religious activity in the Act is only protected if it is “lawful”. Lawfulness is not relevant to a consideration of whether something constitutes a religious activity. Where a religious activity is unlawful, this will be excluded from discrimination protection under the direct/indirect provisions of the Act, so including it in the definition of religious activity is unnecessary.

*Question 41: Should the scope of the religious bodies’ exemption be retained or changed? In what areas should exemptions for religious bodies apply, and in relation to which attributes?*

16. Protections for religious schools and other religious bodies should not be narrowed, but strengthened in any reform of Queensland’s discrimination law.

17. The Act currently protects the religious freedom rights of schools and other religious bodies by providing “exemptions” for certain activities that would otherwise be unlawful discrimination under the Act, in sections 41, 48, 80, 90 & 109.<sup>4</sup> This protection is inadequate and couches positive religious rights widely recognised in international law as “exemptions”, as if protecting religious freedom rights is a kind of special treatment.
18. The Commission’s discussion paper covers the possibility of narrowing protections for religious bodies by removing protections for lay representatives of religious communities and questions the need for religious bodies to discriminate on the basis of any attribute.<sup>5</sup> This analysis shows a poor appreciation for the unique nature of religious freedom rights. Any change to Queensland’s discrimination law must ensure that protections afforded to religious freedom reflect the full extent of the scope and nature of the right as articulated in the ICCPR<sup>6</sup>:

**Article 18**

1. 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.
  2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
  3. 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.
  4. 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 moral education of their children in conformity with their own convictions.
19. Article 18 shows that freedom of religious belief and activity is a unique right for a variety of reasons:
    - 19.1. **Freedom of religious belief and activity is both an individual and collective right.** It is an individual right because religious belief is a matter of an individual’s personal conscience and as part of the individual’s motivating conscience, governs their private life and activity. It is a collective right because individuals express their religious belief through forming religious communities. Religious communities are integral to the manifestation of religious belief through communal worship, observance, practice and teaching of the faith.
    - 19.2. **Freedom of religious belief and activity is both a private and a public right.** It is a private right because, as a matter of personal conscience and communal practice,

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<sup>4</sup> *Anti-Discrimination Act 1991 (QLD)*, ss 41, 48, 80, 90 & 109.

<sup>5</sup> Queensland Human Rights Commission, *Review of Queensland’s Anti-Discrimination Act: Discussion Paper* (November 2021) 114-115.

<sup>6</sup> *Human Rights Act 2004 (ACT)*, s 28(2)(a).

people of faith should be able to live in accordance with their religious belief and conscience both privately and within their communities with limited interference by the State. Religious belief and activity is a public right because religious individuals and religious communities must be able to manifest their religious belief through public religious activity.

- 19.3. **Freedom of Religion should only be limited in exceptional circumstances.** The ICCPR sets a very high bar for interference with this right – limiting interference to what is *necessary* for the protection of public safety, health, morals or the fundamental rights and freedoms of others. The Siracusa Principles outline that freedom of religious belief and activity is a non-derogable right, meaning that the right to freedom of religious belief is absolute, and that the right to freedom of religious activity is only to be limited in the most extreme of circumstances.<sup>7</sup>
- 19.4. **Freedom of religious belief and activity includes the right of parents to educate their children in conformity with their own convictions.** Article 18(4) ensures the religious liberty of parents to educate their children in accordance with their deeply held religious convictions. A law that protects religious belief and activity must ensure that parents may manifest their religious belief through the education of their children in conformity with their beliefs.
20. The unique nature of the right to religious freedom of belief and activity means that it needs to be protected in all of the prohibited areas prescribed by the Act, as the individual, communal, private and public aspect of religious freedom touches all areas of public and private life.
21. The exemptions in the Act should not be narrowed, but should be re-framed as positive protections. Positive protections that recognise the unique nature of religious freedom rights would properly reflect that religious bodies do not discriminate when they conduct their affairs in accordance with their doctrines, tenets and beliefs – rather they are exercising a fundamental human right.
22. The freedom to religious belief and activity also should not be subordinated to any other rights protected in the Act, and should therefore be balanced against all other attributes, without any carve-outs for attributes to which exemptions for religious belief and activity in the Act will not apply. This will be discussed further below.

#### **Protecting statements of religious belief**

23. A significant aspect of religious activity is religious speech. Reasonable statements of religious belief should be protected in the Act.
24. The Act should include positive protections for religious speech that recognise religious individuals do not unlawfully discriminate nor unlawfully vilify others when they exercise their

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<sup>7</sup> American Association for the International Commission of Jurists, above no. 1, 12.

positive religious freedom and free speech rights by making public statements about what they believe.

