SUBMISSION ON ANTI-DISCRIMINATION BILL 2024 CONSULTATION

Department of Justice and Attorney-General (QLD)

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On behalf of Australian Christian Churches

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Introduction

My name is Mark Llewellyn Edwards, and I am the Founding Pastor of Cityhope Church in Ipswich Queensland, affiliated with Australian Christian Churches (ACC). This submission is made on behalf of the ACC of which I am their representative on matters of Religious Freedom.

ACC is the largest Pentecostal movement in Australia, comprised of more than 1,000 churches, 3,300 credentialed pastors and 400,000 constituents.

The Queensland Government is seeking community feedback by way of submissions on the new proposed Anti-Discrimination Bill 2024 (hereafter referred to as 'the Draft Bill') that is intended to replace the Anti-Discrimination Bill 1991.

This submission is intended as part of that requested feedback.

General Comments on Clauses 7 & 10 and Religious Freedom

At the outset, the ACC welcomes the new Clause 7 which specifically specifies that the Act 'must be interpreted in a way that is beneficial to a person who has a protected attribute' to the extent it is possible to do so. Following this, Clause 10 (n) lists 'religious belief or religious activity' as a 'protected attribute'.

Listing 'religious belief or religious activity' as a 'protected attribute' is extremely important because **Religious Freedom is an internationally recognised human right** and in fact is regarded as one of the oldest human rights in history.

In the High Court of Australia – *Church of the New Faith v Commissioner of Pay Roll Tax* (1983) 57 ALRJ 785 at 787, per Mason ACJ and Brennan J, it was stated, '**Freedom of religion, the paradigm freedom of conscience, is of the essence of a free society.** The chief function in the law of a definition of religion is to mark out an area within which a person subject to the law is free to believe and to act in accordance with his belief without legal restraint. Such a definition affects the scope and operation of s. 116 of the Constitution and identifies the subject matters which other laws are presumed not to intend to affect. Religion is thus a concept of fundamental importance to the law.'

As previously stated, Religious Freedom is indeed one of the oldest human rights. As early as the 2nd century the son of a Roman Centurion, Tertullian, a Roman citizen, lawyer and historian wrote, 'Rome should allow Christians to exercise their faith because religious freedom was an essential component of human nature….

Every person should be able to worship according to (their) own convictions.' This is the first and oldest recorded written statement that expresses the need for religious freedom to be an essential human right.

Without progressing into a thesis on Religious Freedom and its acceptance throughout history, there are now numerous international treaties, declarations and other instruments which seek to protect Religious Freedom. Australia is a party to some and without doubt has an obligation in international law to comply with them.

Certainly, the most well-known of these international 'accords', in a modern context, in terms of the protection of Religious Freedom, is the **1948 United Nations Universal Declaration of Human Rights (Universal Declaration)**. Passed by the UN General Assembly, including Australia, the Universal Declaration has not become part of Australian law but surely this must influence lawmakers in considering any proposed legislation or changes to existing legislation, in relation to religious freedom or discrimination.

Several of the Universal Declaration's provisions relate to Religious Freedom. However, for the purpose of this submission, **Articles 2 and 18** are the most significant.

Article 2 prohibits discrimination in a number of areas including religion. However, one must note that the prohibition of discrimination is found in numerous international treaties and documents.

Article 18 states, 'Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.'

There are limits for all freedoms being exercised. In the case of Religious Freedom, **Article 18(3)** imposes limits on the practice of religion if it can be justified as prescribed by law 'where this is necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'. The acceptance of such limits (in accordance with other UN documents, such as the *Siracusa Principles*) must be shown to be 'necessary' and 'proportionate', with a key question being whether, if there are limits imposed for a specific reason, that the limits be as least restrictive as possible.

One must have regard to **Article 18 (4)** of the **International Covenant on Civil and Political Rights (ICCPR)**that parents and legal guardians must have the freedom to choose the 'religious and moral education of their children in conformity of their own convictions'.

For completeness **Article 18 (1-4)** is fully outlined below.

> 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.
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> 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.
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> 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.
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> 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.

Effect of the draft bill

Clause 29 of the draft bill provides that ‘a person may discriminate against another person on the basis of the person’s religious belief or religious activity in relation to work for a religious body if’ and the draft bill then lists three provisions (a) to (c).

These proposed changes, specifically Clause 29, seek to narrow further the already narrow religious exceptions contained in the 1991 Act. The changes are the most restrictive regime for regulating religious bodies in Australia and will significantly undermine the ability of religious organisations to employ persons in accordance with their faith, contrary to international law cited above in Article 18. It is important to note that the Department of Foreign Affairs and Trade on its website (dfat.gov.au) states, ‘Australia's commitment to human rights is enduring: we were an original signatory to the Universal Declaration of Human Rights in 1948. We have been a leading proponent of its consistent and comprehensive implementation.’ Clause 29 is inconsistent with this International Agreement of Human Rights.

