Respect at Work and Other Matters Amendment Bill 2024

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Community Safety and Legal Affairs
Committee
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28 June 2024
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Dear Committee Secretary,

The Australian Christian Lobby (ACL) is grateful for the opportunity to make a submission concerning the *Respect at Work and Other Matters Amendment Bill 2024 (Qld)*.

Thank you for giving the following submission your careful consideration.

Yours Sincerely,

[redacted]

Rob Norman
Queensland Director

SUBMISSION:

The Respect at Work and Other Matters Amendment Bill 2024 (Qld)

AUSTRALIAN CHRISTIAN LOBBY

About Australian Christian Lobby

The vision of the Australian Christian Lobby (ACL) is to see Christian principles and ethics influencing the way we are governed, do business, and relate to each other as a community. ACL seeks to see a compassionate, just and moral society through having the public contributions of the Christian faith reflected in the political life of the nation.

With around 250,000 supporters, ACL facilitates professional engagement and dialogue between the Christian constituency and government, allowing the Voice of Christians to be heard in the public square. ACL is neither party-partisan nor denominationally aligned. ACL representatives bring a Christian perspective to policy makers in Federal, State and Territory Parliaments.

acl.org.au

Submission

Overarching comments

Queensland's *Respect at Work and Other Matters Amendment Bill 2024* seeks to introduce in Queensland a number of extreme measures, which would operate to the serious, immediate and irreversible detriment of individuals and organisations of faith, including Christian churches and schools.

Recent media statements lament the fact that the Bill stops short of "scrapping exemptions that allow faith-based schools to discriminate against teachers based on their sexuality, pregnancy, relationship status and gender identity". Those familiar with faith-based schools appreciate how distorted such negative representations are of their purpose and mission. Part of the problem is that discrimination law, including in Queensland, is already so extensive – because of definitions like "gender identity" – that it frames religious organisations as "discriminators" merely for having an ethos, and recruiting people who share it. This Bill would make their situation much worse than anyone ever expected. No matter what some say against Christian schools, they are cherished and sought after by a wide cross-section of Australians, many in search of an alternative to schools in which radical ideology is vigorously forced on children.

The Queensland Bill is consistent with some of the most radical proposals pressed or overseen by the federal Labor, that include:

- the ALRC *Inquiry into religious educational institutions*, framed by terms of reference that lead to the foregone conclusion that no matter what international law demands the exemptions for faith-based schools must go
- proposals for vilification laws at the lowest threshold and on the widest range of grounds, so that it is inevitable that the ordinary expression of religious beliefs and other views would be caught
- changes to the existing system for awarding legal costs in Commonwealth discrimination claims, which would incentivise litigation against religious institutions by making it more risk-free for complainants (just as the floodgate opens for claims against religious schools after their exemptions are removed), and
- the Productivity Commission's recommendations for philanthropic giving, that would disadvantage religious charities in Australia relative to others.

These measures specifically target those of faith in an unwarranted way. The Queensland Bill takes things even further.

The Bill would operate to the permanent disadvantage of religious organisations, as it would require them to succumb to strict prohibitions on discrimination and vilification on a new basis, and it would subject them to extensive government powers enforcing compliance through a new preventative "positive duty" to eliminate "as far as possible" all breaches.

For years Christian schools and churches have been in crosshairs of anti-Christian activism. It would be naive not to recognise that reality, no matter how unpalatable it is. These changes would empower activists to shut down the promotion and practise of Christian belief in religious schools and elsewhere, where it conflicts with existing and emerging gender ideologies. The alternative is to face legal retribution.

The Bill brings the definition of "sexual orientation" in line with the Yogyakarta Principles, just like the existing definition of "gender identity" already is, however the Yogyakarta Principles are a treaty that has not been ratified in Australia, nor has any legal force. The only way religious organisations can safely steer clear of the range of legal liability that this Bill would expand, would be if they operate at all times in a manner that positively affirms the ideology on which the Bill and the Yogyakarta Principles are predicated. The cases cited below (under the heading "Vilification") already show that in practice they will be rendered liable as discriminators and vilifiers if they do not. This Bill would add significantly to the risk of legal action against Christian organisations, particularly schools, simply for continuing to operate on the basis of assumptions concerning the traditional view of the human person that a large percentage of Australians share. They will be plunged into a much more hostile regime of discrimination and vilification legislation than ever before.

