

4 February 2020

Our ref: KB-MC

Human Rights Unit, Integrity Law Branch, Integrity and Security Division
Attorney-General's Department
3-5 National Circuit
Barton ACT 2600

By email: [REDACTED]

Dear Consultation Team

Religious Freedom Bills – Second Exposure Drafts

Thank you for the opportunity to provide comments on the Religious freedom reforms which include the drafts of the:

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

The Queensland Law Society (QLS) is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase /community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This submission has been contributed to by multiple QLS legal policy committees, whose members have expertise in number of practice areas relevant to these reforms.

QLS made a submission in respect of the first exposure drafts of these bills. Upon review of the amended drafts, we consider that much of this earlier submission remains relevant and we **enclose** a copy of this submission for ease of reference.

General comment on these reforms

There are several Commonwealth acts that deal with discrimination on the basis of an individual's right or 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. 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.

To ensure there is equal application of the law, we submit there should be a single piece of federal anti-discrimination legislation, rather than a piecemeal approach to dealing with human rights. 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.

Clause 8 Employer Conduct Rules / Indirect Discrimination

We repeat the comments in our earlier submission in respect of clause 8 of the Exposure draft – Religious Discrimination Bill 2019 (**Bill**).

While the clause has been amended in this Bill, our concern regarding what would constitute *unjustifiable financial hardship* in instances where the imposition of an employer conduct rule would limit an employee's capacity to make a statement of belief outside of work hours, remains. We refer to our earlier submission which further details our concerns.

This submission noted that there is already a test for what is *unreasonable* under current federal discrimination law and proffered that this test should be applied in this Bill to ensure consistency.

In the alternative, we suggest that *unjustifiable financial hardship* is given further explanation in the Bill, either by way of a definition or a note, to give guidance to those affected by this clause.

Further, subclause 8(6) provides that the imposition of 'health practitioner conduct rules' is *prima facie* not reasonable unless compliance with the rule is necessary to avoid an unjustifiable adverse impact on the ability of the person imposing the rule to provide the health service, or on the health of any person who would otherwise be provided with the health service. Similarly to the preceding subclauses, there does not appear to be any guidance on how to interpret the phrase "*unjustifiable adverse impact*" in this context. This phrase also appears to impose an onus on the entity that is much higher than the usual "reasonableness" threshold. Further clarification would be welcomed.

Clause 11- Religious bodies may act in accordance with their faith

We refer to comments made in our earlier submission in relation to clause 10 in the previous draft bill. The amendments to this clause, to expressly state that a religious body will not discriminate by giving a preference to someone of that same religion, go some way to addressing our concerns. We also note that *religious body* has been amended to expressly omit, "*an institution that is a hospital or aged care facility, or that solely or primarily provides accommodation*".

A further change has also been made to the test for determining what is *reasonable*. The previous wording in clause 10(1) (as it then was) provided that the conduct "*may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion*". The clause now states that the conduct needs to be reasonable to "*a person of the same religion as the religious body could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of that religion*". This appears to give a more subjective element to the test, but does not fully address the concerns raised in our earlier submission about how the Commission or a court will decide such matters.

Despite the amendments to this clause, we remain concerned that the drafting does not correlate with the intent expressed in the explanatory material. If the intent of this clause is to ensure that a religious body can engage 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. In our previous submission, we suggested that the terms “inherent” or “genuine occupational requirement” be used to help clarify the scope in this regard.

Without reference to what is specifically intended, the effect of this clause seems quite broad and not in keeping with the purpose of the legislation as a whole. 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 note in this clause confirming that conduct cannot, however, breach any other Commonwealth law, for example other discrimination legislation, is helpful although we consider there is still the potential for conflict between different rights and attributes based on the drafting.

Finally, we note that, the Bill has removed the language, “other than a registered charity that engages solely or primarily in commercial activities” from the definition of *religious body* and that a religious charity will be considered a religious body unless it “engages solely or primarily in commercial activities” pursuant to subsection (5). Again, this goes some way to addressing our concerns.

Clause 42 – Statements of belief do not constitute discrimination etc

The clause has been amended, in subclause (2), to add the words, “threaten” and “seriously intimidate”. This is preferable to the previous construction of this clause.

However, we continue to hold the concerns expressed in our earlier submission in respect of this clause.

Clause 45 - Advertisements

QLS maintains this clause requires amendment so that unlawful discrimination is a necessary prerequisite to its operation as opposed to the proposed standard that “*the advertisement or notice indicates, or could reasonably be understood to indicate, an intention to engage in conduct that would be unlawful under Part 3*”.

