

Joint Faiths Anti Discrimination Act Working Group

C/- David Baker

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Anti-Discrimination Act Review

Strategic Policy and Legislation, Justice Policy and Reform

Department of the Attorney-General

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To Whom It May Concern:

RE: Antidiscrimination Bill 2024 Consultation.

Please find below a submission from the parties listed at the end of the submission. Yours faithfully,

A handwritten signature in black ink that reads "David Baker". The signature is written in a cursive style and is positioned above the printed name.

David Baker

Interfaith Submission to Queensland Department of Justice and Attorney-General on the Anti-Discrimination Bill 2024

## Executive Summary

The proposed changes to the Queensland Anti-Discrimination Act seek to narrow religious exceptions even further, which is concerning for many religious organizations. These changes are the most restrictive regime for regulating religious bodies in Australia and will significantly undermine the ability of religious organizations to employ persons in accordance with their faith.

The proposed ‘reasonable and proportionate’ standard is inappropriate because Article 18 of the International Covenant on Civil and Political Rights (ICCPR) requires any restrictions on religious freedom to be ‘necessary’, not merely reasonable. The same exception clause also requires a secular court to impose a theological definition of what is a genuine occupational requirement on the basis of religion, which is a disturbing intrusion of the state into religion.

Imposing a ‘genuine occupational requirement’ standard and reasonableness inquiry are not necessary restrictions on religious freedom. Many religious organizations are seeking to create and maintain a faith-based culture and ethos, which necessitates employment of persons who fit in that culture by believing and acting consistently with the requirements of the faith, including in matters of personal morality, and not merely by having technical proficiency in the role. We urge the Queensland Government to thoroughly reconsider clause 29.

The proposed exceptions should be reframed to continue the exemption for religious bodies, including religious schools while clarifying that it is for protecting the freedom to manifest religion or belief, individually or in community with others. This includes the right to worship, observe, practice, teach, and enable a parent’s right to choose a school that conforms with their religious and moral convictions under Article 18.4 of the ICCPR.

Additionally, religious bodies have the right to select and maintain a body of staff that upholds their beliefs, practices and moral convictions. Of course, this does not excuse such bodies from taking reasonable and proportionate measures to eliminate sexual harassment or any other form of harassment, vilification, or victimization based on any protected characteristic among their employees. However, the law should acknowledge the right of such bodies to create and maintain a faith-based culture and ethos through their employment decisions.

The freedom to practice religion can be restricted, but only if the restriction is lawful, necessary, and supported by evidence. The restriction must be based on a valid reason, address a pressing public or social issue, seek a legitimate aim, and be proportional to the goal. The need for the restriction must be evaluated objectively.

This bill limits religious freedom to promote equality, prevent discrimination, sexual harassment, vilification, and other unlawful conduct. It aims to identify and eliminate systemic causes of discrimination, sexual harassment, vilification, and victimization. These goals are pressing and align with international law. However, the proposed narrowing of the religious exception is not proportionate to these aims. According to the Siracusa Principles, a state should use no more restrictive means than required.

Human rights-based frameworks should aim to maximize all human rights and freedoms, rather than pit them against each other. Governments have often used religious exception clauses within an anti-discrimination framework. Recent Victorian reforms have alarmed and isolated many faith communities.

Queensland should not be forced to repeat the same problematic approaches used elsewhere. Rather, it should lead the way in innovative law reform to maximize all human rights and freedoms.

The principle of religious liberty extends beyond private belief and acts of worship to public and associational contexts such as propagation, social and business interactions, employment, cultural and charitable activities, education, and so on. For many religious believers these external manifestations of religion are just as central and important to them as private belief, prayer and worship.

Article 18 of the ICCPR reflects this, stating that 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.

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

The States Parties to the ICCPR, including Australia, have also undertaken 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 conclusion, the proposed changes to the Queensland Anti-Discrimination Act are overly restrictive and will undermine the ability of religious organizations to employ persons in accordance with their faith. The proposed 'reasonable and proportionate' standard is inappropriate because it does not align with international human rights law. Instead, the proposed exceptions should be reframed to continue the exemption for religious bodies while clarifying that it is for protecting the freedom to manifest religion or belief, individually or in community with others. Obligations on religious organizations that are already well defined at law, such as taking appropriate and proportionate measures to eliminate sexual harassment, vilification, and victimization based on protected attributes are appropriate, and religious bodies should not be exempt from such obligations.

We believe it is Government's duty to facilitate a truly inclusive society by leading the way in innovative law reform to maximize all human rights and freedoms and not just pit them against each other.