25. The ability to make public religious statements is protected by Articles 18(1) (above) and 19(2) of the ICCPR:

**Article 19**

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
26. In the *Adelaide Preachers* case, two street preachers were convicted under local by-laws prohibiting street preaching in the city without a licence. Chief Justice French outlined the serious importance of the right of free speech at common law and emphasised the ‘principle of legality’. This principle is that when interpreting legislation courts should do so in a way that does not interfere with fundamental common law rights, like free speech.<sup>8</sup>
27. The importance of free speech (and therefore statements of religious belief) has also been recognised at international law. International cases have described the rights as being of paramount importance,<sup>9</sup> and that any restriction on free speech must be *necessary* to protect the rights or reputation of others and not merely a stated purpose of a limitation on free speech.<sup>10</sup>
28. A positive protection for reasonable statements of religious belief would protect religious and non-religious employees from sanction by their employer for making statements of belief in their own time outside of the workplace.
29. This would bring necessary balance to the rights of employees against those of their employer to censure their speech and religious activity outside of work.

*Question 42: Should religious bodies be permitted to discriminate when providing services on behalf of the state such as aged care, child and adoption services, social services, accommodation and health services?*

30. Christian groups were historically some of the first organisations to provide social services to the poor and the sick. The assumption implicit in the above question is that it is the State’s responsibility to provide all services and should be able to dictate the terms on which they are provided.
31. The State does not and should not hold the moral authority over the provision of aid. Religious organisations still provide a large amount of services to the public and the State partners with those organisations by providing them with assistance, usually through funding. Christians, Muslims, Hindus are all taxpayers. It is legitimate that tax funding be used to provide agency

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<sup>8</sup> *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3, [43].

<sup>9</sup> *Marques de Morais v Angola*, CCPR/C/83/D/1128/2002, 29 March 2005, [6.8].

<sup>10</sup> *Faurisson v France*, CCPR/C/58/D/550/1993, 8 November 2006, [8].



to religious service providers when those service providers also pursue the legitimate charitable aim of promoting religion. The State should not be able to dictate to those charities the moral terms on which they provide those services and therefore cause service providers to compromise on their deeply held religious convictions.

32. It is also a hypothetical furphy that religious service providers turn people away or persecute people with particular protected attributes when they provide services, there is no documented evidence of this and posing such a question is a solution in search of a problem.

*Question 43: Should religious bodies be permitted to discriminate when providing accommodation on a commercial basis including holiday, residential and business premises.*

33. A religious accommodation provider should be able to refuse accommodation if doing so would cause them to act against the deeply held religious convictions and doctrines, tenets and beliefs of the provider.
34. There is no meaningful distinction between a religious school, commercial service provider or religious charity that is providing services and conducting its affairs in accordance with the doctrines, tenets and beliefs of the organisation's religion. As stated above, the right to freedom of religious activity is a public right, not just a private right and religious communities manifest their religious beliefs in community not just in religious schools or charities, but in a variety of other entities.
35. These other entities, regardless of what they do, should be afforded the same kind of protections that certain religious service providers like schools and charities are afforded under the current Act.
36. This is because the bar for acceptable limitations placed on the right to manifest religious belief through activity in Article 18(3) of the ICCPR is very high. The legal standard of restricting this right is one of *necessity*, not convenience, or even what is reasonable. Restricting the rights of a religious body, whatever its character, must be necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.<sup>11</sup>
37. Restricting the religious freedom of an organisation merely because it is commercial fails to meet this extremely high standard set by international law.

*Question 16: Should a representative body or trade union be able to make a complaint on behalf of an affected person about discrimination? Why or why not?*

38. Religious bodies can face discrimination by having funding refused or services denied on the grounds of the religious belief of the organisation. It is unacceptable that there is no recourse to relief for religious bodies.
39. Religious belief is a unique human right and protected attribute under the Act, corporations or organisations should not be able to possess most attributes, like age or race – but it does

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<sup>11</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966 (entered into force 23 March 1976) art 18(3).

make sense for a corporation or body to possess a religious belief. This is because, as previously discussed, it is a unique aspect of the freedom of religious belief as set out in Article 18 of the ICCPR that the freedom is not just an individual freedom, but a freedom that individuals express in community. A key part of religious freedom is religious individuals forming religious communities to manifest and live out their religious beliefs. Protections for religious bodies have been recognised in international law and should be protected in Queensland.

40. If religious freedom is to be properly protected by the Act, it must allow these religious bodies to make claims of religious discrimination on behalf of those religious individuals.