The apparent "concession" that existing discrimination exemptions will be preserved in Queensland is a fallacy. There is no concession at all in a Bill as far-reaching as this, which will require religious organisations in practice to purge themselves of their rationale, and all expressions of belief, where they are incompatible with the extravagant definitions on which the prohibitions are based. Even if existing exemptions for religious bodies in Queensland are preserved, they will be forced to operate in a new, high risk, environment in which activism and litigation are promoted and enabled by this Bill, including on new "hostile work environment" and "harassment" grounds, purely for non-conformity with the radical ideology on which this Bill is based. The Bill frames religious organisations as discriminators, vilifiers and harassers in a way that no government has any right to.

New attributes applicable to the discrimination and vilification provisions

Summary of relevant provision

Clause 7 would amend section 7 to add new attributes (sexual orientation, physical appearance, and irrelevant medical record) on the basis of which discrimination and vilification are prohibited. The definition of "sexuality" (meaning "heterosexuality, homosexuality or bisexuality") would be substituted with a new definition of "sexual orientation" as follows: "

> "sexual orientation, of a person, means the person's capacity, or lack of capacity, for emotional, affectional and sexual attraction to, or intimate or sexual relations with, persons of a different gender or the same gender or more than one gender"

The Explanatory Memorandum states that,

> "[a] definition of 'sexual orientation' has been incorporated and updated compared to the existing definition of 'sexuality'. The definition of "sexual orientation" "additionally captures a lack of capacity for the relevant attraction or intimate or sexual relations with another person, which covers people who may be asexual or aromantic within the definition of the attribute".

Impact

The Explanatory Memorandum underplays the radical nature of this new definition, which is based on the Yogyakarta Principles in which "sexual orientation is understood to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender". There is an exact definitional match between the Bill's and the Yogyakarta Principles' definitions of "sexual orientation".

That definition (and the existing definition of "gender identity")[1] are underpinned by ideology that is irreconcilable with the fundamental beliefs of the world's major religions, including those drawn from texts sacred to those religions. The statement of compatibility does not address the true impact of the definitions of "sexual orientation" and "gender identity", as they apply in the discrimination and vilification provisions of the Bill, to restrict the self-organisation and day-to-day operations of religious organisations of all major religions. There are many such organisations in Australia, serving the interests of diverse faiths and backgrounds. Their teachings and practices reflect religious beliefs which are irreconcilable with those on which the Yogyakarta Principles (and these two definitions) are based.

The Bill's proposed definition of "sexual orientation", and the *Anti-Discrimination Act's* existing definition of "gender identity", reflect a gender ideology which replaces the traditional hylomorphic view of the human person comprising both body and soul. They reflect a novel anthropology that might be described as centering "sexual orientation" and "gender identity" (the "SOGI") as the principal elements of personhood, "integral to personality". The vision for human flourishing that arises when the nature of the human person is thus reimagined has profound consequences for our whole society. It is a vision not shared by the religions to which a large percentage of the Australian population adhere, and not shared by many Australians with no faith affiliation at all.

Neither the Yogyakarta Principles nor the Yogyakarta Principles plus 10 (YP+10) are a treaty and are not among the seven treaties ratified by Australia that "reflect international agreement about the fundamental values that make up 'human rights' protected under the treaties," as affirmed in Australia's Human Rights Framework. The Senate Legal and Constitutional Affairs Legislation Committee appropriately noted the status of the Yogyakarta Principles in its report concerning the 2013 Bill which amended the *Sex Discrimination Act 1984*. It drew attention to the Attorney-General's Department observation that "[T]he Yogyakarta Principles have no legal force either internationally or within Australia. They were

[1] Gender identity, of a person (a) is the person's internal and individual experience of gender, whether or not it corresponds with the sex assigned to the person at birth; and (b) without limiting paragraph (a), includes (i) the person's personal sense of the body; and (ii) if freely chosen - modification of the person's bodily appearance or functions by medical, surgical or other means; and (iii) other expressions of the person's gender, including name, dress, speech and behaviour."

