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| Religious Discrimination Bill – Exposure Draft |
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| **Submission**  **to**  **Australian Government, Attorney-General’s Department** |

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| 2 October 2019 |

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# Introduction

1. The Queensland Human Rights Commission (the Commission) is a statutory authority established under the Queensland *Anti-Discrimination Act 1991*. On 1 July 2019 the name of the Commission was changed from Anti-Discrimination Commission Queensland to Queensland Human Rights Commission.
2. The functions of the Commission include promoting an understanding, acceptance, and public discussion of human rights in Queensland, and dealing with complaints alleging contraventions of the Anti-Discrimination Act 1991 and of reprisal under the Public Interest Disclosure Act 2010. The Commission has educative functions under the *Human Rights Act 2019*, and from 1 January 2020 the Commission will also deal with human rights complaints.
3. The Queensland *Anti-Discrimination Act 1991* prohibits discrimination in various areas of public life on various grounds, including discrimination on the basis of religious belief and religious activity. Vilification on the grounds of religion is also prohibited, and vilification that involves threat of physical harm to person or property is a criminal offence.
4. Complaints of discrimination on the basis of religious belief or religious activity usually comprise between one and two percent of complaints accepted by the Commission. Complaints of religious vilification comprise less than one percent of accepted complaints. A table showing the number of accepted complaints of religious discrimination and religious vilification, and their percentage of all accepted complaints, is in **Appendix A**.
5. In dealing with complaints, the Commission’s focus is resolution through conciliation. Unresolved complaints dealt with under the *Ant-Discrimination Act 1991* may be referred to a tribunal for hearing and determination. For work-related complaints the tribunal is the Queensland Industrial Relations Commission, and for all other complaints the tribunal is the Queensland Civil and Administrative Tribunal. Both tribunals are essentially ‘no costs’ jurisdictions.

# Background

1. In 2017 the Australian Government announced an inquiry into religious freedoms in Australia, conducted by an Expert Panel (the Religious Freedom Review).
2. The Commission provided a submission to the Religious Freedom Review, outlining how the Queensland *Anti-Discrimination Act 1991* has operated in the protection and enjoyment of religious freedom and other human rights. Officers of the Commission also appeared before the Expert Panel.
3. The Australian Government responded to recommendations of the Religious Freedom Review, and is currently consulting on a suite of Exposure Drafts of proposed legislative reforms:

* Religious Discrimination Bill 2019
* Religious Discrimination (Consequential Amendments) Bill 2019
* Human Rights Legislation Amendment (Freedom of Religion) Bill 2019.

1. This submission is confined to the Religious Discrimination Bill 2019 – Exposure Draft (the Bill).
2. The purpose of the Bill is to implement recommendations 3, 15, and 19 of the Religious Freedom Review, namely:

* Recommendation 3 – that governments should consider using objects, purposes or other interpretative clauses in anti-discrimination legislation to reflect the equal status in international law of all human rights, including freedom of religion.[[1]](#footnote-1)
* Recommendation 15 – that the Commonwealth enact a Religious Discrimination Act to render it unlawful to discriminate on the basis of a person’s religious belief or activity, including on the basis that a person does not hold any religious belief.
* Recommendation 19 – that the Australian Human Rights Commission take a leading role in the protection of freedom of religion, including through enhancing engagement, understanding and dialogue.

# Summary

1. The Commission supports the enactment of a Religious Discrimination Act at the federal level insofar as the scheme and provisions of the legislation reflect the existing model of federal anti-discrimination legislation,[[2]](#footnote-2) and do not derogate from existing protections in the Queensland legislation.
2. The Commission supports the following components of the Bill:

* making discrimination on the ground of religious belief or activity unlawful in specified areas of public life;
* defining religious belief to include holding or not holding a religious belief;
* extending unlawful discrimination on the basis of religious belief or activity to include past, present, or presumed religious belief or activity, as well as characteristics associated with particular religious beliefs or activities;
* prohibiting both direct and indirect discrimination on the basis of religious belief or activity.

1. Aspects of the Bill that the Commission does not support include:

* the exception for statements of beliefs;
* deeming certain requirements to be unreasonable (health practitioners, statements of belief made outside of work);
* the scope of the conduct of religious bodies that is exempt; and
* overriding State anti-discrimination legislation.

