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Institute of Public Affairs

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Anti-Discrimination Bill 2024 Consultation
Strategic Policy and Legislation, Justice Policy and Reform
Department of Justice and Attorney-General
GPO Box 149
BRISBANE QLD 4001

Dear Secretary,

Institute of Public Affairs submission to the Consultation into the Draft Anti-Discrimination Bill 2024

The Institute of Public Affairs (IPA) welcomes the opportunity to provide the Queensland Department of Justice and Attorney-General with analysis of the draft *Anti-Discrimination Bill 2024* ("the bill").

IPA analysis of the draft bill finds it is fundamentally flawed and would be a major and direct assault on the freedom of speech of all Queenslanders. In particular, the analysis finds:

- The bill's explicit aim of achieving substantive equality is fundamentally incompatible with Australia's liberal democratic tradition of formal equality before the law.
- The bill undermines basic rule of law principles and would dramatically expand the scope and reduce the standard of unlawful speech in Queensland.
- The bill imposes a vague and ambiguous duty on employers to actively eliminate discrimination, sexual harassment, and vilification, which will have a chilling effect on workers and workplaces.
- The bill blurs the line between church and state by giving the government a greater responsibility for deciding whether religious beliefs and practices are legitimate.
- The bill would be the beginning of the end of religious schooling in Queensland.

On the basis of these findings the IPA recommends the draft Anti-Discrimination Bill not be legislated.

The bill's explicit aim of achieving substantive equality is fundamentally incompatible with Australia's liberal democratic tradition of formal equality before the law

A pillar of the bill is that it aims to achieve 'substantive equality'. The preamble of the bill explicitly states that the achievement of 'substantive equality' through securing equitable outcomes and equal opportunity may require a 'different application of a rule to different groups' and 'the making of reasonable accommodations and the taking of affirmative measures'.

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This is reflected in clauses 13(4) and 16 of the bill, where it allows a person to undertake 'affirmative measures' which treat members of a group differently 'to promote or realise substantive equality'. In other words, the bill attempts to achieve equality by treating people unequally, and attempts to solve discrimination with more discrimination.

The ideological underpinnings of 'substantive equality' are flawed and do not align with the principle of formal equality. The *Affirmative Measures Consultation Paper* suggests that formal equality is underpinned by the view that people should be treated alike, which it critiques by suggesting that 'not everyone starts on an equal footing, and so equal treatment will not address the results of systemic and historical inequalities and disadvantages for certain groups in society.'[1] It argues that to achieve substantive equality it may be necessary to 'treat various groups differently'. The perspective that some defined identity group should be treated differently is blatantly illiberal and should not be codified in legislation. Indeed, when a proposal with similar ideological underpinnings was presented to Queensland voters—to amend the Australian Constitution to establish a body to make representations for Indigenous Australians—it was rejected by 70 per cent of Queensland electors at the October 2023 referendum.

The IPA has previously argued that this framing of rights is often presented as a zero-sum trade-off between free speech rights for some groups, and a conferral of dignity on other groups. This vision of freedom of speech is not realistic and represents a narrow vision of dignity and what it means to participate in society.[2] Rather, freedom of speech should be understood as fundamental to the dignity of the individual. The IPA explored the relationship between autonomy and dignity in a 2016 report, noting:

> Individual autonomy and dignity are inseparable; the latter can only be realised where the former is constrained only by universal, reciprocal, coherent rules. The argument that dignity requires that some people sacrifice their autonomy for the benefit of others satisfies none of these conditions; the loss of autonomy is itself a loss of dignity.[3]

The bill undermines basic rule of law principles and would dramatically expand the scope and reduce the standard for unlawful speech

Clause 84 of the bill would make it unlawful to engage in a public act that a reasonable person would consider 'hateful, reviling, seriously contemptuous, or seriously ridiculing' another person or people because of their age, disability, gender, identity, race, religion, sex, sex characteristics, or sexual orientation. These subjective standards for unlawful speech are a dramatic diminution of the standards in the current *Anti-Discrimination Act 1991* and threaten the freedom of speech of all Queenslanders.

[1] Department of Justice and Attorney-General, *Anti-Discrimination Bill 2024 (Exposure Draft) – Affirmative measures* (Consultation Paper, February 2024) 9.
[2] Morgan Begg, *IPA Submissions to Inquiry into Anti-Vilification Protections* (Institute of Public Affairs, December 2019) 2.
[3] Chirs Berg, Simon Breheny, Morgan Begg, and Andrew Bushnell, *The Case for the Repeal of Section 18C* (Institute of Public Affairs Research Report, December 2016) 9.

Currently, unlawful vilification in Queensland is defined as an act involving the 'incitement of hatred, serious contempt for, or severe ridicule of' another person because of the race or religious characteristics. The proposed clause 84 would apply to seven other protected attributes and would remove the already flawed requirement that a causal connection between the act and the incitement of an emotional response in another person be established.

