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ACC: Religious Freedom, Employment and Church Entities

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Schools & Education | Not for Profit & Charity | Commercial | Employment & Discrimination | Compensation Law | Family
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Topics to Cover

- › Religious freedom intersecting with employment law affecting entities specifically schools and churches.
- › The Anti-Discrimination Act (1991) and exceptions.
- › New Draft Anti-Discrimination Bill and its implications.
- › Practical guidelines and policies that apply to the employment of staff.

What is “religious freedom”?

Section 20 of the *Human Rights Act 2019* says that:

1. Every person has the right to freedom of thought, conscience, religion and belief, including-
 - (a) the freedom to have or to adopt a religion or belief of the person’s choice; and
 - (b) the freedom to demonstrate the person’s religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private.
2. A person must not be coerced or restrained in a way that limits the person’s freedom to have or adopt a religion or belief.

What is “religious freedom”?

- The Queensland Human Rights Commission identifies that:
 - “this means everybody can think and believe what they want. They can develop their own conscience. They can have or adopt a religion, free from external influence.”
- Protects both religious and non-religious belief
- This right has two parts:
 - a freedom to think and believe anything an individual chooses; and
 - a freedom to express your beliefs publicly.

Anti-Discrimination Act 1991 (Qld)

- › The *Anti-Discrimination Act 1991 (Qld)* provides a comprehensive anti-discrimination regime that, among other things, balances religious freedom against the individual's right not to suffer discriminatory treatment.

Draft *Anti-Discrimination Bill*

- › Building Belonging Report tabled in July 2022 – review of *Anti-Discrimination Act 1991* (Qld)
- › Building on the 2022 *Building Belonging Report*, the QLD Government released its Draft *Anti-Discrimination Bill* in March this year as part of a community consultation process. The Bill is a holistic redrafting of the Anti-Discrimination Act aimed at bringing QLD more into line with other States such as Victoria.

Act vs. Bill – Key Points of Distinction

- › Employment – Genuine occupational requirements
- › Meaning of ‘discrimination’

Genuine Occupational Requirements: The Act

Section 25(3) of the current Act provides that in relation to religious schools and other religious bodies:

It is not unlawful for an employer to discriminate ... in a way that is not unreasonable, against a person if—

(a) the person openly acts in a way that the person knows or ought reasonably to know is contrary to the employer's religious beliefs—

(i) during a selection process; or

(ii) in the course of the person's work; or

(iii) in doing something connected with the person's work; and

(b) it is a genuine occupational requirement of the employer that the person, in the course of, or in connection with, the person's work, act in a way consistent with the employer's religious beliefs.

Genuine Occupational Requirements: The Bill

Section 29(1) of the Draft Bill provides that:

A person may discriminate against another person on the basis of the other person's religious belief or religious activity in relation to work for a religious body if—

- (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.*

- › 2) For the purposes of sub-section (1) the relevant religion is the religion in accordance with which the religious body is conducted.
- › 3) To remove any doubt, it is declared that a person can not rely on subsection (1) to discriminate against another person on the basis of a protected attribute other than religious belief or religious activity.

Genuine Occupational Requirements: Comparison

- › New requirement that discrimination be based on the employee or applicant's **religious belief or religious activity** – *not* their conduct.
 - › If an employee shares the employer's beliefs that certain conduct is wrong, but still engages in that conduct anyway, the employer has no recourse.
- › The Act currently contains an example of a genuine occupational requirement, which has been deliberately omitted from the Bill:
 - › “employing persons of a particular religion to teach in a school established for students of the particular religion”.

Genuine Occupational Requirements: Comparison

Anti-Discrimination Act 1991 (Qld)

‘Example 4— employing persons of a particular religion to teach in a school established for students of the particular religion’

Example for paragraph (a)— A staff member openly acts in a way contrary to a requirement imposed by the staff member’s employer in his or her contract of employment, that the staff member abstain from acting in a way openly contrary to the employer’s religious beliefs in the course of, or in connection with the staff member’s employment.

Anti-Discrimination Bill 2024

Examples of Genuine Occupational Requirements for a position

- *Using membership for a particular political party as a criterion for a position as an adviser to a political party or a worker in the office of a member of parliament*
- *Preferencing people on the basis of age for a peer support position in a service for children and young people*

Genuine Occupational Requirements: Comparison

- › *Current: (b) it is a genuine occupational requirement of the employer that the person, in the course of, or in connection with, the person's work, act in a way consistent with the employer's religious beliefs.*

- New: (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.*

What does this mean for Churches and Schools?