Definitions

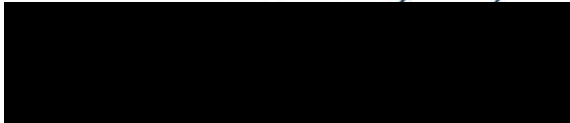
The definition of *health practitioners* in the previous draft seemed to be consistent with the definition under the *Therapeutic Goods Act 1989*, however, this definition has now been amended. Unless there is good reasons to the contrary, it seems appropriate for clarity and consistency that the definition of *health practitioners* refer to or be akin with the definition under the *Health Practitioner Regulation National Law* or the *Therapeutic Goods Act 1989*.

Human Rights Legislation Amendment (Freedom of Religion) Bill 2019

Our recommendation in respect of the *Charities Act 2013* was not adopted and we maintain our previous view that this change is not required and should not be made.

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

A large black rectangular redaction box covering the signature of Luke Murphy.

Luke Murphy
President

2 October 2019

Our ref: LP-MC

Human Rights Unit, Integrity Law Branch, Integrity and Security Division
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

By email: [REDACTED]

Dear Consultation Team

Religious freedom reforms

Thank you for the opportunity to provide comments on the package of legislative reforms on religious freedom, being the:

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

The Queensland Law Society (**QLS**) appreciates the opportunity to provide feedback on these significant reforms.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This response has been compiled with the assistance of members of the QLS Industrial Law and Not for Profit Law Committees, whose members have substantial expertise in this area.

Background

The intention of the Religious Discrimination Bill (**the Bill**) is to protect against discrimination on the basis of religious belief or activity. This Bill has been drafted as an opportunity to enhance the statutory protection of the right to freedom of religion in Australian law and implements recommendations from the Religious Freedom Review.

Additional legislation has also been drafted to supplement the Bill in the form of the Religious Discrimination (Consequential Amendments) Bill 2019 and Human Rights Legislation Amendment (Freedom of Religion) Bill 2019. While these are acknowledged, the primary focus of these submissions will be on the Bill.

With respect to the consultation drafts we raise the following:

Religious Discrimination Bill 2019

The Bill prohibits discrimination on the grounds of religious belief or activity in key areas of public life (including employment). In addition to these protections, this Bill creates the office of the Freedom of Religion Commission in the Australian Human Rights Commission. It is intended that any complaints made under this Bill will be made to this newly established office.

Under this Bill, a person will be entitled to make a complaint to the Australian Human Rights Commission for unlawful discrimination if:

- A person has or engages in a religious belief or activity;
- A person has been subject to direct or indirect discrimination on the basis of their religious belief or activity;
- Discrimination occurs in a specified area of public life (including employment); and
- The conduct is covered by the Bill and an exception does not apply.

Key provisions of this Bill which modify existing employment law rights are the indirect discrimination provisions relating to employer conduct rules and the provisions relating to statements of beliefs.

Clause 8 – Discrimination on the ground of religious belief or activity - Indirect Discrimination

Employer Conduct Rules

Indirect discrimination occurs when a certain rule or policy applied equally can disadvantage people who share a particular attribute. The Bill purports to deal with indirect discrimination and alters the test for the reasonableness of indirect discrimination.

Section 8(1) of the Bill, provides that a person discriminates against another on the ground of a person's religious belief or activity if:

- The person imposes, or proposes to impose, a condition, requirement or practice;
- The condition, requirement or practice has, or is likely to have, the effect of disadvantaging persons who have or engage in the same religious belief or activity as the other person; and
- The condition, requirement or practice is not reasonable.

There is clarification at section 8(3) of the Bill regarding which conditions are not reasonable (about statements of belief) having regard to employer conduct rules, which usually relate to dress, appearance or behaviour of employees.

In short, if an employer conduct rule is implemented (for example, restricting the posting of certain beliefs on social media) which would restrict an employee making a statement of belief outside work hours, it is not reasonable and could amount to indirect discrimination.

However, if an employer can demonstrate there would be unjustifiable financial hardship to them if the purported conduct rule was not followed (for example, if the social media posting of certain views would harm business), then it will be deemed reasonable and not indirect discrimination.

The Explanatory Notes¹ of this Bill state the presumption is that, unless compliance is necessary to avoid unjustifiable financial hardship, the interference in an employees' manifestation of their religion outside of their working lives is not reasonable.

It should be noted that these provisions only apply to employers with a yearly revenue of at least \$50 million dollars. These provisions also do not apply to the Commonwealth, State or Territory public sector. As such, the majority of small business will not be affected by the requirements of this Bill.

