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Human Rights Unit
Integrity Law Branch
Integrity and Security Division

By email: ForConsultation@ag.gov.au

Dear Colleagues


Caxton Legal Centre is pleased to provide a submission to the Religious Freedom Bill legislative package.

Caxton Legal Centre Inc

Caxton Legal Centre Inc. (Caxton) is the oldest community legal centre in Queensland and has been operating for over 40 years. Caxton’s vision is “to build a just and inclusive society that values difference and diversity and the rights of all people and their communities to the social and economic resources they need to exercise their human rights; to influence the development of law to recognise the needs of people who are socially or economically disadvantaged, and to assist people who would otherwise be denied access to justice due to social or economic disadvantage to exercise their legal rights.”[1]

We target our services to members of the community who are marginalised, disadvantaged and isolated. Our clients’ legal problems typically are multi-faceted and many clients have enmeshed legal and personal difficulties. Accordingly, we adopt a multi-disciplinary approach to the provision of legal services, where social workers and lawyers work together to provide client service.

Protection for Freedom of Religion generally

Freedom of Religion is recognised by the International Covenant on Civil and Political Rights which states, in full:

**Article 18**

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.


2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

In Queensland we have two key existing state protections giving effect to freedom of religion; protection from discrimination on the basis of religion, and protection against vilification on the basis of religion\(^2\). Caxton Legal Centre has assisted clients in relation to both key protections and many associated matters. We have, for example:

(a) assisted a child gain exemption to a rigid uniform policy which was incompatible with his exercise of his religion
(b) assisted community members to access courts and other government facilities without needing to remove religious items (where those items had previously been incorrectly classed as weapons)
(c) advised members of faith communities in relation to offensive published material about their religion and people who share their faith
(d) acted in a significant ‘conflicts of rights’ case on behalf of members of the LGBTI community against distressing comments made ostensibly on the basis of religion\(^3\)
(e) advised in numerous other religious discrimination matters including about:
   a. employees being required to attend at important work meetings at religiously significant times, or to attend work drinks on Friday evenings
   b. the imposition of unnecessary uniform rules at work
   c. bullying and ridiculing of employees on the basis of their religious beliefs
   d. provision of prayer facilities and access to relevant religious texts

Queensland has also recently introduced a Human Rights Act\(^4\) in which freedom of religion is specifically protected as a fundamental human right. The Act also protects freedom of expression, a right to privacy (which encompasses a private life), cultural rights which includes religion, and many other rights relevant to individuals, families and communities in the peaceful practice of religion.

We are broadly in favour of protecting religion as an attribute in a manner consistent with other attributes protected by other Anti-Discrimination laws, and there is ample justification to do so at this time when some people of faith, especially women, face increasing vilification and discrimination.

It is essential however that domestic instruments giving effect to Article 18 do not operate in a way that would permit one person to cause harm to another. Where the practice of one’s religion conflicts with rights of others it is sometimes appropriate and necessary to

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\(^2\) both contained within the Anti-Discrimination Act 1991

\(^3\) Menzies v Owen [2014] QCAT 661 and many preceding cases within the same litigation

\(^4\) Human Rights Act 2019 (Qld)
set restraints on religious freedom to allow for other laws that promote or protect ‘public safety, order, health, or the morals or the fundamental rights and freedoms of others.’

In our view appropriate laws relating to public safety, order, health, the morals or the fundamental rights and freedoms of others would include our many existing provisions that cover:

(a) access to reproductive health care and other health services
(b) protection against vilification on the basis of sexuality or gender identity
(c) access to appropriate gender affirming heath care and the right to transition from an assigned gender to the correct gender (and to be accepted as that correct gender)
(d) the right to an education without discrimination
(e) gender equity matters such as women’s inclusion, employment and promotion
(f) anti-discrimination laws generally
(g) workplace safety and anti-bullying laws
(h) and many others

This suite of Bills does not achieve the correct balance. It instead seeks to elevate religion in the case of a conflict of rights.

It also makes limited distinction between private religious rights (to dress, to worship and gather, to raise children etc in line with religion) affecting mainly individuals and families, and public religious interests (including to ‘speak out’ about and to those not of the same religion). In doing so the reforms miss the opportunity to provide deeply needed protections within a respectful human rights framework.

**Indirect discrimination – clause 8**

Clause 8 is drafted unlike other indirect discrimination provisions in other domestic law. Subclauses 3-6 specifying various circumstances that are not unreasonable contain several problems.

**Restrictions on employer conduct rules**

This provision appears to be designed to capture a ‘Folau’ type situation. One reason the Folau case is so persistent within the public consciousness is because until the matter is determined by a Court it sits on the ‘borderline’ between various existing protections seeking to balance freedom of religion and protection against discrimination/vilification, and between private and public life. These thresholds will always need to lie somewhere, and in fact should bend and yield depending on individual circumstances. It is more appropriate for reasonableness to be determined case-by-case allowing decision makers to consider a range of relevant factors.

