Respect at Work and Other Matters Amendment Bill 2024

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The Hon. Yvette D'Ath MLA
Attorney-General of Queensland

Email: attorney@ministerial.qld.gov.au

Dear Attorney-General D'Ath,

Proposed Queensland discrimination bill a draconian assault on free speech

For over 80 years, the Institute of Public Affairs (IPA) has been committed to undertaking research to preserve and strengthen the foundations of economic, political, and individual freedom. Central to individual freedom is the ability to hold and communicate thoughts and to live a life according to religious convictions.

The IPA is writing to all members of the Queensland parliament to share our research and analysis of the recently announced Respect at Work and Other Matters Amendment Bill 2024 (the RWOMA bill). The RWOMA bill represents a dramatic and direct assault on freedom of speech in Queensland and should be rejected. IPA research finds that the RWOMA bill has two major flaws:

- The RWOMA bill would dramatically expand the scope and reduce the standard for unlawful speech.
- The RWOMA bill will have a chilling effect on the speech of workers by imposing an ambiguous duty on employers to enforce the law.

I note that the state government has reportedly delayed introducing the full extent of reforms originally proposed in the draft Anti-Discrimination Bill 2024 (the draft AD bill) into parliament until after the October state election. While this is a welcome development, IPA analysis finds that the full suite of reforms contained within the draft AD bill (of which the RWOMA bill is the first phase) would undermine the legal paradigm of formal equality before the law and make it almost impossible for faith-based schools and religious bodies to comply with the law and maintain their religious ethos. In particular, the IPA analysis has identified three major flaws of the draft AD bill:

- The draft AD bill 2024 attempts to achieve equality by treating people unequally and through solving discrimination with more discrimination.
- The draft AD bill 2024 would mark the beginning of the end for religious schooling in Queensland.
- The draft AD bill 2024 blurs the line between the church and the state by eroding the autonomy of religious bodies.

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The RWOMA bill would dramatically expand the scope and reduce the standard for unlawful speech

Under the current *Anti-Discrimination Act 1991*, it is unlawful to 'incite hatred towards, serious contempt for, or severe ridicule of', a person or group of persons based on their race, religion, sexuality, or gender identity.

This would be expanded by the RWOMA bill's vilification provisions which would make it unlawful to engage in a public act that a reasonable person would consider to be 'hateful towards, reviling, seriously contemptuous of, or seriously ridiculing' of another person based on their age, impairment, gender identity, race, religion, sex, sex characteristics, or sexual orientation. This is a dramatic diminution from the standards in the current *Anti-Discrimination Act 1991* insofar as it would remove the causal requirement that a person actually be affected by the speech, lowering the standard that someone need only consider it hateful.

Determining whether a public act is 'hateful' is not an objective legal standard. The ambiguity implicit in the term renders it inappropriate to use in legislation without objective measures and specific guidance as to how the provision would be enforced.[1] This is particularly problematic in a legislative provision that includes penalties and liabilities.[2] The boundaries of lawful speech would be subjectively determined according to whether the Commissioner considered an act to be 'hateful'.

If this bill had been implemented before the referendum, arguments that were critical of the proposed Voice would potentially have been unlawful. For example, Pat Anderson, a significant advocate of a Yes vote at the 2023 Voice referendum, argued 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'.[3] Had the RWOMA bill been in force during the referendum campaign, an accusation that political speech was motivated or characterised by 'hate' would have brought that speech potentially within the scope of the prohibited vilification, and it would have at the least had a chilling effect on debate in Queensland.

The ambiguous legal standard of 'hateful' also fails to be consistent with the rule of law, which requires that the law 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 of those tasked with presiding over it.

The RWOMA bill would have a chilling effect on workers by imposing an ambiguous duty on employers to enforce the law

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[1] The comments of author Lionel Shriver are instructive here. 'Hatred is an emotion… True freedom of expression entails the right to say things that others find disagreeable. Deeming a statement hateful is a supremely subjective exercise. Britain characterises as a hate crime anything the ostensible victim claims is a hate crime, which is legally absurd, relying as it does on no objective, statutorily specific standard. This eye-of-the-beholder definition is a formula for the pursuit of frivolous litigation and petty personal vendetta.' From Lionel Shriver, 'I hate hate speech laws,' *The Spectator Australia,* 11 May 2024 (accessed 13 May 2024): https://www.spectator.com.au/2024/05/i-hate-hate-speech-laws/

[2] 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.'

[3] 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.