The justification provided for these provisions, only applying to large business, is that these businesses play a significant role in setting standards of workplace culture across the country. The obvious practical difficulty with the current threshold would be for businesses with revenue which may differ year to year above and below the prescribed threshold. This would create uncertainty for employees as to their rights to express their beliefs and it may be the case that these rights change year on year depending on the financial performance of their employer.

This creates uncertainty which is furthered by the fact that these provisions only apply to certain businesses in Australia. It does not apply to the majority of small business and the public sector, which is a large proportion of the Australian workforce, who will have differing discrimination law applied.

In relation to the pure legal interpretation of these provisions, it is not clear how the test for 'unjustifiable financial hardship' will be defined or measured, which appears to be a critical element to this provision. Further, forming the crux of the test for unreasonableness in financial terms may lead to the focus being on the impact the employer's conduct rules will have on the financial performance of an employer, rather than the potential unreasonableness of the conduct rules themselves.

The current test under Commonwealth anti-discrimination laws for unreasonableness requires all of the circumstances of a case to be assessed and balanced. It appears to be appropriate to have this test remain, as the proposed test in the Bill appears to be skewed towards financial considerations. This could lead to employers implementing indirect discriminatory conduct rules, but justifying them by demonstrating certain financial outcomes.

Clause 41- Statements of belief do not constitute discrimination etc

The proposed Bill also states, at clause 41(1), that a statement of belief does not constitute discrimination for the purposes of any anti-discrimination law (within the meaning of the *Fair Work Act 2009*). A statement of belief will not constitute adverse action under the *Fair Work Act 2009*.

A statement of belief is defined as a religious belief, made by the person in good faith, which is regarded as being in keeping with the teachings of that religion. There is a second definition for statements of belief made by those who do not hold religious beliefs, made in good faith about religion.

This provision does not apply to a statement that is malicious, that would, or is likely to, harass, vilify or incite hatred or violence against another person or group of persons; or that encourages people to commit a serious offence.

¹ Paragraph 124

For example, stating a biblical view on marriage may be deemed a statement of belief.

At first glance, this section overrides, and arguably undermines, existing Commonwealth and State and Territory discrimination laws. The Explanatory Notes² state these provisions exist to ensure a person may express their religious belief in good faith regardless of Commonwealth, state or territory anti-discrimination laws that might have otherwise made the statement unlawful.

The Explanatory Notes also state that “*current protections in Commonwealth, state and territory laws for discrimination on the basis of a person’s religious belief or activity are piecemeal, have limited application and are inconsistent across jurisdictions*” and thus the purpose of the Bill is to “*address this gap in Australia’s statutory anti-discrimination framework*”.³

However, QLS cautions that this legislation needs to carefully balance the existing legislative frameworks with any new proposed protections.

The operation of this draft section appears, on one reading, to be elevating the attribute of religious freedom above other protected attributes, for example sex, race, disability, age, sexual orientation or gender identity. This appears to be supported by the Explanatory Notes⁴ which state there have been alterations to reflect the distinct nature of religious belief or activity as a protected attribute. On another reading, it is seeking to preserve the ability to hold and express a particular religious belief that may be contrary to other views in the community, as long as it is done in a respectful manner.

Further, this provision does attempt to exclude statements which are malicious, or would, or are likely to, harass, vilify or incite hatred or violence. It is unclear how the threshold implemented by these provisions would work in practical terms. This may create circumstances in which a statement is made which could be offensive to a section of society, but might not be unlawful under these provisions. To address this lack of clarity, QLS recommends that the words “humiliate” and “intimidate” also be added to clause 41(2)(b).

The two definitions of statement of belief also may unintentionally provide broader protection to those who do not hold a religious belief. A person with a religious belief must have reasonable regard to the religion’s doctrines, whereas, those who do not hold a religious belief are not held to the same standard. This may create an instance where a non-religious person may be protected from making a statement, however, a religious person would not be afforded the same protection.

Clause 10 – Religious bodies may act in accordance with their faith

The Bill is unclear as to whether religious bodies can exercise a mere *preference* for hiring a person who is a faith adherent in their hiring practices as opposed to this being a *requirement* for **all** (as opposed to some) staff and *required* by the doctrines, tenets and beliefs or teachings of the religion (which is what the Explanatory Notes suggest at [180] and [181]) as set out below (emphasis added):

² Paragraph 401

³ Paragraph 6

⁴ Paragraph 25

*This provision will also ensure that religious bodies are able to maintain their religious ethos through staffing decisions. For example, it would not be unlawful for a Jewish school to require **that all staff be Jewish** and accordingly refuse to hire someone because they were not Jewish, **if that conformed** to the doctrines, tenets, beliefs or teachings of Judaism.*

*Similarly, a Catholic charity could require that **all employees**, including volunteer workers, were Catholic, and refuse to engage a volunteer worker who was not Catholic, **provided this** was in good faith and in accordance with the doctrines, tenets, beliefs and teachings of Catholicism.*

In practice, our members who regularly advise religious bodies and faith-based charities report that:

- religious bodies are unlikely to require that **all** staff adhere to the religious belief but only some staff, usually when this amounts to a genuine occupational requirement; and
- it would be extremely rare that the doctrines, tenets and beliefs of the religion **would require** that all staff adhere to the beliefs of the religion.