developed by a group of human rights experts, rather than being an agreement between States."[2] In November 2022, the *UN Special Rapporteur on violence against women and girls, its causes, and consequences* restated the international law position that the Yogyakarta Principles are not binding, when speaking in support of the rights that need to be upheld in the face of excessive claims based on gender ideology.[3] Nevertheless, the definition of "gender identity" in Commonwealth legislation (the *Sex Discrimination Act 1984*) has become notorious as the cause of direct conflict with certain of the seven human rights treaties to which Australia is bound (especially the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW)), particularly as it is applied to certain issues concerning women's sport and access to change rooms, at great cost to the rights of biological women. Part of the problem has been the preference shown by the Australian Human Rights Commission (AHRC) for interpreting legislation in accordance with the Yogyakarta Principles, rather than treaties like CEDAW or the International Covenant on Civil and Political Rights (ICCPR), even when that interpretation is in direct conflict with such treaties.

The ACL stands in support of all seven treaties in preference to the Yogyakarta Principles, and asks that the Bill be assessed critically, including when undergoing human rights scrutiny, for any inconsistency which the Bill generates with such treaties.

We recommend a review of legislation such as the Anti-Discrimination Act 1991 for compliance with the treaties that are binding on Australia and are the reference point for Australia's Human Rights Framework.

The new positive duty

Summary of relevant provision

The Bill would introduce a new positive duty that requires duty holders to take reasonable and proportionate measures to eliminate discrimination, sexual harassment, harassment on the basis of sex "and other objectionable conduct" as far as possible.

Clause 25 would introduce new sections 131H and 131J, which reads as follows.

> 131H Act's positive duty purpose and how it is to be achieved
>
> (1) One of the purposes of this Act is to promote equal opportunity and equitable outcomes for everyone by providing for the taking of positive action— (a) to prevent, as far as possible, contraventions of the Act; and (b) to help promote, as far as possible, the achievement of substantive equality. (2) The purpose is to be achieved by— (a) imposing a positive duty on certain persons to eliminate, as far as possible, discrimination, sexual harassment, harassment on the basis of sex and certain other objectionable conduct; and (b) providing for investigation

[2] Senate Legal and Constitutional Affairs Legislation Committee report, p.26.

[3] Special Rapporteur on violence against women and girls, its causes, and consequences, Reem Alsalem, OL GBR 14/2022, 29 November 2022.

> into, and enforcement of, a person's compliance with the positive duty under chapter 7, part 1A.
>
> 131I Duty to eliminate discrimination, sexual harassment, harassment on the basis of sex and other objectionable conduct
>
> (1) This section applies to a person who, under chapter 2, 3, 4 or 5, must not engage in discrimination, sexual harassment, harassment on the basis of sex or other objectionable conduct. (2) However, this section applies to an individual only if the individual is a person conducting a business or undertaking. (3) The person must take reasonable and proportionate measures to eliminate the discrimination, sexual harassment, harassment on the basis of sex or other objectionable conduct as far as possible. (4) To remove any doubt, it is declared that the duty under subsection (3) does not limit, and applies to the person in addition to, the prohibitions applying to the person under chapter 2, 3, 4 or 5

The duty will only apply to individuals to the extent that they are conducting a business or undertaking.

In practical terms, the positive duty would mean that duty holders will be required to take proactive steps to prevent such conduct, for example (as the Explanatory Memorandum puts it):

- ensuring there are organisational policies in place that address the importance of respectful behaviour in the workplace
- ensuring easily accessible information is available
- conducting workplace surveys to measure knowledge and awareness of unlawful conduct like discrimination or sexual harassment and the extent to which such conduct may have been experienced by members of the workforce
- engaging in informal or formal disciplinary discussions with members of the organisation who are displaying conduct that may be disrespectful and unlawful under the AD Act, and
- managers and people in positions of leadership clearly and regularly articulating expectations of respectful behaviour.