1. To better protect religious freedom, the Commission considers the Bill should include a prohibition on religious vilification by a provision that balances protection of freedom of speech with the proscription of hate speech and other conduct based on religion. The provision should be modelled on the Queensland provision.[[3]](#footnote-3)
2. The Explanatory Notes claim that the Bill will bring legislative protections for religious belief and activity to the same standard as those already afforded under federal anti-discrimination law to discrimination on the basis of age, disability, sex, sexual orientation, gender identity, intersex status, family responsibilities, marital or relationship status, pregnancy or potential pregnancy, breastfeeding, race, colour, national or ethnic origin, descent or immigrant status.[[4]](#footnote-4)
3. Clause 3(2) of the Bill provides that in giving effect to the objects of the Act, regard is to be had to the indivisibility and universality of human rights and the principle that every person is free and equal in dignity and rights. This principle derives from international human rights instruments.
4. Contrary to the claim that the Bill would provide protections equivalent to existing protections reflecting the equal status of all human rights in international law, the Bill, in its form and its application, would in operation give greater protections for religious belief or activity than other human rights.

# International obligations

1. Australia is a party to the International Covenant on Civil and Political Rights (the ICCPR).[[5]](#footnote-5) This means that Australia has obligations to respect, protect and promote the human rights protected under the ICCPR, including implementing the rights through enacting legislation. Indeed the Bill itself states that the main constitutional basis[[6]](#footnote-6) for it is to give effect to Australia’s obligations under a number of listed international instruments, including the ICCPR.[[7]](#footnote-7)
2. Of particular relevance to the Bill are articles 2(1) (implementation), 18 (freedom of thought, conscience and religion) and 26 (equality before the law and non-discrimination) of the ICCPR.

## Article 18

1. Article 18 provides:
2. 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 one’s 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.
3. No none shall be subject to coercion which would impair his freedom to have or adopt a religion or belief of his choice.
4. 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 other.
5. The States Parties to the present Covenant undertake to have respect for the liberty of parents and where applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.
6. The protection of freedom of religion, belief, and conscience in article 18 is supplemented by the United Nations Declaration on the Elimination of All Forms of Discrimination based on Religion or Belief (1981).
7. Article 18 distinguishes the freedom of thought, conscience, religion or belief from the freedom to manifest religion or belief. The freedom to hold a religion is absolute, whereas the freedom to manifest a religion may be limited. Limitations should protect the rights guaranteed under the ICCPR, including the right to equality and non-discrimination on all of the grounds specified in articles 2, 3, and 26.[[8]](#footnote-8)

## Articles 2(1) and 26

1. Article 2(1) provides:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

1. Article 26 provides:

All persons are equal before the law and are entitled without discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

1. Articles 2(1) and 26 are comprehensive prohibitions on discrimination, which are reinforced by other articles of the ICCPR prohibiting discrimination. Equality before the law and non-discrimination are the cornerstones of the ICCPR.
2. Article 26 is an autonomous right concerned with the obligations regarding legislation and the application of legislation. Legislation must comply with the requirements in article 26 that its content should not be discriminatory. The application of the principle of non-discrimination in article 26 is not limited to those rights which are provided for in the ICCPR[[9]](#footnote-9)
3. This means that the Bill, in its form and in its application, must not derogate from the human right not to be discriminated against. This is an important consideration relevant to the exemptions and exceptions in the Bill. Only proportionate measures designed to achieve a legitimate objective are permissible.
4. Australia is also a party to the International Covenant on Economic, Social and Cultural Rights (the ICESCR).[[10]](#footnote-10) Article 12 of the ICESCR is discussed further in this submission in relation to indirect discrimination and clauses 8(5) and (6). Article 12(1) of the ICESCR provides:

The States Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

# Protection of freedom of religion in Queensland

1. Freedom of religion is protected in Queensland under the *Anti-Discrimination Act 1991*. The preamble sets out Parliament’s reasons for enacting the *Anti-Discrimination Act 1991*, which include extending Commonwealth human rights legislation to give effect to Australia’s obligations under international human rights instruments. The listed instruments include the International Covenant on Civil and Political Rights (the ICCPR).
2. The *Anti-Discrimination Act 1991* prohibits direct and indirect discrimination on the basis of religious belief or religious activity in all of the areas of activity under the Act.[[11]](#footnote-11) ‘Religious belief’ is defined to mean holding or not holding a religious belief, and ‘religious activity’ is defined to mean engaging in, not engaging in, or refusing to engage in a lawful religious activity. Discrimination on the basis of religious belief or religious activity includes discrimination on the basis of a characteristic that a person with the religious belief or activity usually has, a characteristic that is often imputed to a person with the religious belief or activity, a religious belief or activity that a person is presumed to have or have had, as well as a past religious belief or activity.
3. Discrimination on the basis of religious belief or activity is allowed in engaging domestic or child care services to be performed in a person’s home, and the provision of goods or services by not-for-profit associations. This general exemption allows not-for-profit religious bodies to discriminate on any of the 16 grounds under the Act when supplying goods or services.
4. Religious-based schools and educational institutions and religious bodies have other protections that are provided through specific and general exemptions. Schools and other educational institutions may be established and operated wholly or mainly for students of a particular religion or sex, and may provide accommodation wholly or mainly for students of that religion or sex. They may also require teachers to be of the particular religion.
5. Where it is a genuine occupational requirement that people working for a religious body or religious-based school or other educational institution act in a way that is consistent with the religion, the employer may discriminate if the worker openly acts in a way that is contrary to the religion.[[12]](#footnote-12) A body established for religious purposes may discriminate in the other areas on any ground, if the discrimination is in accordance with the doctrines of the religion and is necessary to avoid offending the religious sensitivities of people of the religion.
6. The *Anti-Discrimination Act 1991* also protects against vilification based on religion and other attributes. It is unlawful to incite hatred towards, serious contempt for, or sever ridicule of a person or group of people because of their religion, race, sexuality, or gender identity. Exceptions ensure that the right to freedom of speech is not unreasonably restricted, and provide an appropriate balance of rights.
7. The low levels of complaints (see Appendix A) do not lessen the need for protection of religious belief and activity, and may reflect of low representation of vulnerable people, and an inherent reluctance to complain. The Commission knows from its community engagement work that religious vilification occurs more commonly than is reflected in the complaint statistics, particularly of Muslim women. For example, a Muslim women had to exit a bus when vilified by another passenger, and she is now too afraid to use public transport. There have also been many media reports of people experiencing religious or racial vilification on public transport.
8. Freedom of religion will also be protected in Queensland under the *Human Rights Act 2019*, the main provisions of which are expected to commence on 1 January 2020. Parliament will be required to consider human rights in making legislation, courts and tribunals will be required to apply human rights in performing their functions and in interpreting statutes, and public entities will be required to act and make decisions in a way that is compatible with human rights.
9. Freedom of religion is drawn from article 18 of the ICCPR, and is provided for in section 20, which states:

**Freedom of thought conscience, religion and belief**

1. Every person has the right to freedom of thought, conscience, religion and belief, including —
   1. the freedom to have or to adopt a religion or belief of the person’ choice; and
   2. the freedom to demonstrate the person’s religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private.
2. A person must not be coerced or restrained in a way that limits the person’s freedom to have or adopt a religion or belief.
3. The human rights in the *Human Rights Act 2019* may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.[[13]](#footnote-13) Limitations involve the consideration of proportionality.

# Provisions of the Bill

1. In this part of the submission the Commission outlines concerns about provisions of the Bill.

## Indirect discrimination

1. The Bill departs from the conventional and accepted way of defining indirect discrimination, by deeming certain requirements to be unreasonable, and in the list of factors to be included in considering whether a requirement is reasonable. In doing so, the Bill makes religion more important than other attributes and freedoms, despite the edict espoused in the Explanatory Notes and in clause 3(2) that all human rights are equal.
2. The deeming provisions remove the proportionality test for reasonableness of a term, condition or requirement in indirect discrimination, which would otherwise entail consideration of all other relevant circumstances, including any impact on other human rights. They take certain statements of belief and the conscientious objections of certain health practitioners outside the scope of conduct that is regulated by the Bill. Statements of belief are discussed further below.
3. Requirements that are deemed to be unreasonable are:

* a restriction by a large employer[[14]](#footnote-14) on an employee making a statement of belief outside of work; and
* a rule that does not allow a health practitioner to object to providing a health service because of their religion.

1. This is an unusual way of attempting to regulate terms of employment based on the size of the employer in one case (statements made outside of work) and the type of work in the other (health practitioners).