QLS submits that the drafting should make clear whether clause 10(1) is intended to apply to the appointing, preferring to appoint and maintaining the appointment of staff or volunteers who practice the religion of the body including any conduct rule (or the faith with which the body is associated). The current drafting when read with the Explanatory Notes does not seem to achieve this outcome.

Additionally the language, “*may reasonably be regarded as being in accordance with*” (both in this clause and in the definition of ‘statement of belief’ in clause 5), could potentially be problematic as it will ultimately place a court in the position of seeking to determine if certain conduct is reasonably in accordance with the doctrines, tenets, beliefs or teachings of the religion. This is something the courts have historically refused to do. If the intent of the legislation is to import an objective test as to whether particular conduct or statements are “reasonably regarded as being in accordance with”, this will introduce the need to lead expert evidence in disputes, which in itself may present practical challenges in implementation.

If the intent of the legislation is to permit religious bodies to preference appointees who practice the religion of the body, then clause 10 is perhaps also the place for consideration to be given to expressly addressing an ‘inherent requirement’ or ‘genuine occupational requirement’ exemption. The currently drafted clauses 15 and 31 do not permit a religious school, for example, to preference teachers or perhaps at least senior executive staff who share the religious belief of the body if this is an inherent or genuine occupational requirement of the role. If this is the intention of the proposed legislation, amendment would be required to clause 31 (noting that clause 31 as currently drafted does not achieve this intention) and the note to clause 8(3) of the Bill.

The QLS also queries the language, “*other than a registered charity that engages solely or primarily in commercial activities*” as seeming to be inconsistent with the decision of the High Court in *Commissioner of Taxation of the Commonwealth v Word Investments Ltd* [2008] HCA 55. In that decision a commercial enterprise (means to an end) undertaken for the charitable purpose of the advancement of religion was held to be entitled to be a charity for the

advancement of religion. Therefore it would seem that these words should be deleted from clauses 10(2)(b) and (c),

Clause 44 – Advertisements

QLS submits that the drafting of this clause should be amended so that unlawful discrimination is a necessary pre-requisite to its operation.

Human Rights Legislation Amendment (Freedom of Religion) Bill 2019

The exposure draft of the *Human Rights Legislation Amendment (Freedom of Religion) Bill 2019* (Cth) dated 29 August 2019, includes in schedule 1 proposed amendments to the *Charities Act 2013* (Cth) (the **Charities Act**).

Under these proposed amendments, section 11 of the Charities Act would read as follows (with the proposed amendments underlined):

11. **Disqualifying Purpose**

(1) In this Act:

Disqualifying Purpose means:

- (a) The purpose of engaging in, or promoting, activities that are unlawful or contrary to public policy; or

Example: Public policy includes the rule of law, the constitutional system of Government of the Commonwealth, the safety of the general public and National security;

Note: Activities are not contrary to public policy merely because they are contrary to Government policy.

- (b) The purpose of promoting or opposing a political party or a candidate for political office.

Example: Paragraph (b) does not apply to the purpose of distributing information, or advancing debate, about the policies of political parties or candidates for political office (such as by assessing, critiquing, comparing or ranking those policies).

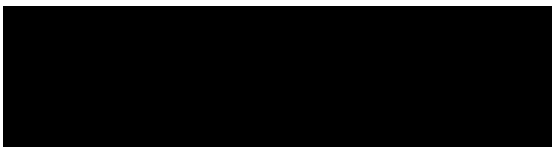
Note: The purpose of promoting or opposing a change to any matter established by Law, policy or practice in the Commonwealth, a State, a Territory or another country may be a charitable purpose (see paragraph (1) of the definition of Charitable Purpose in subsection 12(1)).

- (2) To avoid doubt, the purpose of engaging in, or promoting, activities that support a view of marriage as a union of a man and woman to the exclusion of all others, voluntarily entered into for life, is not, of itself, a ***disqualifying purpose***.

QLS has had the benefit of reading a draft submission of the Law Council of Australia on this proposed amendment and broadly agrees with that submission that this amendment is not required and should not be made to the Charities Act.

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



Bill Potts
President