<u>Impact</u>

The Explanatory Memorandum acknowledges that the positive duty in the Bill is broader in scope than section 47C of the *Sex Discrimination Act 1984* which implements the recommendations of the *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces*. It only covers sexual harassment and certain types of conduct on the basis of "sex".[4] The Bill purports to implement recommendations from the same Inquiry as those which produced the modest changes in section 47C.

[4] The Explanatory Memorandum points out that the recommendations of the Respect@Work Report giving rise to changes in the [*Sex Discrimination Act 1984* (Cth)] were "implemented by section 47C of the [*Sex Discrimination Act 1984* (Cth)], which provides that 'an employer or a person conducting a business or undertaking … must take reasonable and proportionate measures to eliminate' certain types of unlawful conduct by or against certain persons".

The Explanatory Memorandum does not answer why the Bill extends the duty on an exponential scale, so that it applies to "a person who, under chapters 2, 3, 4 and 5 [of the Queensland Anti-Discrimination Act], must not engage in discrimination [chapter 2, on all applicable grounds], sexual harassment [chapter 3], harassment on the basis of sex [to be added by the Bill in chapter 3] and other objectionable conduct [chapters 4 and 5]".[5] ("Objectionable conduct" incidentally does not lend itself to clear definition, and is therefore a very imprecise basis for imposing such a far-reaching positive duty.)

The wording of the Bill is likely to mislead casual readers, when it is expressed as applying to "a person who, under chapter 2, 3, 4 or 5, must not engage in discrimination, sexual harassment, harassment on the basis of sex or other objectionable conduct". This could well mistakenly be read as "applying to "discrimination [on the basis of sex], sexual harassment [and] harassment on the basis of sex" i.e. acts confined to the ground of "sex".[6] The reality is that the Bill's new duty is expansive.

The practical result of the duty will be to require religious entities with a doctrinal basis that is irreconcilable with evolving and unstable gender ideology, to reorganise internally in such a way that their composition, ethos, motivation and mission no longer freely correspond with their own belief-driven purposes, but instead instantiate the ideology underpinning the definitions of "sexual orientation" and "gender identity" expressed in the Yogyakarta Principles. There are numerous examples in Australia of discrimination and vilification claims asserting such grounds simply in response to conduct that is merely not affirming of "sexual orientation", or "gender identity". Laws prohibiting discrimination or vilification, or which impose a positive duty, should not be enacted to require affirmation of beliefs which are contrary to those to which an individual or institution actually adheres, or to allow legal action to be taken on the basis of conflict between one ideology or belief system and another.

The existing exemptions which benefit religious organisations (including those in sections 25 and 109) are confined, and are not well drafted to provide exemption that meaningfully accords with the positive freedom of religion and other rights which are relevant, for example to the operation of Christian schools. Instead of improving those exemptions to better reflect the fundamental human rights involved, the Queensland Government's higher priority seems to be to support the activism which would remove those exemptions altogether. The exemptions are already ill adapted and clumsy. With the expansion of the grounds on which discrimination and vilification will be prohibited by the Bill, the exemptions themselves will be put under new threat, as new avenues are created for challenging them.

[5] Chapter 2 alone spans discrimination on all prohibited grounds, not just sex. It would include discrimination on the newly introduced prohibited grounds under the Bill. Chapter 3 deals with sexual harassment and will be expanded to address harassment on the basis of sex; chapter 4 with associated objectionable conduct; and chapter 5 with associated highly objectionable conduct.

[6] "Discrimination under chapter 2" alone applies to every prohibited ground covered by the existing Act, as supplemented by the Bill; section 131H clarifies that the purposes "to prevent, as far as possible, contraventions of the Act"; and that is before "other objectionable conduct" is factored in, which under section 121 is "objectional conduct that is inconsistent with the other purposes of the Act".