We do, however, believe there is a broader conversation needed in relation to the rights of employers to regulate outside of work conduct generally. We note the recent case of

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5 For a straightforward discussion of this see Gillian Triggs writing for the Guardian *Are you for Israel Folau or against? We love a simple answer but this is not a binary case* 30 June 2019
Banerji v Comcare\(^6\) and its impact on freedom of political opinion for commonwealth public servants. We have also noticed in our employment law practice increasing encroachment on the private lives of employees across a range of sectors and employers. Whilst we do not believe that this proposed law is the right place to resolve this problem we would like to see consideration given to law reform which would benefit the whole community by giving effect to the human right to a private life for employees generally.

*Restrictions on health practitioner conduct rules*

Presently conscientious objection regimes are in place in various jurisdictions in relation to termination of pregnancy (including in Queensland)\(^7\) and voluntary assisted dying. Subclause (6) extends some aspects of conscientious objection to all health providers and in relation to all types of health care. It would prohibit any workplace policy specifying health services must be provided without discrimination if there is a possibility that a religious health practitioner might object to providing care to certain patients or certain kinds of care based on religious belief. It would assist religious employees who are being asked by their employer to provide services against conscience. It cannot, however, protect the health service or the religious health practitioner from a claim by a patient in relation to treatment or services sought.

This is confusing and risky for both consumers and religious health practitioners. If a State has implemented laws protecting people from discrimination in the access of health services, or provided for a right to health services in a Human Rights Act, as Queensland\(^8\) has, then a responsible employer would inform employees and give guidance on how to comply – probably by way of a health practitioner conduct rule. Clause 8(6) would make that difficult to do.

It also applies to health services which have limited nexus with religious belief, such as dentistry and podiatry. Because it is so broad it will apply much more generally than just termination of pregnancy and voluntary assisted dying for which conscientious objection regimes, with appropriate provisions for referrals, are generally accepted as appropriate. Instead it would extend to mental health care, paediatric care, palliative care, dental services, occupational therapy, counselling and so on. It is not a proportionate response to its purpose.

Restricting health services from providing clarity around access may also make certain vulnerable groups (women, victims of sexual violence, LGBTI people, sex workers, people with mental illness etc) reluctant to raise health care matters with their health service provider for fear of withdrawal of services or other humiliation, even though it does not permit this explicitly.

\(^6\) *Banerji v Comcare* [2019] HCA 23
\(^7\) Section 8 *Termination of Pregnancy Act 2019* (Qld)
\(^8\) Section 37 *Human Rights Act 2019*
We recommend that the test for reasonableness in relation to indirect discrimination be consistent with other anti-discrimination law and subclauses (3)-(6) be removed.

In the alternative, we recommend the removal of subclauses (3) and (4) and the amendment of subclauses (5) and (6) to reflect a more limited and considered conscientious objection regime with an appropriate referral mechanism.

**Statements of belief – clause 41**

Clause 41 states that ‘(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) ...’

This elevates statements of belief above other protections. It is a serious interference with the laws of the states including Queensland which has sought to balance the rights of people with different attributes in a more careful manner. It is noted that the exceptions to clause 41 are proposed to include circumstances of malice and vilification.

The term ‘vilification’ has been subject to much judicial interpretation and it is the provision by which most actions in relation to statements of belief are brought, outside the workplace. In Queensland to establish vilification it is necessary to prove that an ordinary reasonable person could be incited to hate etc by a public act. It is concerned with the feelings which might be incited in a third-party observer rather than the feelings of the primary victim who is injured directly as a result of comments made to, or about, them. In this regard it functions complementarily with anti-discrimination protections which are concerned with the primary victim who is harmed. Discrimination law also operates where vilification law does not, notably in private spaces within public life including at work.

The interaction between clause 41 and the anti-discrimination regime is troubling. It is apparently designed to belatedly address some of the workplace conflict around religious statements made during the same-sex marriage plebiscite.

The workplace conflict during the plebiscite was unfortunate. We are aware that it included shared opinions, some based on religious beliefs, that offended many people but which also made some employees feel unsafe. The laws that protect LGBTI people and give them a right to safety at work are laws that serve the sorts of legitimate purposes Article 18 envisages.

In addition to LGBTI people, others currently protected against harmful statements of belief include women (especially single parents and women victims of violence), people with disabilities including mental health conditions, children and young people, and people of other religions. We note that anti-discrimination law only addresses statements of belief that cause harm; most statements of belief do no harm at all, are not currently prohibited.

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9 GLBTI v Wilks & Anor [2007] QADT 27 and others such as Deen v Lamb [2001] QADT 20 and Owen v Menzies [2014] QCAT 661
by anti-discrimination law and people making those statements would be protected by the general protections against discrimination on the basis of religion.

