Dear Sir/Madam,

RELIGIOUS DISCRIMINATION BILL AND RELATED LEGISLATION

Kindly accept this submission on behalf of the QCCL in relation to above bills.

1. GENERAL PRINCIPLES

1.1 Freedom of Worship

Religious worship is essential to most people's lives. This is true for non-believers as well as believers once we recognise that freedom of religious worship includes the freedom not to worship.

Once we accept that proposition the only generally acceptable basis for freedom of worship is equal freedom for everybody. Each person when considering their own claim to be able to worship freely, would reject a proposal that gave them less freedom to do so then another person.

Religious belief is primarily a matter of individual conscience. However, freedom of religion also encompasses the freedom to manifest one's belief in community with others and in public. This is because witness in words and deeds is bound up with the existence of religious convictions.

For these reasons freedom of religious worship is one of the most fundamental rights of a liberal democratic order.

1.2 Freedom of association.¹

The whole point of the liberal institutions is to leave people with a great deal of discretion in their conduct, and one of the ways in which they can exercise that discretion is voluntarily to follow the orders issued by bodies whose authority they acknowledge.

For this reason, freedom of association is a core liberal value and it protects the freedom of groups whose norms mandate among other things the unequal treatment of men and women. “The only condition on a group being able to impose norms on its members is that the sanctions backing the norms must be restricted to ones that are consistent with liberal principles. What this means is primarily that, while membership of the group can be made contingent upon submission to these unequal norms, those who leave or are expelled may not be subjected to gratuitous losses”²

For example, Jewish and Muslim divorce laws treat men and women differently. It is beyond the scope of a liberal State to be rewrite those rules so long as the only reason anybody is adhering to them is the wish to remain a member of the community. What a liberal State cannot do however is to give legal force to religious rules that contravene liberal principles of equal treatment.³

Individuals should be free to associate together anyway they like so long as they do not in doing so break laws designed to protect the rights and interests of those outside the group. There are two

¹ This discussion draws heavily on Brian Barry Culture and Equality Polity 2001
² ibid 127-8
³ ibid pages127-8
provisos. The first is that all the participants should be adults of sound mind. The second is that their taking part in the activities should come about because of their voluntary decision and they should be free to leave whenever they want to.  

The condition upon which Churches can legitimately tell members what to do is that those members are free to obey without being liable to any penalty except expulsion. In contrast a Church that would call on the State to punish heresy or disobedience would clearly be unacceptable. Equally unacceptable on liberal principles would be a Church whose members could inflict punishment on dissenters without legal sanction.

Once upon a time, the concept of freedom of association was used to found much greater claims. It was considered that the power to exclude people from membership of a club or association was like being able to choose your friends. Additionally, it was argued that, at least in a commercial context, you could obtain what you are looking for elsewhere. This is still the position of classical liberals.

However, the first point against that position is that some associations such as business clubs controlled access to significant resources. The blanket exclusion of women from those clubs raises questions of equity. Freedom of association can conflict with the principle that people should not be put at a material disadvantage based on belonging to a certain gender or ethnic or racial group.

The second category is that some clubs do not exercise any discretion in the choice of members but impose a blanket of exclusion of say Jews and women. Such clubs have relatively weak claim based freedom of association. The demand that they should remove the blanket exclusion is well-founded based on equity.

By way of contrast many clubs have some process of selection which allows otherwise eligible candidates to be rejected on purely personal grounds. Their claim to do so based on freedom of association is stronger. Being excluded from a club arbitrarily is a possibility that anybody must face and is inherent in the power of clubs to select their own members at all. But being excluded on the basis of race or sex effects the members of the excluded group differently from somebody excluded on a purely personal. Excluding a person on the basis of race or sex has stigmatising effect on the whole group. It does not make any difference here whether the club controls a great resource or not.

1.3 What practical rules can be derived from these arguments?

1 Institutions that open their doors to the public to provide services—whether accommodation, catering a healthcare, should not be able to claim an exemption to rules furthering equality or public health. Any contrary rule would permit the institution to impose its faith on others resulting in harm to health and equality.

2 Institutions that provide goods and services to the public differ from Churches synagogues mosques and other places of worship. In those places the rules of the faith are typically being imposed only on those who have chosen to accept or to at least explore the faith.

1.4 Employment

The next topic concerns claims of discrimination in employment brought against religious and religious affiliated institutions.

In the Church of Jesus Christ of Latter Day Saints vs Amos, Mr Amos had worked for 16 years as a janitor in a gymnasium open to the public that was owned by the Mormon Church. He was fired for

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4 ibid page 148
5 Brian Barry Justice as Impartiality Oxford University Press 1995 pages 15-18
not complying with the eligibility test for attendance at a Mormon temple. The American Supreme Court held that if the exemption for religious organisations from the discrimination statue did not extend to this "it would be an interference with the autonomy of religious organisations." The Court held that if there no exemption the religious community's process of self-definition would be determined at least in part by the Courts.