Although the exemptions are presumably meant to provide some protection against the new positive duty, the interface between the exemptions and that duty is problematic. For example, the positive duty to "take reasonable and proportionate measures to eliminate discrimination", or "to eliminate, as far as possible, discrimination", does not detract from the plain meaning of section 7, which is that "discrimination on the basis of certain attributes is prohibited". The exemption provided for in section 25 states that "a person may impose genuine occupational requirements for a position", and that "it is not unlawful for an employer to discriminate" in certain circumstances, but that does not alleviate the positive duty to eliminate "discrimination". Conduct within the exemptions, though unlawful, is still discrimination. Furthermore, the duty "does not limit, and applies to the person in addition to, the prohibitions applying to the person under chapter 2, 3, 4 or 5".

Even when an existing exemption applies, the expansion of the discrimination grounds, combined with the positive duty, create a much tougher environment for those relying on the exemptions, and provides a wider basis for challenging them.

Faith-based organisations can expect to be confronted with the Queensland Human Rights Commission's (QHRC) educational programs and guidelines to enforce compliance with the Act, and reliance on exemptions is unlikely to be treated sympathetically.

The Bill gives the QHRC expanded investigative functions and enforcement powers in support of the new positive duty, and to report on certain systemic contraventions. This is seriously concerning to religious bodies, at a time when Queensland's human rights commissioner, Scott McDougall, freely expresses that he is "deeply disappointed" and "at a loss to understand why" the state Labor government reneged on its promise to overhaul the state's Anti-Discrimination Act, including by "scrapping exemptions that allow faith-based schools to discriminate against teachers". Hostility towards faith-based organisations is seen as a virtue by officials responsible for upholding human rights, which is deeply disturbing.

We recommend that the positive duty be expressly disapplied to the circumstances in which an exemption applies, to give practical efficacy to the exemption.

Vilification

Summary of relevant provisions

Criminal and civil grounds the same but expanded

For all vilification provisions, the grounds would be expanded (formerly "race, religion, sexuality or gender identity") to cover "age, impairment, sex, sex characteristics and sexual orientation".

A "public act" in all cases would include social media/online communications.

Criminal

For the criminal prohibition the only change is that the grounds are extended (*Criminal Code Act 1899*, s52A, "*Offence of serious vilification on grounds of age, gender identity, impairment, race, religion, sex, sex characteristics or sexual orientation"*).[7]

Civil

There would now be two civil vilification provisions: sections 124C and 124D (replacing the existing section 124A).

S. 124D (More serious civil vilification: likely to incite hatred towards, serious contempt for, or severe ridicule)

A new section 124D would have the effect of lowering the threshold that currently applies under s.124A to civil incitement (s. 124A currently reads: "A person must not, by a public act, *incite* hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race, religion, sexuality, sex characteristics or gender identity of the person or members of the group".)

The new test for civil vilification would not require a complainant to show that another person was actually incited, but instead that the public act was "likely" to incite (that is, a supposedly objective incitement test, but one that depends on subjective impression and speculation).

S. 124C (New low threshold conduct that a reasonable person would consider hateful, reviling, seriously contemptuous, or seriously ridiculing)

S. 124C is said to focus on the "harm" caused to people who are members of a group with a protected attribute, of hateful, reviling, seriously contemptuous, or seriously ridiculing conduct. No such harm need actually occur, or even be likely. It is enough that there is conduct that a reasonable person *would consider* hateful, reviling, seriously contemptuous, or seriously ridiculing.

The standard of a "reasonable person" is increasingly hostile to Christians, and those who follow other faiths, and worsening, and exacerbated by the QHRC and its commissioners promoting antagonism against them, rather than a message of tolerance.

[7] At present the *Anti-Discrimination Act 1991* contains the following criminal provision (S. 131):
"(1) A person must not, by a public act, knowingly or recklessly incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race, religion, sexuality or gender identity of the person or members of the group in a way that includes—
(a) threatening physical harm towards, or towards any property of, the person or group of persons; or
(b) inciting others to threaten physical harm towards, or towards any property of, the person or group of persons."

Exceptions to sections 124C and D

The Bill includes exceptions for these two civil prohibitions. For both the "harm-based" provision and the "incitement" provision, the following would not be unlawful: publication of a fair report of a public act referred to in the provision; the publication of material in circumstances in which the publication would be subject to a defence of absolute privilege in proceedings for defamation; and a public act, done reasonably and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including public discussion or debate about, and expositions of, any act or matter.