Dealing with Clause 29(1), which provides that discrimination is only permitted where participation in the teaching, observance and practice of the religion is a genuine occupational requirement, and the person cannot satisfy this requirement due to their religious belief or activity (in conjunction with the aforementioned requirement that discrimination be ‘reasonable and proportionate’ in the circumstances). I will refer to ‘reasonable and proportionate’ as outlined in Clause 29 (1) (c) later in this submission.

The 'genuine occupational requirement' standard is too narrow to allow religious organisations to employ someone consistent with their faith.

This clause only perpetuates the false assumption that only employees who engage in their role of a teacher and as part of the actual teaching there is a religious component will fit within Clause 29 (1). This is a religious stereotype and ignores the fact that, for example, religious schools are trying to create a culture of faith.

A culture of faith requires a critical mass of staff who share the beliefs and practices which undergird the school.

Let me give an example by way of a question question posed by Justice Rothman AM to the group discussion that I participated in before the Australian law Reform Commission (ALRC) prior to the final report being prepared by ALRC. This question seems to be exactly what Clause 29 (1) (a) is referring to.

Justice Rothman asked, ‘Why does a maths teacher need to be a Christian in a Christian school?’

In all my years of pastoring people, I have spoken to hundreds of parents seeking guidance on the educational needs of their children. The parents will always, without exception, look for an educational institution whose ethos, values, principles, and convictions are those which conform to their own values and beliefs. For people of faith, parents will therefore be prepared to pay school fees, above their taxes, for their children to be educated at a school or institution that will promote the values that they, as a family, deem appropriate to their family’s beliefs.

This is the family’s primary aim, and its primacy rises above enquiries about the quality of individual teachers teaching specific subjects. In other words, in all my years as a Pastor I have never had a family ask me about a specific teacher at a school as opposed to the more pressing, urgent, and critical question about the school’s ethos, values, principles and convictions, which are paramount for any parent or legal guardian.

In making this choice there is an express understanding or, at the very least, an implied understanding on behalf of the parents that all staff, not just teaching staff, will adhere to the ethos, values, principles, and convictions of the school. The unity of all staff and school’s ethos, values, principles and convictions is not just desired by parents, it is expected.

This expectation overrides whether an individual teacher is, for example, ‘a good maths teacher’ irrespective of that teacher’s personal beliefs. Parents expect competent teaching staff but not at the expense of the modelling of the school’s ethos, values, principles, and convictions by the teaching staff.

The reason for this argument is further enhanced by the fact that teachers 'come and go'. In other words, the teacher may change employment from a particular school however the ethos, values, principles, and convictions of the school itself are consistent over time and do not change.

Therefore, because of the transient nature of all employment including teaching, this is not a situation where Article 18(3) would apply, if it does indeed apply to educational freedom of choice. The staff, including the teacher's personal beliefs must always be subservient to the ethos, values, principles, and convictions of the school. Otherwise, the culture that the ethos, values, principles, and convictions produces are at risk of erosion – and with it, the very quality that attracts parents to a faith-based education for their child. Parents express their desire to see the ethos, values, principles and convictions by their decision to pay for an education over and above what they have already contributed through their taxes. If the culture of faith-based schools did not matter, parents would not "vote with their feet" in the enormous number they do.

Clause 29 must reflect a much broader 'protection' for religious bodies especially schools to include all employees.

These insights provide a persuasive basis for allowing religious faith based schools the autonomy to choose employees who uphold their doctrines in belief and conduct. A religious school may want to preserve their distinctive identity as religious in order to be a community which approaches questions of education from that particular religious perspective. Indeed, those schools may see the practice of education itself as a religious injunction which is to be performed in accordance with their religious convictions.

Therefore, it is not enough for only, for example, the Principal and religious studies teacher to uphold the religious ethos of the school.

The entire community is designed to cultivate a consistent ethos. Maintaining this religious identity allows the school to present a unique perspective in a democracy, and legally compelling them to accept employees with views or conduct inconsistent with that perspective undermines their religious identity and, consequently, their democratic position as equal and valued citizens. Facilitating this action affirms the unique, equal and valued position of religious people and communities as citizens.

The reference in this Draft Report to the ALRC report where this Draft report states, 'The proposed approach is also broadly consistent with the proposals …. outlined in the ALRC's Consultation Paper: Religious Educational Institutions and Anti-Discrimination Laws' seems very premature. The ALRC's final report has not been publicly released by the Federal Government and until it is, no one knows what the recommendations will include or more importantly which recommendations the Government will accept.

It seems extremely inconsistent, to take this point a step further, let's hypothetically think of a situation where an anti-discrimination law compels a political party such as the ALP, LNP or Greens, to name a few highly visible parties in Queensland, to hire anyone and everyone regardless of their beliefs in that political party and the practices associated with it. No political party would accept this proposition.

These changes applied to the context of political parties would mean any position within the party or staffing could be held by a person with technical proficiency regardless of whether their beliefs and practices align with the party. If Government does not enforce such an obligation on political parties, it is distinctly unequal and unfair to impose it on religious bodies such as faith based schools and without doubt demonstrates an anti-religious bias.

