



# Equal Opportunity Tasmania

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## Religious Discrimination Bill 2019

Submission by the Anti-Discrimination Commissioner (Tas) on the second exposure draft of the *Religious Discrimination Bill 2019* (Cth)

January 2020

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## Contents

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|   |    |
|---|----|
| Introduction  | 1  |
| Objects clause  | 2  |
| Discrimination on the ground of religious belief or activity    | 2  |
| Employer and Qualifying Body Conduct Rules                      | 2  |
| Conscientious Objection by Health Practitioners                 | 3  |
| Use of the term person  | 4  |
| Representative Complaints                                       | 4  |
| Religious Bodies  | 5  |
| Discrimination in Work  | 5  |
| Discrimination in Education                                     | 6  |
| Discrimination in the Accommodation                             | 6  |
| Conduct in compliance with legislation                          | 7  |
| Statements of Belief  | 8  |
| Overriding Commonwealth, State and Territory Discrimination Law | 12 |
| Section 42 is contrary to the proposed Objects Clause           | 12 |
| The phrase 'in and of itself' will introduce added complexity   | 12 |
| Relationship with State and Territory Laws                      | 13 |

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## Introduction

Thank you for the opportunity to make a submission on the second exposure draft of the Religious Discrimination Bill 2019 (Cth).

I consent to a copy of this submission being published on the Attorney-General Department's webpage.

The matters covered in this submission are additional to the submission I made on the first exposure draft, which I attach at Appendix A, and to the issues raised by the Australian Council of Human Rights Authorities (ACHRA) of which Equal Opportunity Tasmania (EOT) is a member which is attached at Appendix B.



**Sarah Bolt**

ANTI-DISCRIMINATION COMMISSIONER (TAS)

29 January 2020

## Objects clause

Section 3 of the revised draft Bill introduces express provisions making clear that all human rights have equal status under international law. The intention is to also insert equivalent provisions in other Commonwealth Human Rights Acts.

I am supportive of the intention to reference the equal rights of all human rights along with their indivisibility and universality.

I remain concerned, however, that by introducing into the Religious Discrimination Bill provisions that override conduct that may otherwise be considered discriminatory, the Bill establishes a hierarchy of rights in which protections for those who hold religious beliefs will in many cases displace the rights and protections of those who possess other attributes.

This is particularly relevant in the context of provisions intended to override other anti-discrimination laws, including section 17(1) of Tasmania's *Anti-Discrimination Act 1998* (Tas). Such provisions will act to diminish human rights protections and have the practical effect of giving disproportionate weight and significance to statements of belief over other rights.

## Discrimination on the ground of religious belief or activity

As I raised in our previous submission, the way in which the indirect discrimination clauses are constructed is inconsistent with the approach taken in other anti-discrimination legislation. As such they risk leading to the protection of certain conduct that would otherwise be discriminatory under existing law.

By narrowing the reasonableness test, the way the Bill is currently drafted has the effect of making it easier for complainants to establish the conditions, requirements or practices to establish that discriminatory conduct has taken place and excludes the ability to take into account all relevant circumstances surrounding a complaint.

Amendments to Part 2 of the draft Bill do little to address this imbalance.

## Employer and Qualifying Body Conduct Rules

Clause 8(3) has the effect of making it unlawful for employers with revenue of at least \$50 million to adopt or implement conduct rules that restrict employees from making a statement of belief other than in the course of the employee's employment. In effect this prevents employers from regulating behaviour in non-work situations.

Whilst proposed amendments to the second draft of the Bill broaden the scope of activities that the employer can regulate from situations in which the employer was 'performing work' to circumstances in the 'course of the employee's employment', the provisions still provide for a number of circumstances where an employer will not be able to regulate the behaviour of employees. Accordingly, statements of belief that a person of the same religion could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of that religion will be protected if they are made outside work, regardless of the nature of those beliefs or their discriminatory content or the broader impact on the organisation.