There is no defence for religious acts, even done reasonably and in good faith, although there are for other purposes.

Impact

Cases

The following are sample cases which show how ordinary, legitimate conduct can be claimed to be caught by civil anti-vilification provisions similar to those in the Bill.

- Archbishop Julian Porteous's circulation of a pamphlet explaining Catholic doctrine and teaching on marriage to members of the Catholic Church. Although the complaint was dropped, it was taken up by Equal Opportunity Tasmania as if merely expressing a traditional view of marriage contravened *Anti-Discrimination Act 1998* (Tas) s. 17(1).
- Senator Claire Chandler's harmless comments in an opinion piece on women in sport and the use of change-rooms, which produced a complaint for which Equal Opportunity Tasmania gave its support. She was just speaking up for women's rights supported by international convention.
- Lyle Shelton's remarks to the effect that drag queens are a dangerous role model for children. Proceedings under existing Queensland anti-vilification law (s. 124A) meant that he went to great cost, financially and in time, to defend the claim. Although he won, the matter is currently under appeal. The process itself is punishment, in his experience.
- Katrina Tait's signature of an online petition promoted by ACL that opposed "Drag Queen Story Time" in local Brisbane public libraries. She received an e-mail from the NSW Anti-Discrimination Board enclosing a complaint from an activist. The Board accepted the complaint and decided to investigate.
- Jasmine Sussex's use of the word "mother" (a term common among 95% of breastfeeding counsellors) instead of the transgender inclusive term "parent". In her view only women can breastfeed - not biological men, since there are only a "couple of cases" worldwide of men producing nipple secretions and the unknown liquid is "not mother's milk". She was reportedly sacked from the Australian Breastfeeding Association for "hate speech".

With these laws no one knows what they can and cannot say. None of the above action by complainants, or actions by human rights commissions in support of complaints, should ever

be allowed. These complaints should never be made. The new civil prohibitions would be unworkable.

The vilification provisions are so uncertain that no one can predict whether or in what circumstances they will be liable.

ICCPR standards

Australia has undertaken to guarantee freedom of expression and freedom of religion under the ICCPR. The civil vilification proposals not only fail to support both freedoms but severely undermine them. They even limit the freedom of individuals and groups to express their beliefs openly.

The following principles are violated by the proposed sections 124C and 124D:

- The terms "hateful, reviling, seriously contemptuous or seriously ridiculing" in section 124D, and "hatred towards, serious contempt for, or severe ridicule" in section 124C are far below the threshold established for "hatred" and "hostility" in article 20(2) of the ICCPR, which requires "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law". Under international law "hatred" and "hostility" is understood as "intense and irrational emotions of opprobrium, enmity and detestation towards the target group"; "advocacy" as "requiring an intention to promote hatred publicly towards the target group"; and "incitement" as "statements about…groups which create an imminent risk of discrimination, hostility or violence against persons belonging to those groups".
- These two sections would offend the principle head on that the prohibition of "insults, ridicule or slander of persons or groups or justification of hatred, contempt or discrimination" may only be prohibited where it "clearly amounts to incitement to hatred or discrimination…The terms 'ridicule' and 'justification' are extremely broad and are generally precluded from restriction under international human rights law, which protects the rights to offend and mock. Thus, the ties to incitement and to the framework established under article 19(3) of the [ICCPR] help to constrain such a prohibition to the most serious category."
- A "law" restricting freedom of expression, as sections 124C and D would, must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution. Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not.
- Restrictive measures on freedom of expression (in sections 124C and D) must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected…The principle of proportionality has to be respected not only in the law

that frames the restrictions but also by the administrative and judicial authorities in applying the law.

Rationale of vilification legislation

The prohibition of vilification is supposedly in recognition of the significant harm caused not only to individuals who have been subject to systemic discrimination and social exclusion on the basis of certain protected attributes, but also the harm caused to the community, including the breakdown of social cohesion.

The two civil prohibitions are said to be tailored towards addressing these harms, yet as applied to individuals and entities of faith, they will have the effect of marginalising and excluding them from society when branded as vilifiers. These provisions would make hate targets of Christians and other followers of other faiths.