Determining whether a public act is 'hateful' is not an objective legal standard. The ambiguity implicit in the term makes it inappropriate to use in legislation without objective measures and specific guidance as to how it will be enforced.[4] The Anti-Discrimination Commissioner would inevitably have to use their own value system in determining whether conduct was hateful.

If this bill had been implemented before the referendum, arguments that were critical of the proposed Voice would potentially have been unlawful or would have at least had a chilling effect on the debate. For example, Voice proponent and co-chair of the Referendum Council said of the debate in May 2023 that 'The hate is raining down on us. This is not new, but it is in such a concentrated form, and it is nasty and malevolent'.[5]

Requiring the Commissioner to make decisions within this legislative framework cannot be expected to yield predictable and uniform decisions. A subjective law means that a person can never truly know when they are breaking it, as they cannot be sure as to how it will be applied. It also fails to be consistent with the rule of law, which requires the law to be clearly known and for the people subject to it to be capable of understanding their legal obligations. Without this, the society cannot be said to be ruled by objective, uniformly enforced law, but rather the inclinations and fancies of those tasked with presiding over it.

The bill imposes a vague and ambiguous duty on employers to actively eliminate discrimination, sexual harassment, and vilification, which will have a chilling effect on workers and workplaces

The bill requires a private entity to enforce the government's laws by imposing on businesses and individuals a 'positive duty' to eliminate discrimination, sexual harassment, and vilification in the workplace.

Clause 19 of the bill compels employers to take 'reasonable and proportionate measures' to eliminate the relevant unlawful conduct but offers no meaningful specificity for understanding what is appropriate to meet the standard. This will have the effect of organisations and employers over-complying with the unclear legal obligation to restrict speech in the workplace as a risk mitigation measure.

4 Susan Reye, *Review of the Disability Discrimination Act 1992*, Legal Advice to the Productivity Commission, 1 March 2004, 2-6: 'In our view, the ordinary meaning of the word "vilification" is not sufficiently clear to be relied on a legislative provision, especially one that imposes liabilities and penalties.'

5 Lorena Allam, 'Indigenous leaders warn that "hate is raining down on us" as Voice campaign ramps up,' *The Guardian* (26 May 2023): https://www.theguardian.com/australia-news/2023/may/26/indigenous-leaders-warn-that-hate-is-raining-down-on-us-as-voice-campaign-ramps-up.

However, by privatising the enforcement of the discrimination, harassment and vilification provisions, a person affected by the prohibitions will have no legal right to appeal the actions of their employer who unfairly restrict their speech.

Furthermore, clause 19 requires businesses and organisations, including religious ones which would have already had their religious freedom limited under this bill, to then develop policies to enforce a part of the Act that the organisation views as morally wrong. This would compel people of faith to police thought in organisations in ways that are inconsistent with, and even in contradiction to, their faith-based convictions.

The bill blurs the line between the church and state by giving the government greater responsibility for deciding whether religious beliefs and practices are legitimate

Religion enriches the personal lives of many Queenslanders, while also providing a wealth of wisdom and ethical insight to Australian society more broadly. Religious organisations also serve the community in vital ways, such as providing a religious school education, or services such as crisis housing and food relief to the vulnerable and underprivileged.

Religious freedoms are commonly at conflict with the provisions in anti-discrimination laws. Individuals or organisations which exercise genuine religious belief and practices may nonetheless be acting unlawfully under anti-discrimination laws due to the legal rights granted to others to complain. Most anti-discrimination laws include provisions that, in limited circumstances, exempt churches and faith-based organisations, such as schools and welfare organisations, from liability. Yet the bill will narrow these Sections even further, diminishing the religious character of religious schools and organisations.

Clause 29 outlines that one of the conditions for religious bodies to be exempt in workplace hiring is if the discrimination is 'reasonable and proportionate in the circumstances'. This requires religious adherents to justify their practices to the state, rather than the state justifying why their liberties ought to be restricted. It is a well-established legal principle that interferences with religious liberty must be justified and under very specific circumstances, with even the International Covenant on Civil and Political Rights (ICCPR) stating that limitations may only be constituted by what is 'necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others'.[6] As Associate Professor in the School of Law at Queensland University of Technology Alex Deagon notes, 'This is a high threshold which requires substantive proof before any legal limitation is appropriate'.[7] The burden should not be placed on religious organisations to prove that their alleged discriminatory conduct was 'reasonable and proportionate' in the circumstances, but rather the burden should be on the state to demonstrate that any limitation to their religious liberty was 'necessary'.