The only defence to an employer who seeks to regulate the behaviour is ‘unjustifiable financial hardship’. Actions that are taken to maintain the ethos of the organisation or to demonstrate that the employer, for example, adheres to the principles of diversity and inclusion are not considered relevant in this context. The sense in which ‘unjustifiable financial hardship’ is used in the Bill is antithetical to broader principles of ‘unjustifiable hardship’ in discrimination law which generally seeks to balance all circumstances when considering the reasonableness of an action.

Of particular concern is the way in which the provisions in the draft Bill will act to preference those making a statement of belief in circumstances where this ability would not also be available to those who express a non-religious belief on the same matter. So, for example, a person holding a religious belief about abortion would be able to freely express that view, but a person who is not engaged in religious activity would not be able to articulate their views on the same issue unless that comment is specifically connected to the fact of not holding a religious belief.

I believe this will contribute toward setting up a hierarchy of rights in which religious views (including on matters such as abortion, same-sex marriage, and single-parenthood for example) are protected, but other opinions are not.

The decision to add qualifying bodies to the range of organisations that will be restricted in their ability to make rules that restrict or prevent a person from making a statement of belief other than in circumstances where the restrictions are an essential requirement of the profession or trade (clause 8(4)) will also considerably broaden circumstances where persons with the attribute of holding a religious belief may be given a higher level of protection than others.

## Conscientious Objection by Health Practitioners

I welcome the proposal to narrow the list of health services covered by the provisions of clause 8(6). Under the first draft of the Bill, a health service included services such as dental, optometry, podiatry and physiotherapy. Under the second draft Bill, these services have been removed from the scope of the clause.

However the range of services covered under the generic heading of ‘medical services’ remains potentially very broad. In addition, inclusion of the words ‘participating in’ designated health services has the potential to capture a range of ancillary work beyond that associated with the direct provision of the identified health service.

Notes to the clause have been added to attempt to clarify that the provision is not aimed at allowing a health practitioner to refuse to provide a service to a particular group or person. Whilst in theory this aims to promote consistency in the approach taken by a health practitioner who objects to providing a particular service, it does not eliminate the potential for indirect discrimination persons with particular protected attributes that are disproportionately higher users of that service. A health practitioner’s policy not to provide hormone therapy for example may be differentially targeted at those undergoing gender transition.

Further, no provision is made that would require a health practitioner who conscientiously objects to the delivery of a procedure to offer those who are refused the service information about

alternative services where their health needs can be met. This is at odds with similar conscientious objection provisions, including those contained in Tasmanian law. For example, under the *Reproductive Health (Access to Terminations) Act 2013* (Tas) a doctor who holds a conscientious objection to abortion is required to provide a list of prescribed health services where information can be found on termination services to any woman seeking these services. Failure to do risks professional sanction.

It is my view that should the Bill include conscientious objection provisions, provisions requiring the health practitioner to refer their client to alternative services should be included.

### Use of the term person

In the first draft of the Bill, the term 'person' was defined in accordance with the *Acts Interpretation Act 1901* (Cth) to include a body corporate. As a consequence, core provisions of the draft Bill also captured actions undertaken by religious bodies and other religious institutions.

Whilst the definition of 'person' has now been removed, without explicitly restricting the term to natural persons uncertainty about the scope of provisions containing the term 'person' are likely to give rise to a reference back to way in which the *Acts Interpretation Act 1901* (Cth) defines the term. This does not solve the problem of using the term 'person' in its broader sense and does little to provide legal certainty about the scope of the Bill.

Under the *Acts Interpretation Act 1901*(Cth) the term 'individual' is used to denote a natural person. It would be preferable, therefore, to substitute references to 'persons' in the Bill with the term 'individual'. This would provide certainty that a broader range of bodies are not captured.

Use of the term 'individual' would, for example, clarify the uncertainty surrounding cl 9 which uses both the terms 'person' and 'individual' and implies that the term 'individual' also captures organisations which is contrary how the term is defined in the *Act Interpretation Act 1901* (Cth).

### Representative Complaints

The Explanatory Notes accompanying the revised draft Bill state that whilst the Act is intended to protect individuals, it does not preclude bodies corporate or other non-natural persons from being 'persons aggrieved' for the purposes of the *Australian Human Rights Commission Act 1986* (Cth). In effect this means that religious bodies and other religious institutions would have standing to bring a complaint in their own right.