We recommend that existing vilification prohibitions (section 124A) be conformed to the above requirements of international law, which appropriately balance the need for protection against discrimination and freedom of expression.

Hostile work environments

Summary of relevant provisions

Clause 22 of the Bill would insert a new part 5 in chapter 4 of the Act to prohibit "hostile work environments".

Section 124E(1) prohibits hostile work environments by making it unlawful for a person to subject another person to a work environment that is hostile "on the basis of sex".

Section 124E(2) provides that

> (2) A person (the first person) subjects another person (the second person) to a work environment that is hostile on the basis of sex if— (a) the first person engages in conduct in a place where the first person or second person, or both, work; and (b) the second person is at the place at the time or after the conduct is engaged in; and (c) a reasonable person, *having regard to all the circumstances*, would have anticipated the possibility that the conduct would create a work environment that would be *offensive, humiliating or intimidating* to a person of the second person's sex on the basis of— (i) the sex of the second person; or (ii) a characteristic that a person of the second person's sex generally has; or (iii) a characteristic that is often imputed to a person of the second person's sex.
>
> (3) For subsection (2), it does not matter whether the conduct would create a work environment that would be offensive, humiliating or intimidating to a person for 2 or more reasons, as long as 1 of the reasons is the person's sex or a characteristic mentioned in subsection (2)(c)(ii) or (iii).

Section 124F clarifies the meaning of relevant circumstances.

> For section 124E(2)(c), the circumstances that are relevant in determining whether a reasonable person would have anticipated that conduct would create a work environment that would be offensive, humiliating or intimidating to a person include—(a) the seriousness of the conduct; and (b) whether the conduct was continuous or repetitive; and (c) the role, influence or authority of the person engaging in the conduct; and (d) any other relevant circumstance.

The Explanatory Memorandum states:

> This new prohibition [Hostile work environments] only relates to the attribute of sex. However, it would still be open for a complainant to argue that a person has imposed a term that constitutes indirect discrimination by creating or facilitating a work environment that is hostile on the basis of an attribute other than sex.

Impact

Although "sex" is not defined, the definition of "sex characteristics" in the Bill might suggest that "sex" refers to biological, or chromosomal, sex.[8] However, such a simple interpretation is ruled out, and "sex" is likely to be understood more widely, so that it extends, for example, to aspects of gender identity. This is because Queensland's own *Births, Deaths and Marriages Registration Act 2023* defines "*sex descriptor*" as "(a)'male'; or (b)'female'; or (c) any other descriptor of a sex", and enables certain records of a person's "sex" to be altered to a sex descriptor that does not correspond with their natal sex, or their chromosomal sex. In other words, whatever meaning "sex" has, it is not confined to biological, or chromosomal, sex. Contested issues of "gender identity" have further clouded the meaning of "sex".

A "hostile work environment" as defined in the Bill is therefore not one that simply relates to sex in a way that can be understood.

Some of the concerns raised below, in connection with the *harassment* provisions, also apply to *hostile work environments*, with unacceptable uncertainty as to the intended reach of these provisions. They fail the first test of certainty for law that restricts fundamental rights, if for example gender identity is to be a basis for making claims under these provisions.

We recommend that the hostile work provisions be delineated so they only apply to a workplace environment that is hostile on the ground of "sex" (not on the basis of sex), and that a narrow and precise definition of "sex" be provided, which is confined to natal or chromosomal sex.

Harassment provisions

Summary of relevant provisions

Clause 18 of the Bill would insert a new definition of "harassment on the basis of sex", adapted from, but expanding on, the *Sex Discrimination Act 1984 (Cth)*. The Bill provides in section 120 that "harassment on the basis of 'sex'" happens if a person:

> (a) engages in unwelcome conduct of a demeaning nature in relation to another person; and
>
> (b) engages in the conduct on the basis of—

[8] "*sex characteristics*, of a person, means the person's physical features and development related to the person's sex, and includes—(a) genitalia, gonads and other sexual and reproductive parts of the person's anatomy; and (b)the person's chromosomes, genes and hormones that are related to the person's sex; and (c) the person's secondary physical features emerging as a result of puberty."

