From the desk of Daniel Wild, Director of Research
and the desk of Morgan Begg, Research Fellow
[redacted]

Institute of Public Affairs

5 December 2019

Mr Christian Porter MP
PO Box 6022
House of Representatives, Parliament House
CANBERRA ACT 2600

cc: all Members of Parliament

IPA RESEARCH INTO THE *RELIGIOUS DISCRIMINATION BILL 2019*

Dear Attorney-General

For over 75 years, the Institute of Public Affairs ("the IPA") has been committed to undertaking research to promote the human dignity of all Australians. At the heart of human dignity is individual freedom. This is why a key focus of the IPA's research is on legal rights, freedom of speech, freedom of association, and freedom of religion.

The IPA is writing to you and your colleagues to communicate our research on the government's proposed *Religious Discrimination Bill 2019* ("the Bill"). We note the introduction of the Bill into parliament has been delayed. This is a welcome development. However, IPA research and analysis shows the Bill is fundamentally flawed and, as such, should be withdrawn and the government should start the process again. IPA research suggests the status quo would be preferable to proceeding with the Bill as drafted.

IPA research has found the Bill contains three key flaws. Firstly, the Bill requires the civil courts to make adjudications on religious doctrine which will abolish the separation of church and state. Secondly, the protections for freedom of speech offered under the Bill are strictly defined and subject to vague exemptions and are therefore illusory. Thirdly, the Bill threatens the freedoms of Australians of faith by potentially exposing them to litigation from other faith and secular groups.

This letter is a summation of a submission the IPA made to the Attorney-General Department's consultation into the Bill in October, in the form of a report titled *Religious Liberty and its Challenges in Australia Today* ("the Report"). The report is available at the IPA's website. We have also enclosed for your information media coverage of the IPA's Report which was published in *The Australian* on 15 November 2019, and an opinion article published in *The Weekend Australian* on 23 November 2019 and authored by Mark Fowler, an associate adjunct professor at the Notre Dame Law School.

The Bill will abolish the separation of church and state by requiring a secular judicial system to make determinations about religious doctrine

The Bill requires the secular court system to make adjudications of the "doctrines, tenets, beliefs or teachings" of a religion. This will abolish the distinction between church and state. In order for a "statement of belief" to be protected from liability under state anti-discrimination laws, it is required under clause 5(1) to be made in good faith, and must be a religious belief which may be reasonably regarded as being in accordance with the "doctrines,

tenets, beliefs or teachings" of the religion. Requiring secular courts to make assessments about religious beliefs represents a reversal of the separation of church and state. The IPA stated in its Report that this confers on the courts "the inappropriate role of defining religion and determining which religious practices or beliefs are legitimate. This is an inevitable consequence of the secular law intruding into the religious sphere".

Similar views were expressed by Mark Fowler, who noted in *The Weekend Australian* on 23 November 2019 that the "original motivation for the Enlightenment formulation of the 'separation of church and state' included the imperative to keep the state out of religion". Fowler notes the provisions of the Bill will mean that:

> a person will not be protected if a judge decides their sincerely held convictions are not an accurate interpretation of their religion. There are a strictly defined set of legitimate grounds on which religious belief may be limited in a democratic society. They do not include a judge deciding that you have mistakenly interpreted your religious obligations.

This means it would be up to judges to decide if, for example, Israel Folau's views constitute a reasonable religious belief and therefore are deserving of protection under the Bill. This would subject the freedoms of Australians of faith to Australia's secular judicial system. In this respect, the Bill has the potential to undermine religious tolerance by providing the opportunity for those of different religious and secular viewpoints to settle their disputes through the courts rather than through the avenues of civil society and the processes of discussion and debate consistent with the values of a liberal democracy.

Once the courts start making decisions about the legitimacy of religious beliefs, there is no limit to how far the secular state can mandate religious affairs. For example, a secular court could consider the practice of male and female partition in certain religious services as discriminatory and therefore illegitimate. This could result in the courts becoming theocratic.