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## Introduction

The proposed changes to the Queensland Anti-Discrimination Act seek to narrow further the already narrow religious exceptions. These 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 human rights law.

In particular, the proposed ‘reasonable and proportionate’ standard is inappropriate because Article 18 of the ICCPR requires any restrictions on religious freedom to be ‘necessary’, not merely reasonable. The same proposed exception clause also requires a secular court to impose a theological definition of what is a *genuine* occupational requirement on the basis of religion, which is a disturbing intrusion of the state into religion. Imposing a ‘genuine occupational requirement’ standard and reasonableness inquiry are not *necessary* restrictions on religious freedom and ignore the fact that many religious organisations are seeking to create and maintain a faith-based culture and ethos. This necessitates employment of persons who fit in that culture by believing and acting consistently with the requirements of the faith, including in matters of personal morality, and not merely by having technical proficiency in the role. We urge the Queensland Government to thoroughly reconsider clause 29.

The proposed exceptions should be reframed to continue the exemption for religious bodies, including religious schools while clarifying that it is for protecting the freedom to manifest religion or belief, individually or in a community with others. This includes the right to worship, observe, practice, teach, and uphold the right of parent’s to choose a school that conforms with their religious and moral convictions in accordance with Article 18.4 of the ICCPR. Additionally, religious bodies have the right to select and maintain a staff body that upholds their beliefs and practices. Of course, this does not excuse such bodies from taking appropriate and proportionate measures to eliminate sexual harassment or any other form of harassment, vilification, or victimisation based on any protected characteristic among their employees. However, the law should acknowledge the right of such bodies to create and maintain a faith-based culture and ethos through their employment decisions.

## Discussion

### Maximizing all human rights and freedoms

The freedom to practice religion can be restricted, but only if the restriction is lawful, necessary, and supported by evidence. The restriction must be based on a valid reason, address a pressing public or social issue, seek a legitimate aim, and be proportional to the goal.<sup>1</sup> The need for the

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<sup>1</sup> United Nations Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, UN Doc E/CN.4/1985/4, Annex (28 September 1984), p 6. Available online: < <https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf>>

restriction must be evaluated objectively. This draft bill limits religious freedom to promote equality, prevent discrimination, sexual harassment, vilification, and other unlawful conduct. It aims to identify and eliminate systemic causes of discrimination, sexual harassment, vilification, and victimization. These goals are pressing and align with international law. However, the proposed religious exception is not proportionate to these aims. According to the Siracusa Principles, a state should use no more restrictive means than required. Human rights-based frameworks should aim to maximize all human rights and freedoms, rather than pit them against each other. Governments have often used religious exception clauses within an anti-discrimination framework. However, recent Victorian reforms have not been successful in satisfying faith communities. Queensland should not be forced to repeat the same problematic approaches used elsewhere. Rather, it should lead the way in innovative law reform to maximize all human rights and freedoms.

### Scope of religious freedom

The principle of religious liberty is not merely limited to private, individual belief and action. It extends beyond private belief and acts of worship to public and associational contexts such as propagation, social and business interactions, employment, cultural and charitable activities, education, and so on. For many religious believers these external manifestations of 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:

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.

Article 18(3) ICCPR requires that restrictions on religious Freedom must be no more than that which is 'necessary' to secure one of the limited legitimate objectives referred to in that article.

Note in particular Article 18(4), which obliges states to have respect for the liberty of parents to educate their children in conformity with religious convictions without limitation, and that this expressly includes the moral education of their children. One significant means by which parents of religious conviction exercise this right is by establishing, maintaining and sending their children to faith-based schools, where they will be educated in accordance with their parents' religious and moral convictions.

Why should religious schools be able to select and regulate the school community, including its staff? Because this enables religious schools to maintain their distinctive religious ethos and it is this ethos that enables parents to ensure the education of their children in conformity with religious and moral convictions. Religious schools should therefore continue to have the legal right to select and maintain staff who at their appointment and throughout their employment continue to believe and to live their lives in a manner consistent with the religious and moral convictions of the parents and of the religious school to which they have chosen to send their children. This right is an essential means by which religious schools, and the parents of children sent to those schools, are able to establish and maintain a community ethos for the education of children in a manner consistent with their religious and moral beliefs and practices. Australia thus fulfils its international obligations by ensuring that faith-based schools can choose and maintain staff in accordance with their religious and moral convictions.