- › Clause 29 reflects a more tailored exception in relation to employment by religious bodies than currently exists in the Anti-Discrimination Act (page 24 of Anti-Discrimination Bill Consultation Report);
- › Operates more narrowly than anticipated in the recommendation in the Building Belonging Report this is because:
 - › Exception tied to the inability meet the genuine occupational requirement; and
 - › The discrimination is reasonable and proportionate in the circumstances.
- › Does not provide scope for reasonable and different treatment on the grounds of religion simply because a position of employment involves religious aspects.

What does this mean for religious institutions

- › Clause 28 still allows differing treatment of existing employees on religious grounds, but only where that person's religious belief means that they cannot fulfil the inherent requirements of their role with respect to the teaching observance or practice of religion, consistent with international human rights law and international labour law.
- › Clause 29 identifies that discrimination is only permitted where participation in the observance and practice of the religion is a genuine occupational requirement, and the person cannot satisfy this requirement due to their religious belief or activity.
- › Therefore, narrows the circumstances in which religious educational institutions can discriminate against their staff and students

Walsh v St Vincent de Paul Society

- › A woman was working for a Catholic charity for six years, a woman described herself as Christian (not Catholic).
- › The employer who was St Vincent De Paul Society told her to become a Catholic, or resign.
- › She elected not to become a Catholic.
- › The employee was a volunteer and was president of a Conference Group.
- › The Tribunal found that it was not a genuine requirement of the position (the president of a Conference Group) to be a Catholic.
- › The woman was awarded significant financial compensation.

The ‘genuine occupational requirement’ standard is too narrow to allow religious organisations to employ someone consistent with their faith. 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 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 animating religious beliefs and practices around sex which can render persons inappropriate for employment in a religious context. As already suggested, as drafted these 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 the discrimination is reasonable and proportionate, making the argument for an impugned religious body even more onerous. It is also disturbing that the consultation guide refers to the maligned ALRC Consultation paper recommendations as broadly consistent to support the changes, when that paper prompted a strong reaction from religious organisations which led the Prime Minister and the Education Minister to distance themselves from that framework.

Neil Foster

Exception – Religious Roles

- › The Act does not apply to the ordination, appointment, training, education, etc. of priests, ministers of religion, or members of a religious order.
- › The Bill, under section 61, maintains this exception, and **extends** it to any “other religious role” that:
 - › is the same as, or similar to, the role of a priest, minister of religion or member of a religious order; or
 - › otherwise involves the propagation of the doctrines, tenets or beliefs of the religion concerned.
- › Second limb may include school chaplains if care is taken to define their roles accordingly.

Commonwealth Legislation

Sex Discrimination Act 1984 (Cth) - background

- › Section 109 of the Constitution declares that

When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.
- › Hitherto, the *Sex Discrimination Act* contained broad provisions excluding religious bodies and schools from coming within the scope of the Act. State governments have therefore had freedom to legislate for themselves, e.g. through the *Anti-Discrimination Act 1991 (Qld)*.
- › Now, the Australian Law Reform Commission (ALRC) has released a report seeking the repeal of the protections for religious institutions under the *Sex Discrimination Act*.
- › If this is followed through, State governments would be prevented from granting any greater protection to religious bodies or schools than is provided for under the *Sex Discrimination Act*.

Sex Discrimination Act 1984 (Cth) – general

- › Section 14 makes it unlawful for employers to discriminate on the basis of “sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding or family responsibilities” in relation to hiring and employment.
- › Section 21 makes it unlawful for educational institutions to discriminate against students or potential students on the same grounds.

Sex Discrimination Act 1984 (Cth) – section 38

- › Section 38 provides an exception regarding employment and enrolment in the case of:

an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

- › ALRC Report recommends that this exception be removed **entirely**.

Sex Discrimination Act 1984 (Cth) – section 23

- › Section 23 prohibits discrimination in the provision of accommodation on the basis of “sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, or breastfeeding”.
- › Section 23(3)(b) provides that s 23 does not apply to “accommodation provided by a religious body”.
- › ALRC report recommends removing this exception.

Policies and Procedures in Hiring Practices

- › For religious institutions to be able to rely on the new Anti-Discrimination Bill (e.g. principal or chaplains) care should be taken towards the following:
 - › Job Descriptions/Position Description;
 - › Statement of Faith;
 - › Policies (e.g. anti-discrimination policy)



QUESTIONS?

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