Clause 131I of the RWOMA bill would require private entities to enforce the government's laws by imposing a 'positive duty' on businesses and individuals to 'eliminate discrimination, sexual harassment, harassment on the basis of sex and other objectionable conduct as far as possible'. While this is a laudable objective, the absence of clarity around what constitutes 'objectionable conduct' renders the duty highly ambiguous and may have chilling consequences for speech in the workplace.

Objectionable conduct is not defined either in the RWOMA bill or the *Anti-Discrimination Act 1991*. Chapter 4 of the *Anti-Discrimination Act* refers to 'associated objectionable conduct (complaint)' and Chapter 4, section 121, refers to 'certain objectionable conduct' in the context of the purposes of the act, that are to 'promote equality of opportunity for everyone by prohibiting certain objectionable conduct that is inconsistent with the other purposes of the Act.' Notably, the existing racial and religious anti-vilification provisions in section 124A are also contained in Chapter 4. The structure of the Act strongly suggests that the objectionable conduct referred to in the positive duty would apply to the new standard of vilification contained in the RWOMA bill of speech which is 'hateful towards, reviling, seriously contemptuous of, or seriously ridiculing' of another person based on a protected characteristic.

Indeed, the explanatory memorandum to the RWOMA bill appears to set an even lower threshold than 'hateful'. The memo refers to the practical obligations of a person subject to the positive duty eliminate objectionable conduct with the following examples:

- ensuring there are organisational policies in place that address the importance of respectful behaviour in the workplace.
- 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.
- managers and people in positions of leadership clearly and regularly articulating expectations of respectful behaviour.

Similar to 'objectionable conduct', the RWOMA bill does not provide a definition of 'respectful behaviour'. It is not possible to predict how these standards might be met, or what measures would be required for a person to comply with the law.

Clause 131I(3) would also compel employers to take 'reasonable and proportionate measures' to enforce parts of the bill, but since the requirements of what constitutes objectionable conduct are ambiguous, it is unclear what acts conduct employers have a duty to prevent and what steps would be considered reasonable and proportionate in doing so.

The RWOMA bill would have the effect of employers over-complying with the positive duty to eliminate any conduct in the workplace that the Queensland Human Rights Commissioner may deem 'objectionable'. This would result in employers erring on the side of caution to eliminate speech in the workplace that a person could consider to be 'hateful', which would fall within the scope of the vilification provisions in the bill.

Concerningly, the positive duty would be enforceable without the requirement that a complaint be made. Clause 173B of the RWOMA bill empowers the Queensland Human Rights Commission to launch an investigation of a person if the Commissioner 'suspects the person is not complying with the duty' to eliminate objectionable conduct. The commissioner may then exercise broad information gathering powers under the RWOMA bill and may issue a notice of compliance requiring the individual to take action to meet the positive duty. This exposes Queenslanders to the

risk of the Queensland Human Rights Commission targeting workplaces for political or other purposes, or to increase the public profile of a commissioner.

Additionally, through privatising the enforcement of the RWOMA bill's discrimination and harassment provisions, the bill imposes restrictions on speech but removes mechanisms for accountability in this area. A person whose speech is restricted by an employer will have no legal right to appeal the actions of an employer that unfairly restricts their speech. This will have the effect of staff self-censoring, compounding the chilling effect on speech of workers in Queensland.

The draft AD bill 2024 may attempt to achieve equality by treating people unequally and to solve discrimination with more discrimination

At the introduction of the RWOMA bill, Attorney-General Yvette D'Ath noted that the Miles government remains committed to implementing the recommendations of the *Building belonging* report and 'will advance a second stage of reforms after further consultation with specific stakeholders on certain exemptions'.[4] This will likely mean that the 'second stage' of reforms will introduce a host of provisions contained within the draft Anti-Discrimination Bill 2024, including its substantive equality clauses.

The preamble to the draft AD bill 2024 states that its objective is to achieve 'substantive equality', where securing equitable outcomes requires 'a different application of rule to different groups'. This is incompatible with Australia's liberal democratic tradition of formal equality, which necessitates that each individual be treated equally before the law regardless of their personal characteristics. The principles of formal equality embedded in Australia's legal system are founded upon an 800-year long tradition of equality before the law, dating back to the sealing of the Magna Carta in 1215 AD, the first attempt to codify the principle that both the rulers and the ruled would be subject to the same laws. The principle of equality before the law has been fundamental to the Australian legal system since the beginning of British settlement.

