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| Religious Discrimination Bill - 2nd Exposure Draft |
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| **Submission**  **to**  **Australian Government, Attorney-General’s Department** |

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| 31 January 2020 |

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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.*
2. The Commission has expertise in promoting an understanding, acceptance, and public discussion of human rights in Queensland, and in dealing with complaints, including complaints of unlawful discrimination. Complaints that are not resolved through conciliation may be referred to a tribunal for hearing and determination.
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.

# Background

1. In August 2019, following the Religious Freedom Review conducted by an Expert Panel, the Australian Government released a suite of Exposure Drafts for legislative reforms, comprising a Religious Discrimination Bill 2019, a Religious Discrimination (Consequential Amendments) Bill 2019, and a Human Rights Legislation Amendment (Freedom of Religion) Bill 2019
2. The Commission made a submission on the first Exposure Draft of the Religious Discrimination Bill in October 2019. That submission is published on the Attorney-General’s Religious Freedom Review website and on the Commission’s website.
3. In December 2019 the government released a second round of Exposure Drafts of each of those Bills. This submission is confined to the second Exposure Draft of the Religious Discrimination Bill (the Bill).

# Summary

1. The Commission continues to support the fundamental aspects of the Bill that would provide protections from discrimination on the basis of religious belief or activity, including holding or not holding a religious belief, in various aspects of public life.
2. In its submission on the first Exposure Draft, the Commission detailed strong concerns about the following four aspects of the first Exposure Draft:
   1. the exceptions for statements of belief;
   2. deeming certain employment requirements to be unreasonable (for health practitioners, and for statements of belief made outside of work);
   3. the scope of the conduct of religious bodies that is exempt; and
   4. overriding State anti-discrimination legislation.
3. Much of those concerns remain unaddressed in the second Exposure Draft. This submission focusses on changes in the current Bill, and is ancillary to the Commission’s submission on the first Exposure Draft of the Religious Discrimination Bill.
4. The Commission considers that a number of provisions lack clarity and are difficult to interpret. Some of these can be improved by changes to the drafting, while others should be removed altogether.

# Objects and international obligations

1. An objects provision describes the purpose of the legislation, and takes a primary role in the interpretation and application of the legislation. However in this Bill, some of the substantive provisions are inconsistent with:

* the stated objects;
* the prescription for how the objects are to give effect to the objects;
* the international principles on which they are said to be based; and
* the intention stated in the Explanatory Notes.

1. The Explanatory Notes state 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’.[[1]](#footnote-1)
2. The objects in clause 3 of the Bill are to:
   1. eliminate discrimination on the ground of religious belief or activity;
   2. ensure as far as practicable that everyone has the same rights to equality before the law regardless of religious belief or activity; and
   3. ensure that people can make statements of belief.

Clause 3(2) of the Bill requires that ‘in giving effect to the objects of the Act, regard is to be had to:

1. the indivisibility of and universality of human rights, and their equal status in international law; and
2. the principle that every person is free and equal in dignity and rights.’

(the words underlined represent the change to clause 3 from the first Exposure Draft)

1. The Explanatory Notes state that ‘these principles reflect the well-established and foundational principle of international human rights law that all rights must be treated with equal importance, and no right should be prioritised at the expense of any other. These principles clarify the relationship between human rights and recognise that all rights are interconnected and interdependent, and that there is no hierarchy of rights at international law.’[[2]](#footnote-2)
2. Although there is no hierarchy of human rights per se, some rights are absolute in that they cannot be abrogated even in times of public emergency, while other rights specifically provide that they may be limited or contain their own limitations. The right to have a religion or belief is an absolute right. Manifestation of religion or belief encompasses a broad range of acts, some of which can interfere with the rights of others, or pose a danger to society.[[3]](#footnote-3) Therefore the freedom to manifest religion or belief is not absolute.
3. Freedom of religion is recognised in article 18 of the *International Covenant on Civil and Political Rights*. Article 18(3) allows restrictions on the freedom to manifest religion or belief to be prescribed by law to protect, amongst other things, the fundamental freedoms of others. These freedoms include freedom from discrimination on any ground, for example sex, sexuality, gender identity, impairment, religion, race, and other statuses.
4. General Comment 22 of the Human Rights Committee provides at paragraphs 3, 7 and 8 (respectively):[[4]](#footnote-4)