### Restrictions by large employers on statements outside of work

1. Restrictions by a large employer on making statements outside of work are not deemed unreasonable if the restriction is necessary to avoid unjustifiable financial hardship to the employer. There is no justification for financial hardship being the only reason for a large employer to impose rules about conduct outside of work that would restrict an employee making a statement of belief. These rules are usually imposed for reasons that are not limited to financial gain. They include being a model corporate citizen that respects the rights and dignity of all members of our community.
2. According to the Explanatory Notes, the distinction between large employers and other employers (including government entities) is made because large businesses ‘play a significant role in setting standards of workplace culture across the country’, and the restriction does not apply to government entities because ‘there is a legitimate need to impose codes of conduct on public sector employers to protect the unique qualities of public service (i.e. the proper functioning of representative government relies on an impartial, apolitical public service).
3. The purported rationale for the differential treatment of large employers and the financial hardship consideration is inconsistent, and is not reasonable or justifiable in a democratic society that values human dignity, equality, and freedom.

### Rules relating to health practitioners

1. In the Bill, a rule that would have the effect of restricting or preventing a health practitioner objecting to providing a health service because of a religious belief or activity (a health practitioner conduct rule) is deemed unreasonable. The Explanatory Notes state the rationale for these provisions is ‘the significance of maintaining the ability for health practitioners to conscientiously object to providing certain health services in accordance with their religious beliefs, and [to] recognise that health practitioners should not be forced or coerced into acting in contravention of their fundamental religious beliefs’.
2. Examples in the Explanatory Notes of services where a health practitioner may have a religious conscientious objection are abortion, euthanasia, contraception and sterilisation. However, ‘health service’ is defined very broadly and includes, for example, podiatry and physiotherapy.
3. The Explanatory Notes also state that clause 8(5) recognises that in some circumstances States and Territories allow health practitioners to conscientiously object to provide certain health services, and that statutory conscientious objections provisions are primarily a matter for the States and Territories.
4. Clause 8(5) provides that a health practitioner conduct rule is not reasonable if it is inconsistent with the provision of a relevant State or Territory law that allows the health practitioner to refuse to provide the service if they have a conscientious objection. In Queensland, this is the case under the *Termination of Pregnancy Act 2018*, which requires a health practitioner with a conscientious objection to disclose the objection to the person and refer them to another health practitioner or health service provider.
5. Inconsistency with a law relevant to the health practice would be a relevant consideration under the usual test for considering the reasonableness of a term in an indirect discrimination claim.
6. Clause 8(6) provides that where there is no law providing for conscientious objection by a health practitioner, a health practitioner conduct rule is not reasonable unless compliance with the rule is necessary to avoid an unjustifiable impact on the ability to provide the health service, or on the health of a patient. The example of unjustifiable adverse impact in the Explanatory Notes is the death or serious injury of the person seeking the health service. This suggests that ‘unjustifiable adverse impact’ is a very high bar.
7. The effect of the provision is to override any consideration of competing interests such as the right of every person to access health services. This right is provided for in the International Covenant on Economic, Social and Cultural Rights (ICESCR) at article 12. Australia is a party to the ICESCR and has committed to implement the obligations under it.
8. Article 12 of the ICESCR provides that everyone has the right to the highest attainable standard of physical and mental health. The right to health contains freedoms that include the right to control one’s health and body, including sexual and reproductive freedom, as well as entitlements that include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health. The right to health contains the interrelated and essential elements of availability, accessibility, acceptability and quality. Accessibility requires that health facilities, goods and services have to be accessible to everyone without discrimination.[[15]](#footnote-15)
9. Clauses 8(5) and (6) of the Bill would put Australia in breach of its international obligations to provide the highest attainable health system that is accessible for all equally. They disregard the principle espoused in the Bill and the Explanatory Notes that all human rights are equal. They put the religious views of one class of service provider before the rights of all others.
10. Health service providers would be unable to provide a consistent service adding costs in re-directing or refusing services. Adverse consequences are potentially much greater for Queensland due to its large geography and decentralisation, with people living in many regional and remote areas. Hospitals and health service providers will be placed in the invidious position of being unable to recruit on the basis of religious conscientious objection, yet also unable to have any assurance in the services they can deliver.
11. Some people in Queensland have to travel great distances to access health services, and under the Bill they may be left without services because of their relationship status, sexuality, gender identity, work, race, religion, or any other status that the health practitioner doesn’t approve of because of their religious beliefs. A woman may be unable to obtain contraceptives, taking away her right to sexual and reproductive health. Although not necessarily reflected in complaints to the Commission, in our work we hear many stories of less favourable treatment by doctors of people because of their sexuality or gender identity.
12. In Queensland, from 1 January 2020 health practitioners and health services that are public entities will be obliged to act in a way that is compatible with the human rights in the *Human Rights Act 2019*. The rights include the right to access health services.[[16]](#footnote-16) Queensland has enacted the *Human Rights Act 2019* in recognition of the inherent dignity and worth of all human beings, and the equal and inalienable human rights of all human beings. Queensland is striving to improve protections of human rights, including through access to health services without discrimination. Clauses 8(5) and (6) of the Bill would seriously undermine Queensland’s vision of protecting promoting human rights for all, and building a culture in the public sector that respects and promotes human rights.