However as one commentator put it there is no sharper deviation from liberalism than coercing belief by conditioning vital secular benefits on declarations of faith. The janitor’s liberty, which includes the right not to believe, was clearly burdened by the Churches exemption from the law laws as was the religious liberty of any other non-Mormon potential employees.

Many voluntary associations do not have internal rules satisfying the demands that liberal principles make on political bodies. That of course does not just apply to Churches. Other kinds of organisations are often not run democratically and there is no objection to this if membership is voluntary. The consequences of this is that anti-discrimination laws must allow Churches to apply religious criteria to ordination at the least. For example, for a Court to intervene on the side of a woman who wishes to be ordained as a priest of the Catholic Church would be for the State to settle what is an entirely internal dispute in that Church.6

However, this principle does not extend to employment in ordinary capacities as was found in Canadian case concerning a woman who alleged that she was discriminated against by a Christian social services organisation on the basis that she was a lesbian. The Court rejected the organisation’s argument that a "religious ethos infuses the very work that support workers do and, therefore, the Christian ministry and how the work is carried out cannot be distinguished in any meaningful way. Instead, the Court concluded: "There is nothing about the performance of . . . helping residents to eat, wash and use the bathroom, and taking them on outings and to appointments that requires an adherence by the support workers to a lifestyle that precludes same sex relationships.”7

For this reason, exemptions from anti-discrimination law which allow religious schools to refuse to employ people on the basis of marital status and sexual orientation should be removed. Schools of course should be entitled to insist that those who teach religion should be believers. The starting point must be that you don’t need to be a believer to teach mathematics.

Having said that, those who run religious schools are entitled to prevent proselytizing by staff, against the views of the world they hold. This follows from the employee having accepted a position in a school that holds to and seeks to inculcate certain world-views. Equally this does not mean that staff cannot be prevented from discussing the fact there are individuals and other religions within society that hold beliefs or principles different from those of the school’s operators. Religious schools should be entitled to discipline staff who actively campaign against the views and beliefs of the religion of the school in which they are teaching. In our view, section 25 (3) of the Queensland Anti-Discrimination Act deals appropriately with this topic.

We turn now to apply these principles to the legislation.

2. RELIGIOUS DISCRIMINATION BILL 2019

It follows from what has been said, that we support a law which prohibits discrimination on the grounds of religion.

There is much debate as to whether such a law is necessary in Australia. In our view that is not to the point. The point is that religion like sexuality, like race is fundamental to who we are as human beings and the right to be treated equally regardless of your religion is entitled to protection just as much as the right to be treated equally regardless of your sexual orientation, gender or race.

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6 Barry Culture and Equality 166-7
7 Drawing the Line 20-21
In that regard, we note that the bill is very much a replication of provisions contained in existing anti-discrimination statutes at the Commonwealth level. As we support those provisions, we do not intend to make any comment upon them. Our remarks will be directed to those provisions which depart in some significant way from the standard anti-discrimination provisions.

2.1 Clause 8

This is the prohibition of indirect discrimination. It follows the other provisions dealing with this topic in other legislation, except in one regard:

(2) Subject to subsections (3), (5) and (6), whether a condition, requirement or practice is reasonable depends on all the relevant circumstances of the case, including the following:

(a) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the condition, requirement or practice;
(b) the feasibility of overcoming or mitigating the disadvantage;
(c) whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the condition, requirement or practice;
(d) if the condition, requirement or practice is an employer conduct rule—the extent to which the rule would limit the ability of an employee of the employer to have or engage in the employee’s religious belief or activity.

The change in this clause, is the addition of sub-clause (d). As noted, this is a prohibition on indirect discrimination. The purpose of prohibiting indirect discrimination is to eliminate employment practices which operate to exclude disadvantaged individuals which cannot be shown to be related to job performance.

It is our view that sub-clause (d) is not related to that object and for that reason we submit that it should be removed.

Subsections (3) and (4) of clause 8, contain what has been referred to in the media as the “Folau” clause.

We have supported Mr Folau in his dispute with Rugby Australia because:

1. he is entitled to express his views, no matter how objectionable they may be.
2. his expression of those views does not appear to be in any way impacting on his performance of his role as a rugby union player. There appears to be no adverse impact upon his relationship with his teammates. In fact, it would appear that a majority of his teammates actually agree with his position.
3. the penalty that is being imposed upon him is entirely disproportionate to the offence. Where is Mr Folau going to find a similarly remunerative job?

Having said that, we do not think that this provision is an appropriate way to deal with his situation. We will put forward our proposals to deal with the situation later in this submission.