### Objects of the Act

*Question 19: Should an objects clause be introduced? If so, what are the key aspects that it should contain?*

41. HRLA does not support the suggested objects clause content outline in the Discussion Paper. An objects clause should only be included in the Act if it will be a helpful interpretive guide that affirms the fundamental principle of international human rights law that all human rights are equal. The expert panel Religious Freedom Review chaired by the Hon Philip Ruddock highlighted the need for religious rights to be given equal treatment and protection under Australian law in Recommendations 2 and 3 of its report.<sup>12</sup>

#### Recommendation 2

Commonwealth, State and Territory governments should have regard to the *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* when drafting laws that would limit the right to freedom of religion.

#### Recommendation 3

Commonwealth, State and Territory governments should consider the use of objects, purposes or other interpretive clauses in anti-discrimination legislation to reflect the equal status in international law of all human rights, including freedom of religion.

42. Any objects clause should incorporate recommendation 2 of the Ruddock Review and should recognise important international instruments that should govern the interpretation of the Act. For example, the objects of the *Sex Discrimination Act* include giving effect to certain provisions of the *Convention on the Elimination of All Forms of Discrimination Against Women* and some provisions of the ICCPR.<sup>13</sup>
43. Objects of the *Age Discrimination Act* require the interpreter to be “bearing in mind the international commitment to eliminate age discrimination reflected in the Political Declaration adopted in Madrid, Spain on 12 April 2002 by the Second World Assembly of Aging”.<sup>14</sup>

<sup>12</sup> Department of Prime Minister and cabinet, *Expert Panel Report: Religious Freedom Review* (May 2018), 1.

<sup>13</sup> *Sex Discrimination Act 1984* (Cth), s 3(a).

<sup>14</sup> *Age Discrimination Act 2004* (Cth), s 3(e).

44. These existing Acts, that demonstrate a better standard, also state that their substantive provisions relating to discrimination “have effect to the extent that the provisions give effect to” specific international instruments.<sup>15</sup>
45. To properly implement the recommendations of the Ruddock Review, an objects clause would require interpretation in accordance with Australia’s international commitments, particularly the ICCPR and the Siracusa Principles.

#### **Changes to the burden of proof and tests for direct and indirect discrimination**

*Question 8: Should the onus of proof shift at any point in the process? If yes what is the appropriate approach?*

46. The burden of proof should not be changed in the Act. It is a fundamental principle of procedural justice that the plaintiff/complainant bears the onus of proving the alleged conduct. The Commission’s power and the supporting power of the Australian State should not be brought to bear on a respondent unless the complainant has sufficiently proved that the facts constitute a breach of the law.
47. Shifting the burden of proof onto organisations like churches, religious schools and religious charities will place an inappropriate burden on organisations that are not-for-profit and under-resourced to meet significant legal complaints.
48. HRLA therefore does not support a presumption of discrimination at the outset, as suggested by the Discussion Paper and as has been implemented in sections 131E and 131F.<sup>16</sup> This places too high a burden on a respondent, particularly under a civil regime that can be actioned by a private civil complainant. This would leave the Act open to easy malicious abuse by activists. There needs to be some barrier to activist misuse of the Act, at the very least a complainant should have to make a sufficient and compelling case to established that discrimination has, on its face, occurred.

*Question 2; Should the test for direct discrimination remain unchanged, or should the ‘unfavourable treatment’ approach be adopted?*

49. The test for direct discrimination in the Act should be changed and the ‘unfavourable treatment’ test used by the ACT and Victoria adopted.
50. As the Discussion Paper outlines, the current comparative test in section 10(1) and the resulting hypothetical comparators often constructed for the purposes of the test can be “difficult to construct and may produce contrived and convoluted result[s].”<sup>17</sup>

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<sup>15</sup> *Sex Discrimination Act 1984* 9Cth), s 9(1); *Disability Discrimination Act 1992* (Cth), s 12(8); *Age Discrimination Act 2004* 9Cth), s 10(7).

<sup>16</sup> Queensland Human Rights Commission, above no.7, 44; *Anti-Discrimination Act 1991* (QLD), ss 131E & 131F.

<sup>17</sup> Queensland Human Rights Commission, above no.7, 32.

51. This problem, best exemplified by the majority decision in *Purvis*,<sup>18</sup> is particularly destructive of religious freedom rights. Religious activities, which are the manifestation of religious beliefs, are likely to be included in a hypothetical comparator under section 10(1).
52. This effectively removes the protection afforded by the direct discrimination test and renders a claim of direct discrimination largely useless for religious claimants.
53. The ‘unfavourable treatment’ test is preferable because it requires the court or tribunal to look merely at whether the claimant was treated unfavourably *because* of their protected attribute.