The Bill will not protect freedom of speech as the Bill will likely fail to override state anti-discrimination law and will therefore likely fail to prevent another Archbishop Porteous-type case from occurring

The proposed clause 41 of the Bill is intended to protect freedom of speech by ensuring that a "statement of belief" is not unlawful under state anti-discrimination or anti-vilification laws. In reality, the strict definition of a "statement of belief" and the use of vague words and broad exceptions means that the protection offered by this provision is illusory.

For a "statement of belief" to be protected from liability under state anti-discrimination laws, it is required to be made in good faith, and must be a religious belief which may reasonably be regarded as being in accordance with the "doctrines, tenets, beliefs or teachings" of the religion. Unclear words such as "good faith" and "reasonably" requires judges to apply their own discretion and values to pick and choose which statements are entitled to legal protection. In the case of *Eatock v Bolt* decided in 2011, Judge Bromborg of the Federal Court of Australia noted that the defences to the complaint of offensive and insulting speech under Section 18C of the *Racial Discrimination Act 1975* would not be available to Andrew Bolt because the use of sarcasm and humour overrode the requirement that a comment be made in good faith.

This protection is also not available to any kind of speech which is "likely to harass, vilify or incite hatred." This alone potentially negates the provision, as state anti-vilification laws by definition and intention capture vilifying speech—which is itself a notoriously vague and subjective word. There is in practice no meaningful difference between an act which is likely to offend—such as Section 17 of the Tasmanian *Anti-Discrimination Act 1998*—or an act which is likely to vilify or incite hatred. This is because the standard is not objectively defined but based on an emotional response. It is an inherently subjective exercise for a judge to determine whether an expression is likely to elicit an emotional reaction in another person.

The Bill has the potential to undermine religious tolerance in Australia by providing the opportunity for those of different religious and secular viewpoints to settle their disputes through the courts

IPA research has found that the Bill will likely exacerbate threats to freedom of religion in Australia rather than protecting it. It is possible that the Bill will be used as a cudgel against Australians of faith. As the IPA noted in its report:

> the bill as currently drafted may heighten sectarian conflict in Australia through the use of anti-discrimination provisions as a weapon by one religious group against another, or by a secular group against a religious group. Despite being marketed to religious communities as a mechanism for their protection, the explanatory notes to the draft bill explicitly explain that the definition of a protected 'religious belief or activity' also 'includes not holding a religious belief or not engaging in, or refusing to engage in, a religious activity'.

Accordingly, Australians of faith will be liable under the provisions of the Bill for unlawful discrimination against Australians of a different or no faith system. Promoting religious discrimination laws as the solution to concerns about religious liberty promotes the idea that freedom is in some way a gift provided by the government, rather than a pre-existing natural right of Australians. It expands the legislative framework that has posed a significant danger to freedom of religion in the past.

The IPA's research finds that the Bill is fundamentally flawed and should be withdrawn. Firstly, by requiring courts to make determinations about religious doctrine, it will abolish the separation of church and state. Secondly, the Bill's proposed protections for freedom of speech are illusory. Thirdly, the Bill will likely be used as a sword against Australians of faith. The recognition of these three key flaws should not detract from the other problems in the Bill, including the reversal of the onus of proof, which requires a party responding to a complaint to prove that its allegedly discriminatory rule was reasonable.

Due to the findings of our research, the IPA believes the government should not proceed with the Bill. Instead, our research finds that only by removing laws which restrict freedom of speech and freedom of association can the Parliament adequately secure freedom of religion. In practice this means removing existing anti-discrimination laws, rather than adding to them.

Yours sincerely,

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Research Fellow

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Director of Research

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THE AUSTRALIAN

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Discrimination bill goes beyond matters of religion

MARK FOWLER

Attorney-General Christian Porter's Religious Discrimination Bill is expected to be tabled in the final parliamentary sitting of the year starting next week. In his address to the National Press Club on Wednesday he indicated he would be making various alterations to the draft bill released in August. However, one objection particularly prevalent among religious groups remains unanswered.