Subsection 6 of clause 8, is intended to override the provisions of state abortion laws which require medical practitioners who have a conscientious objection to abortion to refer patients to medical practitioners who do not have such an objection.

We object to this provision.
At the individual level the law ought to reflect the position that a person is not entitled to exercise a right in such a way as to do harm to another person. So, the first question to be asked is whether or not conscientious refusal of a person to assist in provision of abortion would represent a threat to the safety or health of the woman. In that case the first duty of the health professional must be to the woman.

Therefore, a conscientious objection provision should not apply in an emergency, or in the absence of another termination service within a reasonable geographical proximity. To not include these provisions would mean that practically, women would face unnecessary barriers to access a safe abortion.

Outside of those circumstances, requiring a medical practitioner who conscientiously objects to abortion to perform an abortion would be unreasonable. However, requiring such a medical practitioner to refer a patient to a medical practitioner prepared to provide the service, is in our view a reasonable balancing of the practitioners’ rights, against the right of the woman to access medical treatment which she considers necessary.

2.2 Clause 10

This clause in is in the following terms:

1. A religious body does not discriminate against a person under this Act by engaging, in good faith, in conduct that may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion in relation to which the religious body is conducted.

2. Religious body means:
   (a) an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion; or
   (b) a registered charity that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion (other than a registered charity that engages solely or primarily in commercial activities); or
   (c) any other body that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion (other than a body that engages solely or primarily in commercial activities)
   (d) This section applies despite anything else in this Act

Based on the principles set out above, it is our submission that this provision goes too far in its grant of freedoms to the religious associations involved. It is our view that section 109 of the Queensland Anti-Discrimination Act delineates what freedom of association is required for religious bodies. It is in these terms:

1) The Act does not apply in relation to—
   (a) the ordination or appointment of priests, ministers of religion or members of a religious order; or
   (b) the training or education of people seeking ordination or appointment as priests, ministers of religion or members of a religious order; or
   (c) the selection or appointment of people to perform functions in relation to, or otherwise participate in, any religious observance or practice; or
(d) unless section 90 (Accommodation with religious purposes) applies—an act by a body established for religious purposes if the act is—
(i) in accordance with the doctrine of the religion concerned; and
(ii) necessary to avoid offending the religious sensitivities of people of the religion.
(2) An exemption under subsection (1)(d) does not apply in the work or work-related area or in the education area.

In terms of freedom of association, the presence of clause 35 is also to be noted. There are identical provisions to this in all Commonwealth discrimination legislation except the Racial Discrimination Act. Clause 35 will allow religious bodies to discriminate in relation to the admission of members and the provision of benefits and services and to those who adhere to the faith and are members of the body. This is again, appropriate as between members of the Association. But in our view different considerations apply once the body starts providing services to nonmembers on a commercial basis.

2.3 Clause 11

This clause, an affirmative action provision, is in the following terms:

1. A person does not discriminate against another person under this Act by engaging in conduct that:
   (a) is reasonable in the circumstances; and
   (b) is consistent with the purposes of this Act; and
   (c) either
      (i) is intended to meet a need arising out of a religious belief or activity of a person or group of persons; or
      (ii) is intended to reduce a disadvantage experienced by a person or group of persons on the basis of the person’s or group’s religious beliefs or activities.

2. This section applies despite anything else in this Act.

Apart from subsection (c)(i) this provision mirrors standard affirmative action provisions. The purpose of affirmative action provisions is to undo disadvantage suffered by groups which have been discriminated against. Subsection (c)(i) is outside the ambit of an affirmative action provision, because it has no requirement of disadvantage. For that reason, it should be removed.

2.4 Clause 29 (2)

Nothing in Division 2 or 3 makes it unlawful for a person to discriminate against another person, on the ground of the other person’s religious belief or activity, if:

(a) the person is performing a function or exercising a power relating to law enforcement, national security or intelligence under a law or program of the Commonwealth;

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8 see for example Gardner v All Australia Netball Association Ltd [2003] FMCA 81 - netball association could not discriminate by excluding a pregnant player from its competition who was not an association member.
(b) the conduct constituting the discrimination is reasonably necessary in performing the function or exercising the power.

We object to this provision. Decisions in relation to national security should be made based on the assessment of individuals, not by reference to their religious belief. This exemption will only lead to people being investigated on the basis of stereotypes and misconceptions and will inevitably lead not only to the injustice of the innocent being investigated, but is likely to impede investigations.

2.5 Clause 31(2)

Sections 13 (about employment) and 14 (about partnerships) do not make it unlawful for a person (the first person) to discriminate against another person, on the ground of the other person’s religious belief or activity, if

(a) the discrimination is in connection with a position as an employee or partner; and

(b) because of the other person’s religious belief or activity, the other person is unable to carry out the inherent requirements of the employment or partnership.