Absent from the draft Bill are provisions (common across other human rights instruments) governing representative complaints. Sections 46P, 46PB and 46PC of the *Australian Human Rights Commission Act 1986* (Cth) outline the basis on which a representative complaint can be made to the Commission. In general this allows complaints to be made by a corporate entity on behalf of one or more aggrieved individuals and addresses issues related to the detriment they believe they have experienced as a group of individuals. It is an aggrieved individual, however, that must institute proceedings in the Federal Court if the complaint is not resolved. Provisions such as these are standard across discrimination law and I see no reason to depart from this approach in the Bill.



## Religious Bodies

I am supportive of the Australian Human Rights Commission view expressed on the first draft of the Bill that the extent to which organisations are able to engage in conduct that would otherwise be unlawful discrimination must be carefully considered given the role that many religious organisations play in the provision of public services and the significant public funding it attracts to do so.

Clause 11(1) of the draft Bill effectively shields a broad range of organisations from the application of discrimination law provided that their conduct is in good faith and is reasonably considered to be undertaken in accordance with the doctrines, tenets, beliefs or teachings of the religious body.

Whilst I note that the second draft Bill now explicitly rules out the application of clause 11 to hospitals, aged cared facilities or institutions solely or primarily providing accommodation, the scope of activities captured under clause 11 is still very wide-ranging and covers a broad array of public benevolent institutions regardless of whether they conduct activities that are solely or primarily commercial in nature.

Nor have any effective limits been included on the nature of the activities that would be protected. Coverage is not limited to actions that are core to the religious practices of the adherents of the religion or that relate to aspects of the services provided that relate principally to religious purposes. It is extended to any action that **could** reasonably be considered to be linked to the doctrines, tenets, beliefs or teachings of that religion in any area of public life covered by the Bill.

Clause 11(3) effectively extends the protections available by also exempting conduct that is undertaken to avoid injury to the religious susceptibilities of adherents of the same religion as the religious body. This will enable organisations to, for example, discriminate against those who would otherwise fulfil the inherent requirements of a position.

EOT is not supportive of providing broad exemptions for conduct that is essentially secular in nature and considers that the clause 11 should be re-drafted to narrow the exemption to conduct that is directly or immediately religious and necessary to conform to the doctrines of the religion and to bodies that have been established for religious purposes.

I note in this context that the provisions of clause 11 have the ability to undermine the commitment made to remove exceptions in the *Sex Discrimination Act 1984* (Cth) which allow religious schools to expel gay students and risk introducing inconsistencies in federal discrimination law.

## Discrimination in Work

Prohibition against discrimination in relation to work outlined in clauses 14-18 of the draft Bill are subject to the exceptions set out in clause 32. The exceptions outlined in clause 32 extend beyond those that have precedent in discrimination law where 'inherent requirements' for the most part are narrowly construed and limited only to those that are essential to the position. This is consistent with the approach of adopting least restrictive approaches in circumstances where

an individual risks being subject to discriminatory practices. The exceptions outlined in clause 32 restate, however, that both the employer conduct rules and requirement to comply with health practitioner conduct rules are not considered inherent requirement of employment. This extends the inherent requirements test in a way that is not available to those who possess other protected attributes.

Further clause 32(8)-(11) imports new provisions enabling discrimination against another person on the grounds of the other person's religious belief or activity in relation to employment in religious hospitals, aged-care facilities and the provision of accommodation. Whilst this provides a more limited exception than that covered in the first draft of the Bill, it still provides a very broad exception that is capable of applying to all staff within those services.

In effect, these provisions will enable hospitals and aged care providers to discriminate in relation to employment and the establishment of partnerships, regardless of whether the requirement in relation to their religious beliefs are relevant to the position. They enable, for example, discrimination against a person seeking employment to provide gardening services or recreational activities – tasks which it would be reasonable to assume do not have a religious component.