### Comments

1. The deeming provisions of indirect discrimination in the Bill constitute an unreasonable incursion into employment law, which allows employers to impose reasonable requirements on the behaviour of workers both inside and outside work, depending on the circumstances relevant to the particular employment.
2. The deeming provisions are not seen in any other federal anti-discrimination legislation nor in the Queensland Act, treating discrimination on the basis of religious belief or activity differently, and elevating the status of religion above, and at the expense of, other protected attributes.
3. There is no justification for allowing health practitioners to discriminate, when other professionals and service providers must provide equal access to their services without discrimination.

## Statements of belief

1. Under current law in Queensland, people have the right to talk about their religious beliefs. Comments or statements of religious belief may be unlawful only where they constitute less favourable treatment of another person because of a protected attribute in an area of activity, or where they are made publicly and incite hatred for, serious contempt of, or severe ridicule of a person or group because of their religion, race, sexuality or gender identity.
2. Queensland case law has established that comments in themselves about an attribute do not constitute discrimination.[[17]](#footnote-17) The law also balances vilification and freedom of speech. In a case where a candidate in a federal election made statements about Islam that constituted vilification, the tribunal found that the exception for comments made in good faith for a prescribed purpose applied.[[18]](#footnote-18)
3. The law in Queensland, in both its form and application, effectively protects the freedom of speech, including religious speech, and proscribes hate speech based on religion and other attributes.
4. The Bill makes special provisions for statements of belief. A statement of belief is defined as a statement about the person’s religious belief made in good faith that may reasonably be regarded as being in accordance with aspects of the religion. It is also a statement by a person without a religious belief that is made in good faith, and is about their belief and is about religion. There is a different standard for statements by religious and non-religious people, treating religion and belief unequally, contrary to the obligations in the international instruments.
5. ‘Good faith’ is a subjective element of intent,[[19]](#footnote-19) whereas the requirement that a belief may reasonably be regarded as being in accordance with the religion is an objective test.
6. The Bill makes special provision for statements of belief in three ways:

* the extent to which a requirement limits a statement of belief is a specific factor in considering whether a requirement is reasonable in the context of indirect discrimination on the basis of religious belief or activity;
* a conduct rule by a large employer that limits the ability of an employee to make a statement of belief outside work is prima facie an unreasonable requirement in the context of indirect discrimination on the basis of religious belief or activity; and
* a statement of belief is not discrimination, including under the anti-discrimination laws of States and Territories (the overriding of State and Territory legislation is discussed further below).

1. The special protections for statements of belief are potentially a license for hate speech. The name ‘statement of belief’ in itself will embolden some to say hateful and damaging things about others in the name of religion, without thinking about the parameters of good faith and accord with the religion. The confines of maliciousness, harassment and vilification are not likely to be on the minds of people wanting to express their strong views about the conduct of others.
2. Although the Explanatory Notes states that nothing in clause 8(3) affects the ability of large employers to regulate religious expression at work, the combination of protections for statements of belief will impact the ability of all employers to regulate the conduct of their workers. Because derogatory or offensive comments may no longer be unlawful, and limiting the freedom to say things in the name of religion may be discriminatory, an employer will find it difficult to take action against a worker who makes derogatory or offensive ‘statements’ in the workplace.
3. The employer will be unable to protect workers who are treated less favourably because of the comments made in the name of religion, conflicting with the employer’s duties of care for the health and safety of its workers. The workers subjected to the less favourable treatment will become excluded, with potential adverse impacts on mental health, morale, and productivity. The workplace will be not inclusive, and will become less diverse.
4. It would also allow customers and students to be subjected to insults or abuse. For example, an unmarried mother being told she will rot in hell for her sins when she’s buying food, a trans person being told they are an abomination as they enter a bus, a teacher saying a gay student is abnormal and will be smitten with AIDS as God’s punishment. These statements would not be discrimination and the employer may be reluctant to impose a rule that would limit the worker’s freedom to make statements of belief.
5. In the guise of protecting freedom of religion, the Bill would unleash and condone hate speech, resulting in a divisive community, and undermining advancements in achieving an inclusive society that respects the dignity and rights of all its members.