Article 18 distinguishes the freedom of thought, conscience, religion or belief from the freedom to manifest religion or belief. It does not permit any limitations whatsoever on the freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one’s choice. …

According to article 20, no manifestation of religions or beliefs may amount to propaganda for war or advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. As stated by the Committee in its General Comment 11, States parties are under the obligation to enact laws to prohibit such acts.

Article 18(3) permits restrictions on the freedom to manifest religion or belief only if limitations are prescribed by law and are necessary to protect public safety, order, health or moral, of the **fundamental rights and freedoms of others**. … In interpreting the scope of permissible limitation clauses, States parties should proceed from the need to **protect the rights guaranteed under the Covenant**, including the right to equality and non-discrimination on all grounds specified in articles 2, 3, and 26. …

(emphasis added)

1. This is relevant for a variety of reasons, including that the power to enact the Bill is the external affairs power in the Constitution. The constitutional basis provided for in clause 58 of the Bill is to give effect to Australia’s obligations under one or more of the following international instruments to which Australia is a party:
   1. the *International Covenant on Civil and Political Rights;*
   2. the *International Covenant on Economic, Social and Cultural Rights;*
   3. the *Convention on the Rights of the Child;*
   4. the *International Covenant on the Elimination of all Forms of Racial Discrimination;*
   5. the *ILO Convention (No. 111) concerning Discrimination in respect of Employment and Occupations*;
   6. the *ILO Convention (No. 158) concerning Termination of Employment at the Initiative of the Employer*.
2. Because the right to freedom of religion is recognised in the *International Covenant on Civil and Political Rights*, the *Covenant* is arguably the primary foundation for the proposed legislation. Although it is not necessary that legislation implement all obligations in an international convention for it to be a valid exercise of the external affairs power, the legislation should not be inconsistent with the Convention. On this issue the High Court has said:

Deficiency in implementation of a supporting Convention is not necessarily fatal to the validity of a law; but a law will be held invalid if the deficiency is so substantial as to deny the law the character of a measure implementing the Convention or it is a deficiency which, when coupled with other provisions of the law, make it substantially inconsistent with the Convention.[[5]](#footnote-5)

1. The rights to equality before the law and to freedom from discrimination are also recognised in the *International Convention on Civil and Political Rights*, and Australia has an obligation to enact laws to protect these rights. Federal anti-discrimination legislation has been enacted to protect these rights,[[6]](#footnote-6) and protections are also contained in state and territory anti-discrimination and human rights legislation.
2. Aspects of the Bill would have the effect of treating the right to manifest religion as absolute, and giving the right to freedom of religion a higher status. These aspects include the immunity of statements of belief from constituting unlawful discrimination, deeming certain employment requirements to be unreasonable, and the extent of the coverage of the exemption for religious bodies. This effect is inconsistent with the objects stated in the Bill and international human rights principles and obligations.
3. The Explanatory Notes state that ‘to ensure consistency as far as possible, the provisions of the Bill reflect existing prohibitions on discrimination in the *Age Discrimination Act 2004, Disability Discrimination Act 1992* and the *Sex Discrimination Act 1984*, **with some alternations to reflect the distinct nature of religious belief or activity as a protected attribute**.’[[7]](#footnote-7) (emphasis added) This of itself is inconsistent with other parts of the Explanatory Notes and with the objects in clause 3 of the Bill, and signals the special treatment that this Bill gives to the right to freedom of religion above other human rights.