It is my view that exceptions should only be available in circumstances where it is strictly necessary for undertaking tasks relevant to the job or position, particularly in circumstances where public funding is being used to support that employment.

## Discrimination in Education

Clause 19 of the draft Bill provides that it is unlawful for an educational institution to discriminate against a person on the ground of the person's religious belief or activity in relation to the admission of that student or by subjecting them to detriment, including expulsion. I am supportive of these protections.

I note, however, that the provisions in clause 19 are overridden by those outlined in clause 11 in relation to educational institutions conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religious. As a consequence religious educational institutions would be able to engage in conduct that would otherwise be discriminatory for non-religious educational providers.

I believe that this accords rights to religious educational institutions that far exceed those of other bodies and privileges people of religious faith. In practice this will result in heightened protection for religious educational bodies and unequal legal protection for other groups of people protected under discrimination law.

## Discrimination in the Accommodation

Clause 22 makes it unlawful to discriminate in the provision of accommodation services. This clause is, however, qualified by the exception provided at 33(2)-(5) which permit discrimination in access to religious camps and conference sites provided that the operator of those facilities have a publicly available policy that describes the nature of the restrictions.

The effect of this provision is that operators of religious camps or conference sites would be provided with the capacity to engage in discriminatory practices that would not be available to other secular camps or conference centres.

I believe that this accords rights to the operators of religious camps and conference centres that far exceed those of other bodies and privileges people of religious faith. In practice it will result in unequal legal protection for other groups of people protected under discrimination law who may also operate camps or conference centres.

As with provisions related to employment, education, access to premises, land, sport and clubs, my concern relates to the risk that religious bodies will be able to discriminate lawfully against those who would otherwise be protected from discrimination.

## Conduct in compliance with legislation

Clauses 30 and 31 exempts unlawful discrimination where that conduct is undertaken in direct compliance with Commonwealth law, law enforcement activities, State and Territory Acts and instruments or an order of a court or Tribunal. Under the second draft of the Act, however, clause 30 has been amended to exclude by-laws made by local Government.

This is also given effect by defining religious belief or activity to explicitly cover activities regardless of whether they are prohibited by local by-laws.

I am not supportive of this approach.

By way of example, I refer to the decision by the Hobart City Council to provide a dedicated Speakers Corner at both Salamanca Market and in the Elizabeth Mall as a space for people who want to make a public address in a peaceful and lawful manner. Speakers in Elizabeth Mall are permitted each Tuesday and Friday between the hours of 12pm and 4pm. The use of the Salamanca Market speakers' corner is only permitted on Market Days. Pamphlets and reading material can be displayed for distribution, but speakers are not permitted to approach the public and materials are not to be hand distributed. Persons wanting to use either of the Speakers Corner are required to apply for a permit and there are terms and conditions associated with the permit that the speaker is required to observe. Relevantly this includes:

A speaker must ensure that the subject material of their presentation does not breach any law and in particular does not amount to discrimination or prohibited conduct as defined under the *Anti-Discrimination Act 1998*.

A speaker must ensure that the manner in which they present their material and their behaviour or actions are not offensive in nature or capable of inciting hatred, serious contempt or severe ridicule under the *Anti-Discrimination Act 1998*.

Speakers Corner has been used by those wishing to evangelise. The nature of the content and the conditions of the permit have, however, also been subject to complaint both by parties who

feel their right to evangelise has been impinged and by those who believe that the way in which those evangelising breaks the conditions of the permit.<sup>1</sup>

In determining whether a person using either of the Speakers Corners has breached the terms and conditions of the requirement not to breach Anti-Discrimination law, the Council has made clear previously that this will be determined by whether there is a finding that conduct is discriminatory under State law.

I believe the approach taken by the Council is balanced. Religious preaching or evangelism is allowed, but the way manner in which the activities are undertaken give respect to the rights of all persons using the public space. It enables the Council to control behaviour in the interests of all those who use the space and to regulate the terms and conditions related to when and where a person may preach.

As these requirements apply equally to all persons wishing to access Speakers Corner, they are not discriminatory and there would appear to be little or no justification for excluding State by-laws from the exception or permit action for religious discrimination against those seeking to enforce those laws.