## Religious bodies

1. Clause 10 of the Bill provides that certain conduct by religious bodies is not of itself discrimination. This allows religious bodies to discriminate on the basis of religious belief or activity in all of the areas of activity where discrimination is otherwise permitted. The parameters of the exempt conduct are that it is done in good faith and may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the relevant religion.
2. The test for the connection between the conduct and the religion (may reasonably be regarded as being in accordance with) is a departure from the existing test in the *Sex Discrimination Act 1984* (the SDA) and the *Age Discrimination Act 2004* (the ADA) and is broader. The test in the SDA and the ADA is that the conduct:

* conforms to the doctrines, tenets, or beliefs of the religion; or
* is necessary to avoid injury to the religious [susceptibilities (SDA) sensitivities (ADA)] of adherents to the religion.

1. The existing test requires that the conduct conform in fact, rather than ‘may reasonably regarded’, or is factually necessary. The test in clause 10 of the Bill would allow a broader range of conduct.
2. The Explanatory Notes state that it is intended the provision will apply to conduct that has an intrinsically religious character or is fundamental to the practice of religion as well as other conduct in accordance with the doctrines etc. The example in the Explanatory Notes refers to the conduct conforming to the doctrines etc.
3. The Explanatory Notes do not explain the departure from the existing test, although the explanation and example align with the existing test.

## Overriding State and Territory legislation

1. The Bill would override State and Territory anti-discrimination legislation in two ways:

* specifically in clause 41 by providing that a statement of belief does not constitute discrimination; and
* where there is inconsistency between the State or Territory legislation and federal legislation.

1. The discussion in this submission is about Queensland legislation.

### Clause 41

1. For Queensland, the effect of clause 41 is that a statement of belief is not discrimination under the *Anti-Discrimination Act 1991* unless the statement is malicious, would constitute a serious offence (under federal law), or would harass, vilify, or incite hatred or violence against another person or group of persons. The provision does not apply to the vilification or sexual harassment provisions of the *Anti-Discrimination Act 1991*, however there is power for a regulation to prescribe other laws from which statements of belief will be exempt.
2. According to the Explanatory Notes, the rationale for this provision is that ‘a key aspect of protecting the right to freedom of religion is protecting the ability of individuals to explain, discuss and share their fundamental beliefs’, and ‘protecting the freedom to express religious beliefs civilly and as part of public discourse is an essential part of maintaining a healthy and functioning democracy’.
3. The exemption of statements of belief from constituting discrimination goes much further than this reasoning. Private discussions and sharing of beliefs would not of themselves constitute unlawful discrimination. Most of the time the discussion and sharing of beliefs happens outside the areas of activity (e.g. work, education, providing goods and services), and if it is done civilly and respectfully in the areas of activity it is not likely to constitute unlawful discrimination. A public discourse is not likely to be an area of activity under the legislation. The definition of statement of belief is much broader than a discussion and sharing of beliefs, and allows statements by one person (as opposed to discussion) in the areas of activity where discrimination is otherwise prohibited. A statement of belief is also not confined to a statement by an individual,[[20]](#footnote-20) allowing an organisation to discriminate against its workers or customers through a statement of belief.
4. The Explanatory Notes give two examples of statements of belief captured by the clause. Neither of the examples would constitute discrimination. The examples are:

* A statement made in good faith by a Christian of their religious belief that unrepentant sinners will go to hell.
* A statement made in good faith by an Orthodox Jewish person of their religious belief that Jewish converts are not Jewish.

These statements would not be less favourable treatment of a person on the basis of a protected attribute.