To gain the benefit of the bill's protections, a person must convince a judge their conduct "may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of (their) religion". In non-legalese: a person will not be protected if a judge decides their sincerely held convictions are not an accurate interpretation of their religion. There are a strictly defined set of legitimate grounds on which religious belief may be limited in a democratic society. They do not include a judge deciding that you have mistakenly interpreted your religious obligations.

Unfortunately, this doctrinal test is the engine room of the bill's protections. Satisfying this test is a critical determinant for those asserting a claim of religious discrimination; for religious organisations seeking to defend a discrimination claim; for individuals defending a discrimination claim that has resulted from a statement of belief they have made; and for health practitioners asserting a conscientious objection.

It is often forgotten that the original motivation for the Enlightenment formulation of the "separation of church and state" included the imperative to keep the state out of religion. Citing this foundational liberal philosophical precept, leading jurists have cautioned against placing the content of religious obligation in the gift of the judicial arm of government. Canadian Supreme Court Justice Frank Iacobucci has said: "The state is in no position to be, nor should it become, the arbiter of religious dogma … Secular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion." Consistently the most superior Anglophone courts, including the Australian High Court, the House of Lords and the supreme courts of the US and of Canada, have all directed judges interpreting belief to eschew determinations as to the accuracy of an individual's self-conceived religious duties and focus instead upon their sincerity.

It is a little-known fact the definition of religion provided by the High Court in the 1983 Scientology case is one of our most widely recognised judicial exports. There justices Anthony Mason and Gerard Brennan required a focus on the "integrity" or "sincerity" of a believer, a formulation they considered permits courts to refuse "sham" religions such as "the claimed religion of 'Chief Boo Hoo' and the 'Boo Hoos' ". In effect, the bill displaces the High Court's jurisprudence by requiring a judge to determine what conduct is permitted or required by the relevant religion, regardless of the genuinely held convictions of the believer.

It should not be thought, however, that requiring a focus on religious burdens as self-perceived allows a believer to write themselves into legal protection.

As Mason and Brennan said: "The mantle of immunity would soon be in tatters if it were wrapped around beliefs, practices and observances of every kind whenever a group of adherents chose to call them a religion." It is for this reason that there are strictly articulated grounds for limiting religious manifestation under international law.

However, the bill permits that judges may prevent a person from acting in a manner they genuinely consider is consistent with their religious commitments simply by refusing to acknowledge their beliefs as correctly religious. In substance, the judicial task of identifying the content of a religious belief becomes the backdoor means of limiting that belief. In this way, the state is discharged from the burden to provide justification for restrictions imposed upon liberty.

Conversely, having the precisely held beliefs, as opposed to a constructed irreality, assessed against limitations permits religious believers to understand the grounds on which any limitations are placed on their beliefs.

It thus preserves the prospect of rational acceptance of the limitation, and therefore regard for the law's legitimacy.

More to the point, requiring judges to determine the correctness of religious convictions is not necessary for a court to reach a conclusion on the real question that presents in religious discrimination claims: whether the particular manifestation of the belief should be permitted or prohibited.

The issues at stake are best illustrated by example. Assume Israel Folau's religious discrimination claim against Rugby Australia falls for determination under the bill. If the Folau controversy has demonstrated anything, it is that sincere people of faith can differ on what the requirements of doctrine are. However, for Folau's claim to stand or fall on whether a judge considers his post about Christ's love for "sinners" and ultimate role in judgment was "reasonably … in accordance with" Christian doctrine is an absurd proposition.

However, this is the calculus the bill requires. As US chief justice Warren Burger said: "It is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation." The Australian Catholic Bishops Conference's submission on the bill reflects this concern: "It should be a matter of policy to ensure that courts do not determine the beliefs of a religious community."

Whether the Labor Party will support the bill is yet unknown. Its reply will be the first real indication as to whether it has heeded the lessons of this year's election.