## Statements of Belief

Statement of belief is now defined in the revised Bill by reference to a 'belief that a person of the same religion...could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of that religion'. A statement need not be about religion, it could be about any subject that is covered by a religious teaching. In effect this provides a much more subjective test for determining whether a statement of belief is religious and has the potential to capture a wide range of statements and provide them with protection on the basis that they are a religious belief.

Whilst explanatory material justifies these changes as a way of minimising the need for courts to make a judgement about what is in the doctrines of a particular religion, it removes the capacity of the court to test the doctrinal foundations of a statement particularly in circumstances where those statements may impact on persons who are also entitled to protection from discrimination.

It also removes from considerations of 'reasonableness' whether the statement of belief is expressed in a way that minimises any harm to others also protected under discrimination law.

Whereas a statement of religious belief is given broad-ranging protection, a statement of belief for a person who does not hold a religious view relates only to a 'belief that a person who does not hold a religious belief could reasonably consider to relate to the fact of not holding a religious belief'. What this means in practice is that the person expressing the belief must not hold a religious belief. It does not provide protection for statements made by a person who has a different view on the content of the statement of a person with a religious belief.

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<sup>1</sup> See 'Elizabeth Mall retailers speak out about constant clashes over sermons' *The Mercury*, October 24 2017

Nor does the Bill provide a basis on which to judge whether the way in which religious views are expressed is least discriminatory or the extent to which any statement may diminish the human rights of others. This is contrary to the approach taken in the *International Covenant on Civil and Political Rights* (ICCPR) which provides that everyone has the right to freedom of thought, conscience and religion, but subjects that freedom to certain restrictions including the need to have regard to the rights or reputations of others (Article 19(3)); to desist from any advocacy of religious hatred that constitutes incitement to discrimination, hostility or violence; and to have regard to principles of the equal and effective protection of the law (Article 26).

In other words, where competing views and interests prevail caution should be exercised about the way in which views are expressed.

This is the view of Carr J in *Toben v Jones* [2003] FCAFC 137 (27 June 2003), for example, where His Honour states ‘...a reasonable person acting in good faith would have made every effort to express...his views with as much restraint as was consistent with the communication of those views’.<sup>2</sup>

The key to enabling a balance between freedom of religious speech and the protection of other Australians from discrimination is to require that statements of belief are made ‘reasonably and in good faith’. Failure to include this proviso in the draft Bill risks allowing any form of religious communication to be exempted from the operations of discrimination law.

As I outlined in our submission on the first draft of the Bill, this was the issue at the heart of the Delaney case. In dispute was not the right of the Archdiocese to hold or express a view on same sex marriage. The issue was the way in which that view was cast which implied that homosexuals ‘mess with kids’. It is my view that the nuances of this position are not adequately reflected in the draft Bill. As a consequence, the Bill takes a very blunt approach to freedom of religious activity and belief because it seeks to protect freedom to engage in a broad range of behaviours no matter how hurtful or capable of negatively impacting on others in the community those actions are.

I consider this deficiency has only been strengthened by amendments made in clause 8(5) of the second draft of the Bill.

Section 8(5) provides that statements of belief that are reasonable by virtue of clauses 8(3) and 8(4) must not be malicious or likely to harass, threaten, seriously intimidate or vilify another person or group of persons. It also provides that in expressing those beliefs, a person must not counsel, promote, encourage or urge conduct that would constitute a serious offence (as per clause 28(1)(b)).

This approach is also taken in clause 42(2) of the draft Bill.

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<sup>2</sup> *Toben v Jones* [2003] FCAFC 137 (27 June 2003) [44]

There are several issues I wish to raise about these clauses.

First is the narrowness of the provisions. Whereas under s17(1) of the Tasmanian *Anti-Discrimination Act 1998* (Tas), a person must not engage in any conduct which ‘offends, humiliates, intimidates, insults or ridicules another person’ on the basis of a range of attributes, a much higher harm threshold is established under the draft Bill.