1. While the exemption of statements of belief from discrimination law purports to be a protection of an individual’s freedom of religion, the exemption is much broader. The exemption would treat this type of manifestation of a religious belief as being absolute, which is not the case under international human rights law.
2. While the examples in the Explanatory Notes would not constitute discrimination, unlawful discrimination often happens in words said or written. For example, an Aboriginal man suffered significant psychological injury by being referred to as a ‘black fella’ at his workplace.[[21]](#footnote-21)

### Inconsistency

1. Where a Queensland law is inconsistent with a federal law, the Queensland law will be impliedly repealed and the federal law will prevail. Inconsistency may occur where a Queensland law makes unlawful something that is lawful under federal law.
2. In the present context, aspects of the Queensland *Anti-Discrimination Act 1991* and the *Human Rights Act 2019* may be inconsistent with provisions of the Bill because they would prohibit conduct that is not unlawful under the Bill. These include:

* indirect discrimination under the *Anti-Discrimination Act 1991* – refer to the discussions above*;*
* the exemption for religious bodies under the *Anti-Discrimination Act 1991* – the Queensland exemption is narrower in the bodies to which applies, and in the connection to the religious doctrines etc. Under the Bill the test is ‘may reasonably be regarded’ and under the Queensland Act the test is ‘in accordance with’ and ‘necessary to avoid the religious sensitivities of people of the religion;
* the rights to access health services and to non-discrimination under the *Human Rights Act 2019* – health practitioners that are public entities must act consistently with human rights, however under the Bill a health practitioner may refuse health services on religious grounds.

# Conclusion

1. To promote harmony throughout Australian communities freedom of religion should be protected at the federal level through legislation that prohibits discrimination on the basis of religious belief and religious activity, and prohibits vilification on the basis of religion.
2. The Bill appropriately addresses the need for protection against religious discrimination however fails to prohibit religious vilification.
3. The Bill goes too far by placing the right to freedom of religion above other human rights, such as the right to health and the right to non-discrimination. In effect it treats the right to manifest one’s religion as an absolute right, whereas the international instrument that the Bill purports to implement, recognises that the right to manifest a religion is not absolute and may be subject to reasonable limitations.
4. The unusual provisions about statements of belief are not necessary to protect the discussion and sharing of religious and non-religious beliefs. A true discussion is not likely to be hurtful to others and not likely to constitute less favourable treatment of others. Respectful discussions sharing of beliefs are not likely to be discriminatory or contrary to employer conduct rules.
5. The likely practical adverse consequences of the Bill include:

* increasing gaps in access to health services, particularly for people in regional and remote areas;
* diminishing the ability of health service providers to ensure their services are accessible to all;
* limiting the ability of employers to regulate the conduct of employees in their engagement with other employees, and where relevant, customers and students;
* increasing the complexity of workplace laws, necessitating the additional compliance and training costs;
* affecting morale and health of workplaces resulting in reduced productivity; and
* contributing to a divisive community that does not respect diversity and inclusion.

1. Aspects of the Bill are regressive and would encourage and embolden zealots in their hate speech and discordant anti-social behaviour. It could reasonably be expected this ‘licensing effect’ of the Bill will result in increased levels of online abuse and may also result in violence.

# Recommendations

1. The Commission recommends the following amendments to the Bill:
   1. Remove the deemed unreasonable provisions for indirect discrimination and the overriding of anti-discrimination legislation by deleting clauses 8(3), 8(4), 8(5), 8(6) and 41;
   2. As a consequence, delete in clause 5 of the definitions of:
      1. health practitioner conduct rule;
      2. relevant employer; and
      3. statement of belief.
   3. Align the test for conduct by religious bodies that is exempt. In clause 10:
      1. delete ‘may reasonably be regarded as being in accordance with’, and substitute ‘conforms to’; and
      2. add ‘or is necessary to avoid injury to the religious sensitivities of adherents of that religion’.
   4. Add a prohibition on religious vilification that is modelled on the Queensland provision (see Appendix B).

