Queensland Law Society

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By email: [redacted]
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Dear Mr Tidball

Religious Discrimination Bills package

Thank you for the opportunity to provide comments for the inclusion in the Law Council's submission to the inquiries examining the:

- Religious Discrimination Bill 2021 (**Bill**);
- Religious Discrimination (Consequential Amendments) Bill 2021; and
- Human Rights Legislation Amendment (Freedom of Religion) Bill 2021.

Timeframes for responding

The timeframes for responding to these complicated bills are not reasonable. Our volunteer committee members have not had the capacity to consider all of the issues to enable the provision of a comprehensive response at this time.

The below comments represent our preliminary views on a few issues raised by the legislation. We have not been able to undertake an exhaustive review and it may be that our comments here are able to be refined, amended and/or added to at a later stage. In this case, the QLS will make a submission directly to the Parliamentary Joint Committee on Human Rights and/or a supplementary submission to the Law Council for inclusion in a submission to the inquiry being conducted by Senate Legal and Constitutional Affairs Legislation Committee.

Summary of issues

1. The importance of Queensland's comprehensive discrimination and human rights frameworks;
2. Adverse consequences likely to flow from the provisions relating to qualifying bodies;
3. Objection to the statement of belief framework

1. Queensland's discrimination and human rights framework

Queensland's discrimination laws are among the most comprehensive and effective in the country. QLS is concerned that the Bill's explicit intention in clauses 11 and 12, and in the Bill generally, to override Queensland's laws is ill advised and will produce a number of adverse consequences.

The *Anti-Discrimination Act 1991* (QLD) (**ADAQ**) makes it unlawful to discriminate against someone in areas of public life, including:

- work;
- education;
- state government laws and programs;
- accommodation; and
- when supplying goods and services.

The ADAQ makes it unlawful to discriminate against someone on the basis of characteristics including:

- sex, age, race, gender identity or sexuality
- relationship status
- pregnancy, breastfeeding, family responsibilities or parental status
- impairment
- religious belief or activity
- political belief or activity
- trade union activity
- status as a legal sex worker.

It is also unlawful to discriminate against someone on the basis of an association with a person identified by one of these characteristics.

Queensland's *Human Rights Act 2019* also recognises:

- a right to life in section 16;
- a right to the protection from torture and cruel, inhuman or degrading treatment in section 17;
- a right to freedom from forced work in section 18;
- a right to freedom of movement in section 19;
- a right to freedom of thought, conscience, religion and belief in section 20;
- a right to freedom of expression in section 21;
- a right to peaceful assembly and freedom of association in section 22;
- a right to taking part in public life in section 23;
- property rights in section 24;
- a right to privacy and reputation in section 25;
- a right to protection of families and children in section 26;
- cultural rights – generally in section 27;
- cultural rights – Aboriginal peoples and Torres Strait Islander peoples in section 28;
- a right to liberty and security of person in section 29;
- a right to humane treatment when deprived of liberty in section 30;
- a right to a fair hearing in section 31;
- rights in criminal proceedings in section 32;
- rights of children in the criminal process in section 33;

- a right not to be tried or punished more than once in section 34;
- rights relating retrospective criminal laws in section 35;
- a right to education in section 36; and
- a right to health services in section 37.

The effect of these acts is a comprehensive and robust legislative framework which can take account of different rights and attributes in, for example, claims brought in the Queensland Human Rights Commission (**QHRC**).

This system is operating well and should not be infringed upon. There is no evidence to support the need for overriding Queensland's Laws. This is not to suggest that Queensland's laws are above scrutiny. In fact the Queensland Human Rights Commission is currently reviewing the ADAQ[1].

However, no evidence has been provided as to why this Bill should explicitly limit the operation of state and territory laws, whereas other federal discrimination laws do not.

We raise a separate yet related point about the Commonwealth regime of antidiscrimination law, which is established through statutes each relating to the protection from discrimination on the basis of an a particular attribute. This is problematic and creates the potential for different rights and attributes to be treated differently under the law, including differences in complaint mechanisms. We are concerned that by taking a piecemeal legislative approach to anti-discrimination, there is a real risk that the protection of one right or attribute will be promoted above another without appropriate justification or balancing of the other rights and attributes which should also be considered. It is the view of some of our members that these religious freedom reforms are unnecessary and appear to prioritise religious beliefs above other protected attributes.