Should the approach outlined in the draft Bill be adopted, statements of religious belief that are reasonably likely to offend, humiliate, intimidate, insult or ridicule another person will no longer be unlawful unless they meet the stricter standards set out in clauses 8(5). That is, to be unlawful the statements will need to be malicious or likely to harass, threaten, seriously intimidate or vilify another person or group of person or be of a nature that a reasonable person having regard to all the circumstances believe is counselling, promoting, encouraging or urging conduct that would constitute a serious offence.

Such an approach significantly diminishes available protections against expressions of public hostility involving discriminatory statements and undermines the right of all Australians to live in a community free of discrimination and offensive conduct.

Additionally, I am of the view that the approach taken in the draft Bill will raise considerable legal challenges.

Whereas the concept of offensive conduct (as defined under s17(1) of the Tasmanian *Anti-Discrimination Act 1998* (Tas) and section 18C of the *Race Discrimination Act 1975* (Cth)) have been well considered by the courts and the terms associated with the concept are now well defined in case law, new terms such as ‘malicious’ have not been defined in the draft Bill and are not well understood in the context of discrimination law.

Malicious, for example, in its ordinary meaning involves ‘having or showing a desire to cause harm to someone given to, marked by, or arising from malice or malicious intent’<sup>3</sup>. As such a complainant will need to establish to a legal standard not just that a harm occurred but that there was a clear intent on the respondent to inflict pain, injury or distress. Given the paucity of case law in this area it is expected that it will take some time to obtain a settled legal understanding of the term in the context of discrimination law.

Other terms in the draft Bill also raise issues of interpretation.

- Harass, for example, in discrimination law has the meaning of treating a person less favourably. It covers a wide range of behaviours that appear to be disturbing, upsetting or threatening. Behaviours that have the effect of nullifying or impairing a person from benefitting from their rights.
- Threaten in its ordinary usage has a variety of meanings. It may encompass an

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<sup>3</sup> Merriam-Webster cited online 8/01/2020



‘expression of intention to inflict evil, injury or damage’<sup>4</sup> or cause someone to be vulnerable or at risk. In discrimination law the term is most commonly used in relation to victimisation where a person may be threatened with some form of punishment or retaliation for making a complaint.

- In its ordinary meaning intimidate encompasses behaviour that is intended to ‘make timid or fearful’.<sup>5</sup> The addition of the word ‘seriously’ implies that some forms of intimidation may be acceptable, but the Bill does not provide any guidance about where this line should be drawn.

In addition the term ‘vilify’, has been defined in the second draft of the Bill to mean ‘incite hatred or violence’. This departs from the ordinary meaning of the term and increases the severity of statement of belief that are permissible.

The South Australian *Racial Vilification Act 1996 (SA)*, for example, defines racial vilification as a public act that ‘incites hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of their race’ by ‘threatening physical harm to the person, or members of the group, or to property of the person or members of the group or by inciting others to threaten physical harm to the person, or members of the group, or property of the person or members of the group.’<sup>6</sup> Similar approaches are taken by other States and Territories.<sup>7</sup>

The definition used in the second draft Bill has the effect of requiring an impact on a third person or group of persons. As such, things may well be said or done that are deeply offensive, but would not encourage hatred or violence toward a person or group by a third party. Statements of

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<sup>4</sup> Merriam-Webster cited online 8/01/2020

<sup>5</sup> Merriam-Webster cited online 8/01/2020

<sup>6</sup> *Racial Vilification Act 1996 (SA)* s 4

<sup>7</sup> In the ACT, sections 66 of the *Discrimination Act 1991 (ACT)* defines vilification and reads in part:

It is unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of people on the ground of their race.

The Queensland *Anti-Discrimination Act 1991 (Qld)* includes the following provisions:

124A Vilification on grounds of race, religion, sexuality or gender identity unlawful

- (1) A person must not, by a public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group of person on the ground of race, religion, sexuality or gender identity of the person or members of the group.

this nature would not be considered vilification as they would not reach the threshold established by the definition adopted in the draft Bill.