[6] United Nations General Assembly, *International Covenant on Civil and Political Rights*, adopted 16 December 1966 (entered into force 23 March 1976), https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights.
[7] Alex Deagon, 'Queensland – new proposed discrimination law,' *Law and Religion Australia* (12 March 2024): https://lawandreligionaustralia.blog/2024/03/12/queensland-new-proposed-discrimination-law/.

Clause 29 is further flawed as it inappropriately invites the state to adjudicate on religious theology. When assessing a complaint, the Anti-Discrimination Commissioner will be tasked with judging whether the discrimination was 'reasonable and proportionate in the circumstances'.[8] This disturbingly blurs the line between church and state, making the state the arbiter of which religious beliefs are legitimate.

This increased interference by the state in religious affairs extends to clauses 61 and 62 by undermining the ability of religious organisations to control appointment and dismissal of ministers of religion through making paid ministers subject to the protections of clause 29. Clauses 61 and 62 provide general exceptions for religious bodies, with the former allowing them to discriminate in the selection, training and ordination of ministers, and the latter in the performing of religious acts. This means that while clause 61 allows religious organisations to autonomously select, train and ordain ministers, they must adhere to the requirements of clause 29 in the paid employment of that minister. Clause 29(3) explicitly states that a person cannot discriminate in the hiring on the basis of a protected attribute other than religious belief or religious activity. This would include for protected attributes such as relationship status, sex work activity, gender identity, and sexual orientation.

The effect of the law would be that a religious organisation would be unable to refuse employment, or terminate a minister's employment contract, if their personal conduct was inconsistent with the doctrine of the religion. This incoherent requirement would undermine the ability of a religious organisation to preserve its religious ethos and represents an egregious interference in the ability of religious organisations to independently and freely employ religious leaders who hold the same religious convictions that they do. Such state interference in religious appointments and dismissals is more consistent with an authoritarian state than a liberal democracy.

The bill would mark the beginning of the end for religious schooling in Queensland

The bill retains the flawed 'genuine occupational requirement' present in section 25 of the Anti-Discrimination Act 1991 and narrows it further to make it even more onerous on faith-based schools to comply with the law as well as maintain their religious ethos.

Clause 29 of the proposed bill provides that discrimination is only permitted when 'participation in the teaching, observance or practice of the religion concerned is a genuine occupational requirement of the work', the person cannot satisfy this requirement due to their religious belief or activity, and the discrimination is reasonable and proportionate in the circumstances. The 'genuine occupational requirement' hamstrings the ability of religious schools to employ staff who share their faith. In particular, 29(1)(a) of the bill is based on the fallacy that only some staff, such as the religious studies teacher and the principal, need to profess the religious beliefs of the school for a religious education to be delivered. In reality,

[8] This resembles the case in Victoria, when a judge was required to assess whether a faith-based body was able to use a religious exemption by testing whether its religiously informed actions amounted to a religious doctrine for the purposes of the Victorian *Equal Opportunity Act 1995*: Morgan Begg and Danial Wild, *Religious Liberty and its Challenges in Australia Today: A Report into the Federal Government's Religious Discrimination Bill 2019* (Institute of Public Affairs Research Report, 2019)

parents send their children to religious schools not so that their children can receive a few lessons of religious instruction a week, but rather so that they may actively be involved in a culture of faith and faith community built by both staff and students. As the IPA has previously argued in a 2019 report into proposed religious anti-discrimination laws,

These schools require autonomy over who can be employed in that school in order to ensure its religious character is not diminished, and to ensure students are given a religious education that many parents expect when they enrol their children in such schools.[9]

Religious instruction is also not neatly cleaved into certain periods of the day, but permeates the worldview of people of faith and influences everything that they do. It cannot be expected that the discussion of religious matters by students would only be confined to a few periods within a teaching week. Rather, students could approach any staff member with religious questions. In this way, staff serve as moral role models for students, underlining the importance of giving faith-based schools autonomy to maintain their religious ethos.

Clause 29 also carries the added legal risk for a religious school hiring a person who does share the faith of the school but is not involved in teaching religion. For example, if a school hired a teacher of English or science, who did happen to share the faith of the school, it would open up grounds for a complainant to allege that the successful candidate received preferential treatment in the hiring process. This would place the onus on the school to prove that they did not discriminate in hiring, therein having a deterring effect on any religious school contemplating hiring a candidate for employment who professed the same religion as the school. It is incoherent that a religious school would be penalised in this way for preferencing staff that subscribe on a personal level to the ethos of the school.

I thank the Department of Justice and Attorney-General for the opportunity to make this submission. Please do not hesitate to contact me on mchambers@ipa.org.au for further consultation or discussion.

Kind regards,

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[9] Morgan Begg and Daniel Wild, *Religious Liberty and its Challenges in Australia Today: A Report into the Federal Government's Religious Discrimination Bill 2019* (Institute of Public Affairs Research Report, 2019) 14.