Despite being established as a penal colony, the British government intended that New South Wales inherit the common law and the legal protections transmitted through the *Magna Carta*, the *Petition of Right,* the *Bill of Rights 1689,* and others.[5] So strong was the inheritance of formal equality that just six months after the arrival of the First Fleet, a new court heard the colony's first civil case, where two convicts successfully sued the captain of the ship *Friendship* for losing their belongings on the voyage in *Kable v Sinclair.* In fact, the decision of the presiding judge to grant convicted felons the legal protection of the courts went further than the English tradition, establishing a precedent at the foundation of the colony that formal equality was to extend even to convicts.[6]

The draft AD bill 2024 represents a fundamental betrayal to this tradition. The *Affirmative Measures Consultation Paper*, produced by the Department of Justice and Attorney-General to seek feedback on provisions for affirmative measures in the bill, rejects the formal equality view that 'everybody must be treated alike,' noting 'not everyone starts on an equal footing, and so equal treatment will not address the results of systemic and historical inequalities and disadvantages for

[4] Yvette D'Ath, 'Respect at Work and Other Matters Amendment Bill: Introduction,' in *Record of Proceedings (Proof): First Session of the Fifty-Seventh Parliament Friday, 14 June 2024* (Queensland Parliament, 2024): https://documents.parliament.qld.gov.au/events/han/2024/2024_06_14_DAILY.pdf, 2367
[5] Morgan Begg, *One Voice: Racial Equality in the Australian Constitution* (Institute of Public Affairs, February 2023).
[6] For more on the establishment of Australia's legal system see Bella d'Abrera, 'Laws of Conviction,' *IPA Review* (June 2017): https://ipa.org.au/ipa-review-articles/laws-of-conviction.

certain groups in society.'[7] It argues that substantive equality is focused instead on 'equalising the starting point', 'accomodat[ing differences', and holds that it may be necessary to 'treat various groups differently'.[8] Substantive equality is reflected in clauses 13(4) and 16 of the draft AD bill 2024, which empower a person to engage in discriminatory action through affirmative measures undertaken to 'promote or realise substantive equality'.

This approach is a dramatic departure from how anti-discrimination laws were originally justified. The original logic in anti-discrimination laws was based on the premise that because people were equal, it should be unlawful to treat someone unfairly or unfavourably due to an arbitrary characteristic or attribute of another person. At least in theory, if not in practice, the provisions of anti-discrimination were available to all people—for instance, because everyone possessed a sex or racial characteristic or attribute, then prohibitions against discrimination on the basis of race or sex were in theory generally applicable.

However, the draft AD bill 2024 fundamentally reshapes the anti-discrimination framework through the concept of "affirmative measures" which refer to actions which would amount to direct or indirect discrimination, but are considered lawful because the discrimination is intended to achieve substantive equality. The idea that an individual with protected characteristics would require an affirmative measure to advance their position in society and somehow make them more equal is an affront to the egalitarian values that have shaped Australia for decades.

The perspective that some groups should be treated differently by virtue of their belonging to a certain identity group is illiberal and should not be codified in legislation. Indeed, in 2023 Australians were asked whether they would accept a similar proposal to entrench affirmative measures in the Australian Constitution by establishing a permanent body to make representations to the Commonwealth government on behalf of Indigenous Australians. It was rejected by 70 per cent of Queensland voters at the October 2023 referendum.

The draft AD bill 2024 may mark the beginning of the end for religious schooling in Queensland

The Anti-Discrimination Bill 2024 retains the flawed 'genuine occupational requirement' 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 and maintain their religious identity and ethos.

Currently, the genuine occupational requirement exists in section 25 of the *Anti-Discrimination Act 1991.* Subsection 25(3) specifies that it is not unlawful for an employer to discriminate if an employee or prospective employee 'openly acts in a way that the person knows or ought reasonably to know is contrary to the employer's religious beliefs' during the selection process, course of the person's work, or in doing something connected with the person's work, and it is a genuine occupational requirement that the person act in a way consistent with the employer's religious beliefs.

[7] Department of Justice and Attorney-General, *Consultation Paper: Anti-Discrimination Bill 2024 (exposure Draft) – Affirmative measures* (Department of Justice and Attorney-General, February 2024), accessed 13 May 2024: https://www.publications.qld.gov.au/ckan-publications-attachments-prod/resources/0c17de37-eb21-424c-96e4-034416b83bdc/anti-discrimination-bill-2024-consultation-paper-affirmative-measures.pdf?ETag=432f134397f6b8a74fb47157f28e6770
[8] Ibid.

In clause 29 of the draft AD bill 2024, the genuine occupational requirement exception is narrowed significantly. It outlines that religious bodies, including schools, may only exercise discretion in staffing 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.