It is perhaps helpful to provide an example of how the current law would likely operate in respect of statements of belief around marriage. Currently, a statement of belief that Christian marriage is between a man and a woman is unlikely to breach any existing anti-discrimination law. However, a statement of belief that marriage should be between a man and a woman because same-sex relations are an abomination against god, cultivate child abuse and should be punished might offend anti-discrimination laws if the statement distressed someone who is lesbian, gay or bisexual and it occurred in a relevant domain, at work for example. The fact that this hypothetical comment is offensive generally (including to many people of faith) is not the point; the point is the actual harm it causes to someone in particular.

Clause 41, coupled with the other provisions of this Bill, are clearly intended to give religious statements special status in private places, like secular workplaces, in a manner inconsistent with the delicate balancing asked for by Article 18 and the needs of the community at this time.

**We recommend that clause 41 be removed from the Bill.**

### Protection of institutions

**Clause 5**

The definition of person in clause 5 of the Bill encompasses non-natural corporate persons who are thus furnished with *human* rights. It is not appropriate for human rights law to protect ‘attributes’ held by bodies corporate, companies or institutions. Giving human rights to non-human persons undermines the fundamental importance of *human* rights and their relationship to human dignity.

**We recommend that the definition of person in clause 5 be a natural person.**

**Clause 10**

Clause 10 seeks to distinguish religious bodies which do religious work and are thus able to conduct themselves in a way reasonably regarded as in accordance with their religion, from those that engage in commercial activities and must comply with the usual rules including about discrimination.

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There are, however, a number of religious bodies that engage in far more than religious activities on the one hand and commercial activities on the other. Organisations like Lifeline, Uniting Care, Mission Australia, the Salvation Army etc receive government funding (and private donations) to perform public services on behalf of the state and broader community including counselling, financial counselling, disability care, aged care, homelessness services and others. The explanatory notes to the Bill provide the example of aged care being commercial activity because residents are paying. That is an uncomfortable characterisation and overlooks the importance of faith as a motivator for good public work. These religious charities are doing the work of government but for altruistic reasons, are generally mission oriented and employ purpose-motivated workers at a lower pay than public servants would receive for similar work. It is important to recognise this. It is also important though that when using public money to perform public services on behalf of the state or the broader community is it appropriate for organisations, whether religious or otherwise, to operate in an inclusive and non-discriminatory way.

We are also concerned that the Bill does not adequately protect children at school. In Queensland all children are currently protected against discrimination at school, including religious schools. We note some relevant aspects of religion and schooling are currently the subject of an Australian Law Reform Commission referral. Nonetheless it is undesirable to legislate in relation to some aspects of school functions without broadly ensuring the protection of children as the primary aim of any human rights reform.

We recommend that clause 10 be amended to avoid permitting discrimination in relation to employment in and delivery of public services by religious bodies

General complexity

The Bill as a whole is complex, and further complicated in practice by its relationship to other laws (as set out above in respect of clauses 8 and 41, for example).

The variations between the drafting of this Act and that of other anti-discrimination law will make it complicated to raise complaints in cases of intersectional discrimination (on the basis of more than one attribute). This will affect particularly those who are treated unfavourably because of mixed religion and race, such as middle-Eastern and African Muslims; and those who are treated unfavourably because of mixed religion and sex/sexuality such as a woman in Muslim dress or a gay Christian. Discrimination on the basis of intersecting attributes typically affects the most vulnerable cohort within a group. It is an advantage of consolidated anti-discrimination laws such as most States have adopted that they more easily facilitate complaints about mis-treatment based on more than one attribute.

Some anti-discrimination law reform processes have attempted simplification and have discarded unnecessary complications such as the comparator in direct discrimination. If there is to be departure from a consistent standard, it would be better to depart in a way
that improves coverage and advances human rights protections for vulnerable people in a way that others might follow in due course.

**Amendment to the objects of other Anti-Discrimination Acts**

The proposed reform would introduce into all Commonwealth anti-discrimination laws the idea that *regard must be had to the indivisibility and universality of human rights* and the *principle that every person is free and equal in dignity and rights.*

The Religious Discrimination Bill also includes these words. However, it also contains provisions that undermine the concept of indivisibility and equality, such as clause 41 which specifically permits discrimination by *statement of belief*, elevating religion rather than balancing it against the rights of others.

In other instruments guiding the balancing of human rights, such as Queensland’s Human Rights Act, a proportionality test is engaged. An expanded regime that provided positive rights, such as an Australian Human Rights Act or Charter with an appropriate proportionality mechanism would be better overall for recognising and balancing human rights.

We recommend removing the provisions in the Religious Discrimination Bill that would be against the proposed shared objects.

We recommend introducing a Commonwealth Human Rights Act or Charter of Rights.

Thank you for considering our submission.

Yours faithfully

Caxton Legal Centre
Writer: Bridget Burton, Director Human Rights and Civil Law Practice

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11 Section 13 *Human Rights Act 2019* (Qld)