Uncertainty surrounding these core terms means that the effect of clause 8(5) will be to raise significant issues regarding interpretation and add considerable legal complexity and practical challenges for those charged with implementing discrimination law.

## Overriding Commonwealth, State and Territory Discrimination Law

The effect of clause 42 is to render discriminatory statements of belief that would otherwise be unlawful immune from complaint.

My concern about this approach was outlined in our earlier submissions.

- The provision rolls back protections currently afforded to Tasmanians with attributes protected under s17(1) *Anti-Discrimination Act 1998* and is based on premises about the way in which the Tasmanian law has been used that are incorrect;
- The provision privileges the rights to make religious statements of belief over other rights, including the right to be free from discrimination and related offensive conduct;
- The proposed approach curtails State sovereignty and risks severely limiting access to justice; and
- Is contrary to decisions made by the Tasmanian Parliament to maintain the protections against offensive, humiliating, intimidating, insulting or ridiculing conduct currently available in section 17(1) of the Tasmanian Act.

I re-affirm those views in relation to the second draft Bill.

I wish also to make a number of additional comments in the light of amendments made to the Bill.

### Section 42 is contrary to the proposed Objects Clause

Provisions protecting otherwise discriminatory statements of belief in circumstances where other statements are not similarly protected brings clause 42 into conflict with the Bill's revised Objects clause that states that all human rights have equal status at international law. It does so by favouring one set of rights over others.

This deficiency will not be remedied by the introduction of similar Objects clauses in other Commonwealth anti-discrimination laws as substantive provisions of those Acts would remain unchanged.

### The phrase 'in and of itself' will introduce added complexity

The inclusion of the words 'in and of itself' in clause 42(1) is likely to give rise to added complexity in the way in which complaints are handled.



As outlined in the Explanatory Notes, the inclusion of the phrase is intended to provide that a statement of belief, 'in and of itself', does not contravene certain provisions of Commonwealth, state or territory anti-discrimination law', and as a consequence the Bill 'will not operate to exempt discriminatory conduct, or a series of conduct, merely because it has been accompanied by a statement of belief.' In effect the draft provision as drafted will act to protect statements of belief, but not conduct or actions which may arise from those beliefs.

Whilst the decision to restrict section 42 solely to statements of belief rather than associated conduct makes a welcome distinction, the way in which the provisions will operate in practice remain unclear.

As a consequence of importing this distinction, for example, a complaint made by an individual under the *Anti-Discrimination Act 1998* (Tas) related to both an oral or written statement of belief and actions related to that belief could potentially contain an exempted component and a component that was potentially still live under State law.

Provision exist under section 59A of the *Anti-Discrimination Act 1998* (Tas) for a complaint to include 'part of a complaint and, if the complaint relates to more than one respondent, any part of the complaint that relates to a specific respondent'. By virtue of this provision the way is open for the Commissioner to accept or reject part or all of a complaint depending on the issues raised.

The decision to reject a complaint is, however, a reviewable decision with the person making the complaint having 28 days from the receipt of notification to make application to the Tribunal for the rejection to be reviewed (s65). However by virtue of the fact that the Tasmanian Anti-Discrimination Tribunal is not a court that can exercise federal jurisdiction, it could not determine a question of federal law.

Additionally, even if the complaint relates solely to a statement of belief, it is not clear that the provisions of the Bill as drafted are workable.

There are several reasons for this. First clause 42(2) provides that subclause 42(1) does not apply to statements of belief that are malicious or are likely to harass, threaten, seriously intimidate or vilify another person.

As clause 42(2) is an exception, the relevant standard of proof relates to whether the complainant is able to establish to a legal standard that this was the impact of the statement. If they do so, then subclause 42(1) becomes inoperable. That is, the Tasmanian Act will not be overridden and I will be able to consider and progress the complaint. If, however, the respondent does not accept my determination and is not willing to settle the complaint, there is no way that this point of dispute can be settled at law because of the lack of State jurisdiction.

## Relationship with State and Territory Laws

Clause 62(2) of the draft Bill provides that if a person has made a complaint, instituted a proceeding or taken any other action under a State or Territory law in respect of conduct engaged which may also give rise to complaint under federal law, the person is not entitled to make a complaint or institute proceedings under the federal jurisdiction.