*Question 3: Should the test for indirect discrimination remain unchanged, or should the ‘disadvantage’ approach be adopted?*

54. As the Discussion Paper identifies is the case with race or disability, religious belief also can require complex statistical evidence in arguing the ‘inability to comply’ proportionality test as part of the indirect discrimination test in section 11(1).<sup>19</sup>
55. The current test requires laborious compiling of technical evidence to establish the ‘higher proportion of people’ requirement. This is an onerous evidentiary burden to place on a complainant who often is in an already vulnerable position regards the respondent.
56. The test is also peculiarly prejudicial to religious belief. The test requires a very large amount of evidence to be adduced by the complainant on the nature of their religious belief and the comparative statistical situation of adherents to particular doctrines adhered to by the complainant. This is much more complex to establish than merely age, race or disability.
57. The test should be amended to require that the imposed requirement has the effect or is likely to have the effect of disadvantaging a person with the same protected attribute as the complainant.

### **Controversial ideology should not be included in the Act**

*Question 7: Is there a need to protect people from discrimination because of the effect of a combination of attributes?*

58. ‘Intersectionalism’, which is an ideological concept with its origins in Critical Theory, should have no place in anti-discrimination law.
59. The anti-discrimination regime is organised in terms of protected attributes, and a claim must be made in respect of one of those attributes. Introducing an ideological ‘intersectional’ understanding to how these claims operate is inappropriate:
  - 59.1. A claim is made on the grounds of a protected attribute, there is no meaningful or substantive difference in the way that a claim would operate in terms of the procedure or desired outcome if the claim is made on one or multiple attributes;

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<sup>18</sup> *Purvis v New South Wales* (2003) 217 CLR 92, [224].

<sup>19</sup> Queensland Human Rights Commission, above no.7, 45.

59.2. Running a claim on the grounds of multiple attributes would only make the claim more difficult, complex and costly for complainants;

59.3. The object of anti-discrimination law is to remove discriminatory behaviour from our society and ensure equal opportunity for all – the purpose behind a complaint is to redress the discrimination that someone has suffered, this aim is not helped by complicating a claim with an intersectional approach.

*Questions 26, 27 & 35: Should there be a new definition of gender identity, and if so, what definition should be included in the Act? Should there be a new definition of sexuality, and if so, what definition should be included in the Act? Should an additional attribute of 'gender' be introduced? Should it be defined, and if so, how?*

60. HRLA does not support changes to the definition of gender identity, sexuality or from introducing an additional attribute of 'gender'.

61. 'Gender identity' is a highly contested area of ideology which is the subject of strong activism by its proponents. The boundaries of this ground are impossible to define due to the contested nature of the term.

62. If 'gender identity' is included as a grounds then effective balancing provisions need to be introduced that will protect other rights already covered by the Act:

62.1. long standing sex-based rights and freedoms well established in Australian law and culture;

62.2. the freedom of speech and practice for those who do not subscribe to gender ideology;

62.3. the rights of self-determination of persons with gender dysphoria who seek to align their feelings with the biological reality of their sex; and

62.4. the fundamental rights and freedoms of religious adherents, religious bodies and religious ethos organisations to operate in accordance with their religious convictions about the fundamental basis for gender identity and its relationship to sex.

### **Functions and powers of the Human Rights Commission**

63. HRLA does not support the expansion of any Commission powers. The Commission's current powers should be reformed to reflect the recommendations made by the Commonwealth parliamentary Joint Committee on Human Rights in Freedom of Speech in Australia.<sup>20</sup> These recommended changes had bi-partisan support.

64. Among changes that should be considered are:

64.1. Requiring a complaint lodgement fee that the complainant loses if it is ultimately decided that the complaint does not have substance;

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<sup>20</sup> Parliament of Australia, *Freedom of Speech in Australia* (28 February 2017), <[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights\\_inquiries/FreedomspeechAustralia/Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights_inquiries/FreedomspeechAustralia/Report)> last accessed 28 January 2022.