Denying religious schools autonomy over staffing misunderstands the critical importance of staff in preserving the common ethos of a faith based school as part of a wider religious community that parents seek to be involved in. In particular, 29(1)(a) of the draft AD bill 2024 is based on the fallacy that only some staff, such as those involved in teaching religious studies or the principal, need to profess the school's religious beliefs in order for students to receive a religious education. The reality is that parents send their children to religious schools not solely so that the child may receive a few hours of religious instruction a week, but rather so that they may be involved in a faith community built by students, teachers, and parents. It cannot be expected that the discussion of religion would be neatly cleaved into a few periods of teaching within a week. Rather, students could approach a staff member at any time with religious questions. In this way, staff serve as moral role models for students, which is why it is crucial that faith-based schools retain their autonomy to maintain their religious ethos.

Another consequence of the draft AD bill 2024 is that would have the incoherent effect of exposing a religious school to complaint if it gave preferential treatment to a person who shares the religious values of the school, unless it could prove doing so was 'a genuine occupational requirement' for their role.

Placing the burden on schools to prove that no discrimination occurred is a significant legal risk for religious schools. For example, a school that hired a teacher of English who shares the faith of the school would be exposed to complaint that it exercised preferential treatment in the hiring process. Schools may seek to manage this risk by disregarding candidates who share the school's religion.

The draft AD bill 2024 blurs the line between the church and state by eroding the autonomy of religious bodies

It is a well-established legal principle that interference with religious liberty must be justified and done only under very specific circumstances.[9] Religious freedom is not a gift given to the individual by the state, but is rather a pre-existing natural right. The burden therefore should not be placed on religious organisations to prove that their conduct was reasonable and proportionate, but should always be on the state to demonstrate that any restrictions on religious practices are absolutely necessary.

Clause 29 of the draft AD bill 2024 outlines that one of the conditions for religious bodies to be exempt from workplace hiring requirements is that they can prove that their hiring decisions were 'reasonable and proportionate in the circumstances'.

This requirement would extend to how religious organisations oversee and manage ministers of religion. While clauses 61 and 62 of the draft AD bill 2024 provide an exemption for religious

[9] For example, the International Covenant on Civil and Political Rights states that limitations to religious freedom may only be constituted by what is 'necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.' The standard of what is 'necessary' is a much higher threshold than what is 'reasonable and proportionate'.

bodies in the appointment, ordination, and training stages of ministers, the exemption does not extend to during the term of the appointment or the termination of the appointment. At these times, the religious body would be required to adhere to clause 29. This is because ministers of religion are considered in Australian law to be employees, as per the High Court's decision in *Ermogenous v Greek Orthodox Church of South Australia* (2002).[10]

Associate Professor Mark Fowler has noted the provisions of the draft AD bill 2024 are more restrictive than Victoria's perverse effects of this change are even more restrictive than the Victorian precedent under the state's *Equal Opportunity Act 2010* (Vic), noting:

> Queensland religious institutions will be able to train and 'appoint' ministers who comply with their beliefs, but when appointing those persons to positions of 'work', including as leaders, they must comply with clause 29. As a result, Queensland religious institutions will not be able to refuse a work appointment, or refuse to continue a work appointment, when the person's practices do not align with their beliefs in matters such as marital faithfulness, sexuality, transgender status, or sex work.[11]

The 'reasonable and proportionate' standard of clause 29 is inappropriate as it invites the state to adjudicate which religious beliefs are legitimate. Clause 29 specifies that a person may make hiring decisions on the basis of religious belief or religious activity if the decision 'is reasonable and proportionate' in the circumstances. This is in effect asking a secular court to make a theological judgment on the religious beliefs in question. As Associate Professor Alex Deagon has written, '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.'[12]

The IPA's analysis of both bills finds them to be seriously flawed and an unacceptable assault on the freedom of speech of Queenslanders. Given these findings, the IPA recommends that the Queensland parliament rejects both bills.

Yours sincerely,

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Research Fellow

[10] *Ermogenous v Greek Orthodox Church of South Australia* (2002) 209 CLR 95.
[11] Mark Fowler, 'More issues with the Queensland Anti-Discrimination Bill 2024,' *Law and Religion Australia,* 21 May 2024 (accessed 13 June 2024): https://lawandreligionaustralia.blog/2024/03/21/more-issues-with-the-queensland-anti-discrimination-bill-2024/
[12] Alex Deagon, 'Queensland – new proposed discrimination law,' *Law and Religion Australia,* 12 March 2024 (accessed 7 June 2024): https://lawandreligionaustralia.blog/2024/03/12/queensland-new-proposed-discrimination-law/