> (i) the other person's sex; or
>
> (ii) a characteristic that a person of the other person's sex generally has; or
>
> (ii) a characteristic that is often imputed to a person of the other person's sex; or
>
> (iv) a sex the other person is presumed to be, or to have been at any time, by the person engaging in the conduct; or
>
> (v) a sex the other person has been, even if the person is not that sex at the time of the conduct; and
>
> (c) engages in the conduct—
>
> (i) with the intention of offending, humiliating or intimidating the other person; or
>
> (ii) in circumstances where a reasonable person would have anticipated the possibility that the other person would be offended, humiliated or intimidated by the conduct.
>
> …it does not matter whether the other person's sex is only one of the reasons for the person engaging in the conduct.

Where there are two or more reasons for the conduct, the other person's sex needs to only be one of the reasons. This is in contrast to the definition of discrimination in the existing Act, where the attribute must be the substantial reason for the conduct.

Impact

The most concerning aspects of this are section 120(1)(b)(iv) and (v), which relate to conduct on the basis of presumed sex, or "a sex the other person has been, even if the person is not that sex at the time of the conduct". Both (iv) and (v) stray well beyond the *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces*, and the text of the *Sex Discrimination Act 1984*. They venture into uncharted territory well beyond the original intention of preventing people being made to feel sexually vulnerable at work, or exposed to sexual predation at work.

As with the hostile work environment provisions, section 120(1) would perform an extraordinary labour in the context of harassment, centred on the term "sex", which is not even defined. In particular, "sex" is not clearly delineated from "sexual orientation" and "gender identity". We already raised above (when discussing the new attributes) issues concerning the inclusion of expressions of "sexual orientation" and "gender identity" within such definitions ("sexual orientation" includes the capacity for different forms of sexual expression directed by orientation to gender, and "gender identity" includes expressions of the person's gender (in an open-ended way). Where "sex" overlaps with any aspect of either definition the ramifications would be far-reaching under both sets of provisions (hostile work environments, and harassment on the basis of sex).

It is enough for liability that "a reasonable person would have anticipated the possibility that the other person would be offended, humiliated or intimidated by the conduct".

It is especially easy to envisage "sex", with its broad and uncertain meaning, empowering accusations of harassment simply in response to someone's failure to positively affirm gender

expression, or transgender status. All it takes is for someone to claim that "a reasonable person would have anticipated the possibility that the other person would be offended" by "misgendering", "dead-naming", or hesitation at implementing measures which involve social transitioning (including of a child). This would be one of the first laws of its kind that equates non-affirmation with harassment.

Religious bodies would become easy targets for harassment claims, especially faith-based schools, which might operate with some caution in affirming a child's stated gender identity, and acknowledge the import of the UK's Cass Review Report which indicated that social transitioning is not neutral, and that medical intervention (such as puberty blockers) on a pathway to surgical transitioning involve seriously disruptive and possibly irreversible changes. "Wait and see" and other approaches that engage caution would have no place in this Bill. The stigma of harassment would attach to all non-affirming conduct even though many regard it as necessary in the "best interests of the child".

This would especially punish those who hold religious or medical beliefs that prevent them positively affirming another's beliefs as their own.

Also, the ethos of a religious institution (such as a faith-based school) alone might be claimed without a proper human rights justification, to be:

- "offensive, humiliating or intimidating" and therefore provide a hostile work environment, or
- "demeaning", sufficient for a claim of harassment

where they are based on, or express, traditional beliefs concerning sex and gender. It is inevitable that beliefs, whether they are based in religion, or non-religious ideology, are prone to cause offence, especially where they conflict with another's belief system. It is the essence of a pluralist and tolerant society that diversity of opinion and beliefs should co-exist.

We recommend that the Bill's harassment provisions be conformed with those under the *Sex Discrimination Act 1984*, with the added clarity that confines "sex" to natal or chromosomal sex.

Conclusion

It is scarcely possible to believe that a Bill could be advanced that is so antagonistic to people of faith, and religious bodies, and creates the perfect conditions for lawfare against them.