# Test for connection with religion

1. In the first Exposure Draft, the test for connection with religion was, whether:

the religious belief or activity may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion

1. The test now is, whether:

a person of the same religion … could reasonably consider the [conduct] as being in accordance with the doctrines, tenets, beliefs or teachings of that religion

1. This test applies in determining whether:
2. a refusal to provide or participate in a health service is a conscientious objection;[[8]](#footnote-8)
3. a statement made by a person is a ‘statement of belief’;[[9]](#footnote-9)
4. conduct by a religious body is exempt from the legislation;[[10]](#footnote-10)
5. discrimination in employment by religious hospitals and aged care facilities is exempt;[[11]](#footnote-11) and
6. discrimination in providing accommodation by religious camps and conference centres is exempt.[[12]](#footnote-12)
7. The relevance of (a) and (b) above are:
   1. A health service will be prohibited from requiring its health practitioners to perform or participate in a health service where the health practitioner has a conscientious objection to the health service on the ground of their religion.
   2. Statements of belief have a special status under the Bill. It is not unlawful for a person to make a statement of belief that discriminates against another person or persons on any ground (e.g. their sex, disability, relationship or parental status, sexuality, gender identity), and employers are not able to restrict their workers from making statements of belief.
8. The test in the First Exposure Draft is an objective test, and although not the same as the test in the existing federal legislation, it was closer to the test in the *Sex Discrimination Act 1984* and the *Age Discrimination Act 2004*. The new test in the Bill is a more subjective test. However, the Explanatory Notes describe the test as ‘an objective reasonableness test’.
9. The reasoning for the new test is that courts are not well-placed to make decisions on matters of religious doctrine and whether conduct conforms with the such doctrine, and that religious bodies have a ‘margin of appreciation’ about how they conduct their activities in accordance with their faith.[[13]](#footnote-13)
10. There is no explanation of the basis for the claim that ‘it is a matter of general principle that courts are not well-placed’ to decide whether conduct is reasonably in accordance with the doctrines of a religion. ‘Reasonable person’ tests have long been a part of our legal system, applied and determined by courts and tribunals based on evidence.
11. The new test imports an element of subjectivity that arguably removes any objectivity suggested by the word ‘reasonably’. It has been described as ‘It just takes two’ test.[[14]](#footnote-14) A person can claim that what they do or say is based on their religion, and they need only one other person to say they have the same view. In effect it would enable doctrines to be established within a religion, sect or denomination by only two people.
12. The new test is unwieldy and has the potential for protections to be exploited to the detriment of civil discourse. The Commission maintains the view that the test should be the same as the test in existing federal anti-discrimination legislation, namely, that the conduct:

* conforms to the doctrines, tenets, or beliefs of the religion; or
* is necessary to avoid injury to the religious [susceptibilities[[15]](#footnote-15) / sensitivities[[16]](#footnote-16)] of adherents to the religion.

# Statements of belief

1. The Commission confirms the views expressed in its submission to the first Exposure Draft that the special protections for statements of belief are inappropriate and divisive.
2. The protections for statements of belief have been broadened in this Bill by extending the restrictions on imposing conduct rules to qualifying bodies. A qualifying body would not be able to impose rules that would restrict the ability of a person to make a statement of belief outside the course of their profession, trade, or occupation unless the rule was an essential requirement for the profession, trade, or occupation.
3. This restriction on qualifying bodies is an unreasonable fetter on their ability to manage behaviours. Statements of belief have the potential to bring a profession, trade or occupation into disrepute, whether they are made during or outside the course of the profession, trade, or occupation.
4. The special protections for statements of belief in clauses 8 and 42 should be removed.

# Extension of protection to associates

1. The Bill extends the application of the Act to make it unlawful to discriminate against a person who is associated with an individual who holds or engages in a religious belief or activity. Clause 9 provides:

This Act applies to a person who has an association (whether as a near relative or otherwise) with an individual who holds or engages in a religious belief or activity in the same way as it applies to a person who holds or engages in a religious belief or activity.

Example: It is unlawful, under section 14, for an employer to discriminate against an employee on the ground of a religious belief or activity of the employee’s spouse.