- 64.2. Requiring the Commission to bundle multiple complaints into one proceeding where the complainant lodges multiple complaints against the same respondent, and to require the Commission to decline complaints that are of the same substance and subject matter as earlier complaints from the same complainant.
- 64.3. A section that limits the amount of assistance that the Commission can give to a serial complainant;
- 64.4. A section that requires the Commission to give reasonable assistance to complainants should also require that the Commission give equal assistance to respondents;
- 64.5. Amending section 139 to include two additional subsections requiring the commissioner to reject the complaint if the commissioner is:
- (a) of the reasonable opinion that the complaint has no reasonable prospects of success; and
  - (b) satisfied in the circumstances of the case that further inquiry is not warranted.
- 64.6. Allowing the QCAT to exercise discretion to award costs against the complainant if the complainant persists in pursuit of a claim that has already been determined vexatious or lacking in substance by the Commission and the QCAT confirms that it is so.
65. The Discussion Paper makes recommendations of expanding the Commission's powers that are inappropriate considering the fundamental principles that are the foundation for the separation of powers within Australia's parliamentary democracy:
- 65.1. empowering the Commission to undertake own-motion investigations into suspected breaches of the Act;<sup>21</sup> and
- 65.2. empowering the Commission to issue enforceable undertakings and compliance notices that it can then apply to a court or tribunal on its own initiative to have enforced.<sup>22</sup>
66. These powers would give the Commission quasi-judicial and legislative powers that it could exercise on its own initiative. It is inappropriate to give an unelected or unappointed bureaucratic body the ability to make rules, adjudicate those rules and then enforce compliance with those rules.
67. This ability would interfere with the Commission's ability to deal with complaints in an objective and neutral manner. The Discussion Paper's proposals on this matter should be rejected.

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<sup>21</sup> Queensland Human Rights Commission, *Review of Queensland's Anti-Discrimination Act: Discussion Paper* (November 2021) 83.

<sup>22</sup> *Ibid*, 85.

## Positive Duties

*Question 6: Should the Act adopt a positive duty to make 'reasonable adjustments' or 'reasonable accommodations'?*

68. The Act should be amended to require a prospective discriminator to provide reasonable adjustments to accommodate someone's religious belief or activity. This would be consistent with recommendations by the UN Special Rapporteur in its 2014 Report to the UN.
69. The *Disability Discrimination Act 1992* (Cth) requires persons to make reasonable adjustments to accommodate the specific needs of people with disabilities, provided that such adjustments do not cause unjustified hardship.<sup>23</sup>
70. There are clear applications for religious Australians if such an amendment were made. (e.g., Sabbatarian Christians who do not wish to work on the sabbath; Muslims who require accommodation for their daily prayers; religious dietary requirements of various kinds, etc.)
71. A reasonable adjustments provision would give a balanced and reasonable protection to religious Australians in cases where, for example, employers could easily make adjustments to accommodate religious beliefs without placing an undue burden on the employer through significant cost or hardship.

*Question 21: Do you support the introduction of a positive duty in the Anti-Discrimination Act? Should a positive duty apply to all areas of activity in which the Act operates, or be confined to certain areas of activity, such as employment?*

72. HRLA opposes the introduction of positive duties (other than reasonable accommodations) into discrimination law in general, and opposes the introduction of such duties in the QLD Act, because:
  - 72.1. A positive duty imposed on private and public religious institutions could force religious bodies to act contrary to their deeply held religious beliefs and thus breach their Article 18 ICCPR rights; and
  - 72.2. Discussed Commission regulatory powers that would accompany the imposition of positive duties should not be expanded.<sup>24</sup>
73. An ever growing bureaucracy is undesirable. There is no demonstrated compelling need which has justified imposing a positive duty on organisations to eliminate discrimination.
74. Any introduction of positive duties must include balancing provisions for religious organisations so that they are not required to undertake affirmative action in the promotion of causes or beliefs that do not accord with their own religious doctrines and beliefs and practices.

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<sup>23</sup> *Disability Discrimination Act 1992* (Cth), s 5(2) & 6(2).

<sup>24</sup> Queensland Human Rights Commission, above no.5, 78-87.

75. Article 18 rights of religious individuals and organisations to freely practice their religious beliefs would be undermined if suitable balancing provisions were not included.

*Question 56: Are any provisions in the Anti-Discrimination Act incompatible with human rights? Are there any restrictions on rights that cannot be justified because they are unreasonable, unnecessary or disproportionate?*

76. The defence of reasonableness in section 11(1)(c) places an unjustifiable burden on the freedom of religious activity and does not meet the requisite international standard of *necessity* that is set by Article 18(3) of the ICCPR and expanded upon by the *Siracusa Principles*.
77. Reasonableness is far too low a bar. If a tribunal has found that someone has indirectly discriminated against a complainant then they should bear the burden of showing that the rule they imposed was necessary in the circumstances of the case and not merely reasonable.
78. International law only allows interference with freedoms of belief and activity where it is necessary (Article 18(3) of the ICCPR). As a signatory to the ICCPR, Australia should have State laws that affirm this standard.

#### **CONCLUSION**

79. We thank the QLD Human Rights Commission for the opportunity to make a submission and welcome any opportunity to appear in support of this submission.