The lesson for Labor's engagement with faith, at least as conceptualised by the recent review into the May defeat, is: "The party would be wise to reconnect with people of faith on social justice issues and emphasise its historic links with mainstream churches." The review frankly acknowledged that among the "groups of voters who swung most strongly against Labor were self-described Christians". Given the weight of judicial authority I have outlined, it is difficult to see why in this debate either side of politics should refuse the retention of this foundational limb of the separation of church and state within our judicial system.

Finally, on what has been previously thought to present a separate front, earlier this year the government referred the question of reforms to the religious exemptions in the Sex Discrimination Act to the Australian Law Reform Commission. It has since been keen to stress the debate on the Religious Discrimination Bill does not affect the Sex Discrimination Act. However, the result of a recent exchange between ALRC president Sarah Derrington and Labor senator Kim Carr in Senate estimates seems to have escaped attention. Derrington clarified: "What we've been asked to do is to restrict ourselves to a drafting exercise which would ensure that the Sex Discrimination Act and the Fair Work Act were consistent with the government's bill." If correct, that means the bill about to be introduced is about much more than just religious discrimination.

Assuming the government follows the ALRC recommendations, the outcome of this parliamentary debate will determine the content of the protections to religious freedom across all commonwealth discrimination law

Mark Fowler is a practising lawyer and an adjunct associate professor at the University of Notre Dame school of law, Sydney.

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IPA slams religious discrimination bill for 'blurring church-state roles'

GEOFF CHAMBERS

Institute of Public Affairs executive director John Roskam has slammed the draft religious discrimination bill of the Attorney-General, Christian Porter, saying it will "blur the distinction between church and state" by inviting "secular courts to define what is considered a 'reasonable' and 'good faith' religious practice".

In an attack on the legislation, expected to be tabled in parliament before Christmas, Mr Roskam said the proposed laws would "put judges above priests, imams and rabbis in deciding the limits of religious freedom … The proposed exemptions from the religious anti-discrimination laws do not include bodies which are solely or primarily engaged in commercial activities".

"This fails to recognise that the manifestation of religious beliefs takes place as much in a commercial environment as in a church, synagogue, or mosque," he said.

"The proposed bill will reverse the onus of proof by requiring a 'large business' to justify why their alleged discrimination against an employee of religious faith was justified.

"This is an unconscionable reversal of a centuries-old legal tradition which sits at the heart of Australia's legal system to protect individuals' rights against arbitrary use of government power."

The IPA submission to the Attorney-General's Department in response to the government's draft religious discrimination bill, describes it as "unlikely to achieve its stated objective of protecting Australians of faith from unfair discrimination".

It also says under the legislation, exemptions for faith-based organisations are "too narrow to guarantee the mechanisms introduced by the draft bill will not be used as a cudgel against Australians of faith to combat theological ideas".

The conservative think tank said state and federal governments should "reverse years of encroachment on to the freedoms of Australians by removing or limiting the reach of laws which impinge on those freedoms, which are the anti-discrimination laws themselves".

Mr Roskam said the proposed bill was unlikely to prevent another case such as that of the Catholic Archbishop of Hobart, Julian Porteous, from arising.

"The bill intends to ensure 'statements of faith' cannot be found to be unlawful under state anti-discrimination law. However, the protection for 'statements of faith' does not include speech, which is 'likely to harass, vilify, or incite hatred'," he said.

"This will render proposed protection for 'statements of faith' ineffective because state anti-discrimination laws by definition and intention include speech which 'vilifies', itself a notoriously vague and subjective word."

Mark Fowler, adjunct associate professor at the School of Law Notre Dame, also expressed concern about oversight of faith-based cases under the proposed bill. He said the legislation required judges to determine whether conduct "may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings or the religion".

"(It) requires judges to perform feats in the interpretation of religious belief that leading jurists around the world have cautioned against," Professor Fowler said.

"A strict distinction should be maintained between the task of identifying the content of a religious belief and the consideration of the limitations to be placed upon that belief."

GEOFF CHAMBERS
FEDERAL POLITICAL CORRESPONDENT