1. On its face, this provision appears to extend protections to associates of individuals who hold a religious belief or engage in a religious activity and not to associates of individuals who do not hold a religious belief or engage in a religious activity. Although the definition of religious belief or activity in clause 5 includes ‘not holding a religious belief’ and ‘not engaging in, or refusing to engage in, lawful religious activity’, this clause adopts part only of the definition.
2. The Explanatory Notes indicate an intention that the extended protection would include associates of an individual who does not hold or engage in religious belief or activity.[[17]](#footnote-17) This could have been achieved by using the defined term ‘religious belief or activity’ rather than confining it by the words ‘who holds or engages in’.
3. The Explanatory Notes state that ‘this provision is consistent with similar provisions in the *Disability Discrimination Act,* the *Racial Discrimination Act,* and all state and territory anti-discrimination Acts, which provide for the extended application of those Acts to associates’.[[18]](#footnote-18) In Queensland, ‘association with, or relation to, a person identified on the basis of an attribute’ is itself a protected attribute.[[19]](#footnote-19)
4. The *Disability Discrimination Act 1992* provides in section 7:

This Act applies in relation to a person who has an associate with a disability in the same way as it applies in relation to a person with the disability.

1. If the Bill is enacted, people won’t necessarily have access to the Explanatory Notes and may apply the provision as it reads, namely that discrimination against a person associated with an individual who does not have or engage in a religious belief or activity is permissible.
2. To provide clarity and reflect the intention that the extended protection includes having and not having religious belief or activity, clause 9 should be re-drafted*.* A consequential amendment to Note 1 to the definition of ‘discriminate’ in clause 5 is also required, and consideration should be given to including a definition of ‘associate’, as in the *Disability Discrimination Act 1992*.

# Exemptions for religious bodies

1. The Commission acknowledges that the Act should not apply to activities such as:

* the ordination or appointment of priests, ministers of religion and the like;
* training and educating people to be ordinated or appointed as priests, ministers of religion and the like;
* selecting or appointing people to perform duties or functions connected with religious observance;

and that certain religious bodies should be exempt in relation to conduct that:

* conforms to the doctrines of the relevant religion; or
* is necessary to avoid injury to the religious sensitivities of people of the religion.

These are the types of exemptions in the *Sex Discrimination Act 1984*.

1. However, the exemptions in the Bill are much broader in terms of the:

* range of bodies that have the benefit of the exemptions; and
* extent of the conduct that the exemptions allow.

This results from:

* the broad definition of religious body;
* the test for the connection with religion (discussed above);
* specific exemptions that would allow religious hospitals, aged care facilities, and accommodation providers to discriminate on the basis of religion in employment;[[20]](#footnote-20) and
* a specific exemption for religious camps and conference sites to discriminate on the basis of religion in providing accommodation.[[21]](#footnote-21)

1. Clause 11 of the Bill contains the general exemptions for certain conduct by religious bodies, and includes the definition of ‘religious body’. Clause 11 would allow a broad range of bodies to discriminate on the basis of religious belief or activity, by engaging in conduct (in good faith):

* that another person of the same religion considers is in accordance with the doctrines etc. of the religion;[[22]](#footnote-22) or
* to avoid injury to the religious susceptibilities of people of the same religion.[[23]](#footnote-23)

1. Clauses 11(2) and 11(4) clarify that the exempt conduct includes giving a preference to persons of the same religion as the religious body.[[24]](#footnote-24) This would allow a registered religious charity that collects donations from the public at large (for example to assist people affected by natural disasters) to give preference to assisting people of the same religion as the charity.
2. Clauses 32(8) and 32(10) would allow religious hospitals, aged care facilities and accommodation providers to discriminate on the basis of religion in employment matters. This includes giving a preference to an employee or applicant of the same religion as the hospital, aged care facility or accommodation provider. While it might be appropriate for some positions to be occupied by people of the particular religion to maintain the religious ethos, there should be no need to discriminate broadly in all positions. An exemption for genuine occupational requirements is provided for in clause 32(2). This exemption is consistent with existing anti-discrimination legislation, and religious hospitals, aged care facilities and accommodation providers are able to rely on it when there is a genuine need for a position to be occupied by a person of the religion.
3. The exemptions in the Bill for religious bodies should be wound back so that their coverage is aligned to those in existing federal anti-discrimination legislation, and the special rights of religious hospitals, aged care facilities, accommodation providers, and camps and conferences centres should be removed.