Professor Patrick Parkinson in an article, 'The Future of Religious Freedom' (2019) 93(9) *Australian Law Journal* 699, 702 says that implementing genuine occupational requirements grounded in secular understandings of religion would 'greatly reduce the freedom of religious organisations to have staffing policies consistent with their identity and ethos'. Many faith based religious schools see their religious ethos as central to the educational mission of the school and believe this requires staff to believe and act consistently with that ethos.

Clause 29 (1) (c) imposes a further restriction. In particular, the 'reasonable and proportionate' standard is inappropriate.

I have argued that Article 18 of the ICCPR cannot be ignored by any Government, State of Federal. Australia was a signatory to this International Agreement and in fact assisted in the drafting of of the ICCPR. Previously in this submission I have stated that Religious Freedom like all human rights has limits. These limits are set out in Article 18 and further expounded in what is known as the Siracusa Principles. The limits or restrictions must be shown to be 'necessary' and 'proportionate', with a key question being whether, if there are limits imposed for a specific reason, that the limits be as least restrictive as possible.

The 'reasonable and proportionate' standard of Clause 29 (1) (c) is inappropriate because Article 18 of the ICCPR combined with the Siracusa Principles requires any restrictions on religious freedom to be 'necessary', not merely reasonable.
The principle of religious liberty is not merely limited to private, individual belief and action. It is a well accepted principle that religious freedom extends beyond private belief and acts of worship to a public context such as proselytization, social and business interactions, employment, cultural and charitable activities and education to name just a few external activities. For many religious people these external manifestations of their religion are just as central and important to them as private belief, prayer and worship. Article 18 of the *International Covenant on Civil and Political Rights* reflects this and in particular Article18(4), which obliges States to have respect for the liberty of parents to educate their children in conformity with religious convictions without limitation.

One significant method of achieving this obligation is facilitating the ability of faith-based schools to educate in accordance with their faith-based ethos as parents may wish to choose this. Religious liberty in principle, and with particular regard to associated actions such as the freedom to manifest religion in groups and publicly through creating educational organisations, is subject only to legal limitation which is *necessary* (not merely reasonable) to protect public safety, order, health, morals or fundamental rights and freedoms of others. This is a high threshold which requires substantive proof before any legal limitation is appropriate.

There is another reason the reasonableness standard is inappropriate. This standard requires a court to assess whether allegedly discriminatory conduct on the basis of religion is reasonable, which is in effect asking a secular court to impose a theological finding. This is a significant intrusion of the state into the church. An exemption or right which places the decision in the hands of a secular tribunal to decide whether an occupational requirement is 'genuine', or a discriminatory action is 'reasonable', runs significant risk of imposing a secular perspective on a theological question, which would severely undermine the religious freedom of individuals and religious bodies.

Determining these issues are questions of fact in any given situation and courts should accept the testimony of the religious groups on this rather than being empowered to act as a secular arbiter of a theological dispute, which would damage religious freedom by imposing the views of the secular state on a religious community.

Other Clauses

Clauses 61 and 62 specifically exclude work and education. This has the effect that Clause 29 applies to the employment of clergy. If this is the case, a religious organisation is able to select, train and appoint a minister, but a religious organisation must adhere to the Clause 29 requirements in the paid employment of that clergy/minister. An example of how unworkable this is, would be a religious organisation would not be able to refuse to employ a minister, or terminate the employment of a minister, if they acted inconsistently with the doctrine and tenets of that religion. A clergy therefore, could bring an action for discrimination under this Draft Bill if that individual clergy, although acting inconsistently with the tenets and beliefs of the religious body they are employed by felt discriminated against because they would not adhere to those tenets in applying for employment or in relation to any dismissal.

As noted above, this egregious state interference in the autonomy of religious organisations to select or dismiss leaders is contrary to international law and is not the hallmark of a free and democratic society which values human rights such as religious freedom.

Conclusion

The proposed changes to the Queensland Anti-Discrimination Act are contrary to international law as stated above. It is time that anti-discrimination exemptions should be reframed as positive associational rights.

Perhaps to sum up the position of ACC I can quote, Nicholas Aroney and Paul Taylor, in their article, ‘The Politics of Freedom of Religion in Australia: Can International Human Rights Standards point the way forward?’ (2020) 47(1) *University of Western Australia Law Review* 42, 61-62.)

The authors suggest that what religious schools really need is a ‘freedom to conduct their educational functions through a curriculum and in a manner which is consistent with their religious ethos, delivered by and within a community of like-minded others. Their wish is to make suitable appointments based on the alignment of fundamental beliefs and practices… Substitution of legislation to similar effect, in place of the existing schools exemptions, could remove some of the impassioned hostility from current debate, in particular by enabling them to require employees to act in a manner that demonstrates loyalty to their religious ethos, rather than misplaced sexuality-focused exceptions and exemptions.’

Positive associational rights would enable schools to select and preference staff consistent with their religious and institutional ethos. An example might be inserting a provision to provide employment rights to organisations established for a particular religious purpose or social cause, which would legally affirm the freedom of religious communities to choose or prefer members who adhere to the ethos of the organisation in their beliefs and conduct.

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