If this legislation is passed, then despite our comments in respect of our ADAQ, we submit there should be a single piece of federal anti-discrimination legislation. Consolidated anti-discrimination legislation would help to ensure equal application of the law. Such legislation would ensure that individual rights and attributes are protected while allowing for a single complaints mechanism to operate and be accessible to everyone.

2. Qualifying bodies

The Bill provides for circumstances in which qualifying bodies can discriminate against a person on the basis of their religious belief or activity. A *qualifying body* means an authority or body that is empowered to confer, renew, extend, revoke, vary or withdraw an authorisation or qualification that is needed for, or facilitates, any of the following by an individual:

(a) the practice of a profession;

(b) the carrying on of a trade;

(c) the engaging in of an occupation.

Clause 15 of the Bill states that a qualifying body *discriminates* against a person on the ground of the person's religious belief or activity if:

[1] See first discussion paper at https://www.qhrc.qld.gov.au/law-reform/documents

> (a) the qualifying body imposes, or proposes to impose, a condition, requirement or practice (a ***qualifying body conduct rule***) on persons seeking or holding an authorisation or qualification from the qualifying body that relates to standards of behaviour of those persons; and
>
> (b) the qualifying body conduct rule has, or is likely to have, the effect of restricting or preventing the person from making a statement of belief other than in the course of the person practising in the relevant profession, carrying on the relevant trade or engaging in the relevant occupation.

Subclause (2), however, provides that a qualifying body does not discriminate against a person if compliance with the qualifying body conduct rule is an essential requirement of the profession, trade or occupation.

The Bill does not explain what will constitute an "essential" requirement of the profession, trade or occupation. Paragraph 230 of the Explanatory Memorandum references this issue, but unfortunately, does not provide a meaning. The example in paragraph 236 directly relates to the legal profession. It provides the example of a rule that prohibits the expression of religious beliefs related to the legitimacy of the legal system and states that this rule might be *essential* as belief in the legitimacy of the legal system would be essential to lawyers. We do not necessarily consider this example provides clarity or resolves the potential problems with interpreting these clause and note that it is only an example in the explanatory materials.

Overall, we see unintended consequences flowing from the clause. Professional conduct rules are important. They are an agreed and adhered to set of rules that a profession has decided are necessary and requisite for the performance their role and promotion of the calling. We query why it would be in the public interest limit the rules' effect or the qualifying body's role in applying them.

For example, there are fundamental ethical duties owed at common law by solicitors and these are also referenced in the *Australian Solicitors' Conduct Rules* such as:

- Rule 4.1.2 be honest and courteous in all dealings in the course of legal practice;
- Rule 4.1.4 avoid any compromise to their integrity and professional independence; and
- Rule 5.1 A solicitor must not engage in conduct, in the course of practice or otherwise, which demonstrates that the solicitor is not a fit and proper person to practise law, or which is likely to a material degree to: 5.1.1 be prejudicial to, or diminish the public confidence in, the administration of justice; or 5.1.2 bring the profession into disrepute.

Clause 15 may prevent a legal professional body from investigating or taking action in relation to a lawyer on the grounds of a breach of one of these rules if the reason for this action is protected under the Bill.

Subclause (3) provides that the statement of belief cannot be malicious or one that a reasonable person would consider would threaten, intimidate, harass or vilify a person or group and we refer to our comments below in the section on statements of belief.

We note that clause 14 about indirect discrimination could have a similar effect as clause 15, however, at least this clause contains a reasonableness requirement.

A further issue with these provisions is that the actions of the qualifying body will amount to discrimination even if the body "proposes" to impose a condition, requirement or practice in (a) and "likely" to have an effect of restricting or preventing a person from making a statement of belief in paragraph (b).

The effect of this drafting, and the use of the words "proposed" and "likely", is that a person can bring a claim under this legislation before any action is taken by a qualifying body. This outcome is premature, and could unnecessarily occupy resources and circumvents due process.