# Appendix A - Complaints statistics – 2012 to 2019

**Table 1: Number and percentage of accepted complaints[[22]](#footnote-22) of religious discrimination and religious vilification**

| Blank cell | **Religious Discrimination** | | **Religious Vilification** | |
| --- | --- | --- | --- | --- |
| Blank cell | **No. accepted** | **%** | **No. accepted** | **%** |
| 2012-2013 | 12 | 2% | 5 | 0.8% |
| 2013-2014 | 12 | 1.9% | 1 | 0.2% |
| 2014-2015 | 13 | 2.4% | 3 | 0.5% |
| 2015-2016 | 5 | 1% | 0 | 0% |
| 2016-2017 | 10 | 1.5% | 2 | 0.3% |
| 2017-2018 | 7 | 1% | 1 | 0.1% |
| 2018-2019 | 15 | 1.7% | 3 | 0.3% |

# Appendix B – *Anti-Discrimination Act 1991*, section 124 Vilification

**124A Vilification on grounds of race, religion, sexuality or gender identity unlawful**

1. A person must not, by a public act, incite **hatred** towards, **serious contempt** for, or **severe ridicule** of, a person or group of persons on the ground of the race, religion, sexuality or gender identity of the person or members of the group.
2. Subsection (1) does not make unlawful—
3. the publication of a fair report of a public act mentioned in subsection (1); or
4. the publication of material in circumstances in which the publication would be subject to a defence of absolute privilege in proceedings for defamation; or
5. a public act, done reasonably and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including public discussion or debate about, and expositions of, any act or matter.

1. The Queensland *Anti-Discrimination Act 1991* contains an objects clause and a preamble that include the equal status of all human rights. The Queensland *Human Rights Act 2019* also contains an objects clause and a preamble, and the protected rights include equality before the law and non-discrimination [↑](#footnote-ref-1)
2. *Age Discrimination Act 2004, Disability Discrimination Act 1992,* and the *Sex Discrimination Act 1984.* [↑](#footnote-ref-2)
3. *Anti-Discrimination Act 1991*, section 124A – see Appendix B. [↑](#footnote-ref-3)
4. Exposure Draft of the Religious Discrimination Bill 2019 Explanatory Notes, clause 8. [↑](#footnote-ref-4)
5. Ratified by Australia in 1980. [↑](#footnote-ref-5)
6. Under the Foreign Affairs power in the *Constitution*. [↑](#footnote-ref-6)
7. Clause 57 of the Bill. [↑](#footnote-ref-7)
8. Human Rights Committee, *General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18)*, 48th sess, UN DOC CCPR/C/21/ Rev. 1/Add. 4 (27 September 1993). [↑](#footnote-ref-8)
9. Human Rights Committee, *General Comment No. 18: Non-discrimination)*, 37th Sess, (1989). [↑](#footnote-ref-9)
10. Ratified by Australia in 1975. [↑](#footnote-ref-10)
11. The areas of activity are: work (including applying for work, voluntary work, work experience, partnerships, employment agencies); education; providing goods or services; accommodation (includes residential and commercial premises); administering State laws and programs); club membership and affairs; superannuation and insurance; disposition of land; and between local government members. [↑](#footnote-ref-11)
12. The discrimination must be proportionate to the behavior, and the exemption does not allow discrimination on the basis of age, race or impairment. [↑](#footnote-ref-12)
13. *Human Rights Act 2019,* section 13. [↑](#footnote-ref-13)
14. An employer with a revenue of at least $50 million (other than a government or a body established for a public purpose). [↑](#footnote-ref-14)
15. Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The right to the highest attainable standard of health,* 22nd sess, UN Doc E/C.12/2000/4 (11 August 2000). [↑](#footnote-ref-15)
16. The *Human Rights Act 2019*, section 37 provides that every person has the right to access health services without discrimination, and that a person must not be refused emergency medical treatment that is immediately necessary to save the person’s life or to prevent serious impairment to the person. [↑](#footnote-ref-16)
17. See for example, *Moffat obo Saunders v Whittaker & Medihelp Services Pty Ltd* [1998] QADT 16 (3 September 1998); *Sullivan v Queensland Police Service & Harran* [2004] QADT 14 (17 May 2004). [↑](#footnote-ref-17)
18. *Deen v Lamb* [2001] QADT 20 (8 November 2001). [↑](#footnote-ref-18)
19. For a discussion of ‘good faith’ by Sofronoff P see *Deen v Lamb* [2001] QADT 20 (8 November 2001). [↑](#footnote-ref-19)
20. By virtue of the definitions of ‘statement of belief’ and ‘person’ in clause 5 of the Bill. [↑](#footnote-ref-20)
21. *Barney v State of Queensland* [2012] QCAT 695 (1 November 2012). [↑](#footnote-ref-21)
22. The Commission accepts approximately 60% of complaints that are received. [↑](#footnote-ref-22)