Under Article 18, religious freedom, which includes freedom to manifest religion in groups and publicly through creating educational organizations, may be subject only to those legal limitations that are *necessary* to protect public safety, order, health, morals or fundamental rights and freedoms of others. This is a high threshold that must be reached before any legal limitation is justified or appropriate. Moreover, any such restrictions must be prescribed ‘by law’. The *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* explain that the requirement that restrictions on rights be prescribed by law means that the law must be ‘clear and accessible’. The *Siracusa Principles* also explain that the scope of a limitation referred to in the Covenant shall not be interpreted so as to ‘jeopardize the essence of the right concerned’ and that all limitation clauses shall be ‘interpreted strictly’ and in favor of the rights at issue. Importing a standard of ‘reasonableness’ into the Act would not only contravene Australia’s obligations in respect of restricting religious freedom only by measures that are ‘necessary’ but would also jeopardize the ‘essence’ of the right to freedom of religion.

### Proposed Clause 29 regarding employees

In Queensland, this high human rights standard would not be reflected in requiring organizations to demonstrate the three limbs of new clause 29 to defend against a discrimination complaint:

- (a) participation in the teaching, observance or practice of the religion concerned is a genuine occupational requirement of the work; and
- (b) the other person cannot satisfy the genuine occupational requirement because of the other person’s religious belief or religious activity; and
- (c) the discrimination is reasonable and proportionate in the circumstances.

Instead, under international human rights law, the burden is on the state of Queensland to demonstrate that any limitation on religious freedom is ‘necessary’, prescribed by law, and otherwise in conformity with Article 18.

Unfortunately, it ought to be noted that this neglect of international human rights standards with respect to religious freedom is also present in the Qld *Human Rights Act*, which has the lower ‘reasonableness’ (see s 13) standard in contravention of 18(3) ICCPR, as well as ignoring 18(4) completely.

Secondly, a legal provision that 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 a significant risk of imposing a secular perspective on a theological question, which would severely undermine the religious freedom of groups.

Thirdly, the ‘genuine occupational requirement’ standard is too narrow to allow religious organizations to employ staff consistent with their religious and moral convictions. It perpetuates the ‘only a principal and chaplain need to be 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 religious and moral practices which undergird the school. Furthermore, the explicit prohibition of discrimination on the basis of other attributes, such as sexuality attributes, ignores the fact that there are beliefs and practices concerning sex which can render persons inappropriate for employment in a religious context. As already noted, the proposed requirements are cumulative: a successful defense must establish that there is a genuine occupational requirement that can’t be met due to religious belief or activity *and* that the discrimination is reasonable and proportionate. The combination of these requirements imposes a limitation on religious freedom that is more than is ‘necessary’ to protect other human rights.

### Community reactions

It is also concerning that the consultation guide refers to the maligned ALRC Consultation paper recommendations as broadly supportive of the proposed changes in Queensland law. When the ALRC paper was released, it prompted such a concerted reaction from a wide array of religious organizations that the Prime Minister and the Education Minister immediately distanced themselves from that framework.

Concerns have also been raised that the new section 29 clause may provide a vehicle for culture wars to erupt among staff and between staff and leadership in religious schools. For example:

- A science teacher may choose to refuse to teach students that followers of that religion subscribe to a theory about creation (alongside the Australian science curriculum)
- A homeroom teacher may refuse to sit in the room and supervise their students while a prayer is played over a speaker.

Genuine occupational requirement must not mean that ability of schools to require teachers to uphold a religious ethos of the school is confined only to religious studies teachers. Who will determine this?

Some Australian Islamic schools also raised the concern that such changes, appearing to undermine parental rights to choose a school that conforms with their convictions, may result in parents removing their children and choosing home-schooling. Children of all minority backgrounds deserve to be in community with others who share their religion, especially where



that religion is so closely tied to cultural identity, and where fostering a positive sense of cultural identity is critical to mental health. We refer to evidence about the prevalence of mental health concerns among young Muslims, especially young Muslim teenage girls, who are heavily impacted by societal discrimination.

## Conclusion

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

(Nicholas Aroney and Paul Taylor, '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.)

Positive associational rights would enable schools to select and preference staff consistent with their religious and institutional ethos, and to enforce generally applicable procedures and rules with regard to student advocacy, conduct, dress and so forth. An example would be to insert a provision to provide employment rights to organizations 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 organization in their beliefs and conduct.

This would not excuse such bodies from taking appropriate and proportionate measures to eliminate sexual harassment or any other form of harassment, vilification, or victimisation based on any protected characteristic among their employees. However, the law should acknowledge the right of such bodies to create and maintain a faith-based culture and ethos through their employment decisions.

Signatories:

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