# Conclusion

1. The Commission maintains the view that provisions of the Bill prohibiting discrimination on the basis of religious belief or activity are appropriate, however the Bill should be aligned with existing federal anti-discrimination in terms of exemptions for religious bodies. The unusual provisions giving impunity to statements of belief and conscientious objections by health practitioners should be removed before the Bill is introduced into Parliament.
2. While the international community has deplored a public statement of belief made by a prominent person in Australia that incites discrimination of others, this Bill would legitimise that conduct. The types of discrimination and vilification that the Bill would allow go beyond limitations that are legitimate and appropriate under international human rights principles to which Australia has committed to respect, protect, and fulfil.
3. If introduced in its current form, Australia will be failing in its obligations to respect, protect and fulfil all human rights equally.

1. Explanatory Notes, paragraph 8. [↑](#footnote-ref-1)
2. Explanatory Notes, paragraph 54. [↑](#footnote-ref-2)
3. Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford University Press, 3rd ed, 2013) 567 [17.15]. [↑](#footnote-ref-3)
4. The Human Rights Committee is the treaty body for the *International Covenant on Civil and Political Rights*. A General Comment is the treaty body’s interpretation of human rights treaty provisions. General Comment 22 relates to article 18 of the *International Covenant on Civil and Political Rights.* [↑](#footnote-ref-4)
5. *Victoria v Commonwealth* (1996) 138 ALR 129. [↑](#footnote-ref-5)
6. *Racial Discrimination Act 1975, Sex Discrimination Act 1984, Disability Discrimination Act 1992, Age Discrimination Act 2004,* and *Australian Human Rights Commission Act 1986.* [↑](#footnote-ref-6)
7. Explanatory Notes, paragraph 25. [↑](#footnote-ref-7)
8. Definition of *conscientiously object* in clause 5. [↑](#footnote-ref-8)
9. Definition of *statement of belief* in clause 5. [↑](#footnote-ref-9)
10. Clause 11 – Religious bodies may act in accordance with their faith etc. [↑](#footnote-ref-10)
11. Clause 32(8) – Exemptions relating to work. [↑](#footnote-ref-11)
12. Clause 33 (2) – Exemptions relating to accommodation. [↑](#footnote-ref-12)
13. Explanatory Notes, paragraphs 237 to 239. [↑](#footnote-ref-13)
14. By Equality Australia. [↑](#footnote-ref-14)
15. This is the term used in the *Sex Discrimination Act 1984.* [↑](#footnote-ref-15)
16. This is the term used in the *Age Discrimination Act 2004.* [↑](#footnote-ref-16)
17. Explanatory Notes, paragraph 194. [↑](#footnote-ref-17)
18. Explanatory Notes, paragraph 196. [↑](#footnote-ref-18)
19. *Anti-Discrimination Act 1991* (Qld), section 7(p). [↑](#footnote-ref-19)
20. Clauses 32(8) and (10). [↑](#footnote-ref-20)
21. Clause 33(2). [↑](#footnote-ref-21)
22. Clause 11(1). [↑](#footnote-ref-22)
23. Clause 11(3). [↑](#footnote-ref-23)
24. The explanations of clauses 11(2) and 11(4) in paragraphs 248 and 249 of the Explanatory Notes, are inconsistent with the example in paragraph 252 of the Explanatory Notes. The only interpretation of clauses 11(2) and 11(4) that make sense is that giving a preference based on religion falls within the exempt conduct. It is unlikely that giving a preference based on religion accords with the doctrines etc. of a religion. [↑](#footnote-ref-24)