3. Statements of belief

We have perused the LCA's preliminary comments in the attachment to your memorandum and agree with your opposition to, and comments about, clause 12 of the Bill which allows someone to make a 'statement of belief', as defined in the bill, which will not amount to discrimination. These are:

- It is an extraordinary provision, at odds with Australia's international law obligations, in that it privileges manifestation of religious belief over other human rights including freedom from discrimination on the basis of, for example, sex, disability, sexual orientation, race, and age. It is unlikely to facilitate an inclusive, tolerant and safe environment in a range of public arenas.
- It waters down long-held existing protections under federal and state anti-discrimination law;
- It is not restricted to religious bodies or to recognised representatives of a religion. It is available to any person against whom a complaint of discrimination, on any prohibited ground, has been made.
- It upsets the orthodox balance of federal laws operating concurrently with state and territory laws and provides a defence for potentially harmful and humiliating statements which are made in public arenas;
- The exceptions (for statements which are malicious, or would harass, threaten, seriously intimidate or vilify etc) are of a high threshold. They permit statements which offend, humiliate, insult, intimidate or otherwise harm others which would amount to discrimination under existing federal, state and territory laws or contravene section 17(1) of the Tasmanian Act.
- The defence creates procedural difficulties for anti-discrimination complaints, most of which are heard in state and territory tribunals, in that these will be unable to determine a federal defence. This would need to be determined by a Chapter III Court. Therefore, in proceedings, the defence would need to be raised for separate determination in such a Court. If the defence was rejected or partially successful, the matter would need to return to the relevant tribunal for hearing and determination, adding significant expense and difficulty to litigation.
- The amended definition increases the potential scope of the defence.

In addition to the Law Council's points, we would add:

- The definition and operative provisions are confusing and will likely lead to uncertainty in workplaces and other settings and as well as increased litigation.

  A "statement of belief" is defined in clause 5 of the Bill to be, in paragraph (a), one "made in good faith" and one that "is of a belief that the person genuinely considers to be in accordance with … that religion". Similar wording is used in paragraph (b).

  In clause 12(2), the statement of belief will not be immune from being considered discriminatory if it is malicious, or if a reasonable person would consider the statement

would threaten, intimate harass or vilify a person or group. However, Note 1 under subclause (2) provides, "A moderately expressed religious view that does not incite hatred or violence would not constitute vilification".

In our submission, these clauses and subclauses are contradictory and provide a confusing explanation of what will and what will not constitute discrimination or a protected statement of belief under this legislation.

The effect of these clauses and the note is that:

a. You can make a statement in good faith about a belief genuinely held and this will not amount to discrimination; but
b. it could be discriminatory if the statement is malicious or if a reasonable person considers the statement would threaten, intimate harass or ***vilify*** a person or group; but
c. the statement will not amount to vilification, and thus may not be discriminatory, if the statement was a moderately expressed religious view.

The term 'religious view' is not defined as a standalone term nor is it included in the definition of "religious belief or activity". Further, a "moderately expressed religious view" is not referred to in the definition of "statement of belief". The use of "moderately" is not otherwise required if the elements of "good faith" and "genuinely held belief" are satisfied.

The phrase in Note 1 also effectively adds a further element to the assessment required in clause 12 about whether or not the statement of belief is discriminatory. If the intent is that a "moderate" test is to be applied, this should be in the section itself, not the note under the drafting.

We recommend the definition in clause 5 and the wording of 12 be reviewed to ensure there are no unintended consequences.

- If the legislation was to pass and clause 12 was to remain, which we object to, then we submit that the 'objective' test in the second exposure draft of the legislation should replace the current 'subjective' requirement in the Bill. The previous objective test in the definition of ***statement of belief*** was as follows:

> " … is of a belief that a person of the same religion as the first person could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of that religion;"

We prefer the requirement to assess the statement of belief in terms of what a person "could reasonably consider" to be in accordance with the religion's doctrines, as opposed to the subjective element in the present draft of "a belief that the person genuinely considers to be in accordance with" the religion's doctrines.

This would provide assistance in assessing whether the statement meets a legislative definition and assist to reduce or simplify litigation. The objective test provides greater protection to those affected by inappropriate statements of belief, because the objective test at least requires consideration, in a reasonable way, of the established beliefs of the particular religion and not the genuine, but untested, beliefs of an individual person.