This section provides a defence to an employer who refuses to employ a person or dismisses a person, where because of their religious belief that person cannot perform one of the “inherent requirements” of the job. Once again, this is a familiar provision in anti-discrimination law. This formulation is the one most often used in Commonwealth Anti-discrimination law. There is another formulation used in some state legislation of a “genuine occupational requirement”.

As we have noted above, our position is that it should not be lawful to dismiss Mr Folau. The members of the Council are by no means experts in anti-discrimination or employment law. However, in a brief review of the topic, it is entirely possible that the decision to terminate Mr Folau maybe justifiable on the basis of this provision. That is because the High Court in interpreting this type of provision has put an enormous amount of emphasis on looking at the contract between the employer and the employee to determine what the inherent requirements of the position are. Whilst it appears that the contract is not the final determinant, in that employers cannot simply create inherent requirements out of thin air, the court has given a very heavy influence to what is in the contract.⁹

If that is the case, then it is our view that the government should consider a different formulation for the exemption, which narrows its breadth. Our survey, admittedly not very broad or deep, suggests another alternative formulation is that of a “genuine and determining occupational requirement”, which comes from s37(1) of the Irish Employment Equality Acts. Such a change, would have, if applied to other statutes, the benefit of increasing the scope of anti-discrimination legislation by narrowing this exemption.

2.6 Clauses 31(6) and 41

Clause 31(6) provides

If an employer conduct rule:

(a) is imposed, or proposed to be imposed, by a relevant employer; and

¹ Christi Unlawful termination under Federal employment law: The exception based on the “inherent requirements of the particular position” (2013) 4 WR 55 at 61 and 67-8
would have the effect of restricting or preventing an employee of the employer from making a statement of belief at a time other than when the employee is performing work on behalf of the employer; and

(c) is not reasonable for the purposes of section 8;

a requirement to comply with the rule is not an inherent requirement of employment for the purposes of subsection (2) of this section.

Clause 41 provides:

1. A statement of belief does not:
   (a) constitute discrimination for the purposes of any anti-discrimination law (within the meaning of the Fair Work Act 2009); or
   (b) contravene subsection 17(1) of the Anti-Discrimination Act 1998 of Tasmania; or
   (c) contravene a provision of a law prescribed by the regulations for the purposes of this paragraph.

2. Subsection (1) does not apply to a statement:
   (a) that is malicious; or
   (b) that would, or is likely to, harass, vilify or incite hatred or violence against another person or group of persons; or
   (c) (c) that is covered by paragraph 27(1)(b).

We deal with these two positions together because they suffer from the same deficiency.

Proposed clause 31 (6) purports to protect religious statements made outside the course of employment when they are not reasonable within the meaning of section 8. Whilst we accept, that of course there is a difference between a statement made outside of work hours from that one made inside, the fact remains that a statement made outside work hours can also impact on work if it involves statements about fellow employees which can damage relationships between work colleagues or which impede the capacity of management to manage. It is also subject to the same criticism that we made of proposed section 8(2)(d).

In the debate in relation to section 18C of we took the view that it should not be unlawful to offend or insult a person. We supported an amendment to that section which would remove those words from it. This proposed law in broad terms reflects that position.

However, the problem with both these provisions is that they create a free speech right which only applies in the context of religious statements. As we have stated, we support a broad free speech right. However, if that right is to be created, it needs to be created for all Australians and not just those expressing religious beliefs. This section has the potential to create a very privileged group within the community, a group which many see as already having significant privileges. On that basis, we oppose both these proposed provisions.

3. HUMAN RIGHTS LEGISLATION AMENDMENT (FREEDOM OF RELIGION) BILL

The only clause of this Bill upon which we wish to comment is 47C which is set out below:

1. An educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion may refuse to make a facility available, or to provide
goods or services, for the purposes of the solemnisation of a marriage, or for purposes reasonably incidental to the solemnisation of a marriage, if the refusal:

(a) conforms to the doctrines, tenets, beliefs or teachings of the religion of the educational institution; or

(b) is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

2. Subsection (1) applies to facilities made available, and goods and services provided, whether for payment or not.

3. This section does not limit the grounds on which an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion may refuse to make a facility available, or to provide goods or services, for the purposes of the solemnisation of a marriage, or for purposes reasonably incidental to the solemnisation of a marriage.

4. To avoid doubt, a reference to an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion has the same meaning in this section as it has in section 38 of the *Sex Discrimination Act* 1984.

On the basis of what we have said above, we object to this provision on the basis that it would permit discrimination in cases where the body is providing the facilities on a commercial basis.

We trust this is of assistance to you in your deliberations.

Yours faithfully

Michael Cope
President
For and on behalf of the
Queensland Council for Civil Liberties
2 October 2019