We also note that clause 12(2)(b) of the Bill has an 'objective' element. This has the effect that the person who makes a statement of belief can make a subjective statement

whilst the impact must be assessed objectively, creating different tests for a complainant and a potential respondent in a claim.

- As the Law Council has noted, the defence in clause 15 requires determination by a court, while the substantial claim will be determined by a tribunal. This will create access to justice issues such as increased costs and delay and which will mean that pursuing a claim, either as complainant or respondent, will not be possible for many people.

4. Clause 7

This clause is a revised version of clause 11 in the second exposure draft of this legislation, which was a revised version of clause 10 in the first exposure draft.

Despite the further amended drafting, we remain concerned about the interpretation and effect of this clause. Fundamentally, we consider that the uncertainty of the drafting will lead to debates about the application of these provisions, which is unhelpful for all parties involved.

In Queensland, the ADAQ provides that it is not unlawful discrimination in the work or work-related area if a person imposes a genuine occupational requirement for a position.

Therefore, in Queensland, a section like the proposed clause 7 is not necessary. This model of drafting is preferable. Section 25(2) and (3) of the ADAQ go on to explain how such an exemption operates in the context of working for an educational institution under the direction or control of a body established for religious purposes.

In our submissions relating to the exposure drafts, we expressed a concern that the drafting does not correlate with the intent expressed in the explanatory material.

If the intent of clause 7(2), (3) and (6) is to ensure that a religious body can employ someone for the purposes of carrying out a particular role, which is what is required by the tenets, doctrines and beliefs of that religion, then in our view, the clause should simply state this and remove the broader language. As suggested in our previous submissions, the terms “inherent” or “genuine occupational requirement” should be used to help clarify the scope in this regard.

While it is not possible to list every instance in which a religious body may need to give a preference to, or engage someone of the same religious faith, and, whilst we acknowledge this drafting is preferable to the earlier draft, the clause should clarify the circumstances in which a religious body can preference or otherwise act or omit to act without “discriminating”.

The second note under clauses 7(2) and (4), confirming that conduct cannot, however, breach any other Commonwealth discrimination law, is helpful although we consider there is still the potential for conflict between different rights and attributes based on the drafting.

We are also concerned about the use of the phrase “religious susceptibilities” in clause 7(4) and the note under clause 7(1). This is a term which is not defined and has the potential to be interpreted widely. Is it intended to be a reference to the subjective feelings of the adherents of the religion? Our strong recommendation is that in such sensitive legislation, objective tests are to be preferred to subjective tests.

5. Publicly available policies

Clauses 7(7) and 9(7) provide for the Minister to make a legislative instrument determining the requirements for the policies required under these provisions.

These requirements will be critical to determining the scope of the "publicly available policy" that the religious body will be required to publish.

In our view, these requirements should be specified in the primary legislation or, at the very least, in a regulation.

6. Other issues

We provide some additional points for consideration:

- The definition of ***near relative*** should include references half siblings and other relatives and should generally be amended to be gender inclusive e.g. include non-binary people.
- Your memo requests constituent bodies' views on clause 50 which provides for the offence of victimisation. On the basis that this offence is drafted in the same way as the office provisions in other federal discrimination acts, we have no particular objection to the clause.
- We are concerned about the drafting approach in the Bill whereby some of the first sub-clauses appear to take the tone of an explanatory note rather than being drafted as an effective operative provision. For example, clause 7(1) and 9(1) both explain "What this section is about". If the Commonwealth considers that such an explanation is required, it should adopt the method used in clause 4 of the Bill to provide a "Simplified outline of this Act". This method is regularly used in other Commonwealth legislation. Otherwise the operative provisions are diluted.
- As noted earlier, there is a trend of using terms in the operative provisions which are not defined and the clause does not appropriately use the terms that are defined in clause 5. The use of alternative words will generate debate about the scope and application of the relevant provisions. For example:
    - The phrase "moderately expressed" religious view" in the Note 1 in clause 12(2); and
    - The use of the phrase "religious susceptibilities" in clause 7 and 9.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.

Yours faithfully

Elizabeth Shearer
President