Whilst this is a standard provision in discrimination law, the complexity associated with the way in which clause 42 is cast may mean that a person's ability to have a matter considered are severely curtailed.

Nothing in the Bill as currently draft prevents a person making a complaint with regard to discrimination on the basis of any of the protected attributes listed under the *Anti-Discrimination Act 1998* (Tas). The Bill establishes only that if the respondent to the complaint asserts that the conduct amounts to a statement of belief, the jurisdiction to consider the complaint is limited. However the test of whether a statement meets this threshold can only be ultimately tested as a matter of law.

Nevertheless provisions in the draft Bill and in other federal discrimination acts (such as those at s13(4) of the *Disability Discrimination Act 1992* (Cth)) that prevent a person from raising the same claim in the federal jurisdiction, mean that a complainant cannot raise the same matter at both State and Federal levels at the same time and that they cannot go from a State jurisdiction to federal jurisdiction on the same issue. The difficulty therefore of having a protection enshrined in State law and an exception covered in federal law, may lead to a situation where at the end of the day the complainant has limited recourse to have the matter considered at all.

Where a person contacts the State jurisdiction prior to submitting a formal complaint there may be opportunities for jurisdictions such as my own to refer them federally in the first instance, but this ignores the fact that many complainants do not seek such advice prior to lodging a complaint.

In addition, where a complaint has been lodged it will not always be apparent that a relevant defence under federal law will be relied upon by the respondent. For example, a women may lodge a complaint under the State Act on the basis of marital status because she believes she is being detrimentally treated in her employment. The claim may be accepted as it presents a *prima facie* case of discrimination. Once accepted, my Office will then contact the respondent for a response. It some cases it will not be known until we get this response that an exemption of the type contained in clause 42 is being claimed.

As such it may not be known whether the respondent relies on his or her religious beliefs as the basis for the action until after the complaint is underway. So if a respondent raises clause 42 as a defence during proceedings underway in a state jurisdiction, a complainant is likely to be left without any avenue to seek remedy.

Because this is an issue that has been raised in various contexts (eg, in relation to disability standards) our office has been vigilant in encouraging enquirers to seek legal advice prior to lodging a complaint if there is potential for federal law to apply. Nevertheless the way in which jurisdictional boundaries have been caste has the potential to create significant procedural issues and add to the complexity of dealing with any matter that may have a federal component.

Unfortunately, confusion surrounding the way in which the draft Bill is constructed will likely to lead to circumstances where awareness of rights are poorly understood and many may be wary about exercising their right to make a complaint in the mistaken belief that State discrimination law does not apply.

It may also mean that persons with strong religious beliefs may mistakenly believe that the Bill gives them rights to act in a certain way that are and will remain unlawful. Since the draft Bill has been released, for example, my Office has received an enquiry from a manager who had a staff member refusing to provide services to a family with lesbian parents because of his religious beliefs. The enquirer also told my office that the same staff member is also widely distributing religious materials in the workplace which is making other staff members uncomfortable.

As Commissioner, I and my organisation are strongly committed to ensuring that public environments are safe, inclusive and free from discriminatory influences. Shielding religious statements of belief from meeting this standard will not only give rise to fragmentation of discrimination law, it will potentially leave many individuals exposed to discriminatory and negative social influences. Complexities in the way in which clause 42 may be applied are such that it remains my strong view that these provisions should not be enacted.





# Equal Opportunity Tasmania

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## Religious Discrimination Bill 2019

Submission by the Anti-Discrimination Commissioner (Tas) on the exposure draft of the *Religious Discrimination Bill 2019* (Cth)

October 2019

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### **Equal Opportunity Tasmania**

(the office of the Anti-Discrimination Commissioner)

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Celebrating Difference  
Embracing Equality

## Introduction

Thank you for the opportunity to make a submission on the exposure draft of the *Religious Discrimination Bill 2019* (Cth).

I am content for a copy of this submission to be published on the Attorney-General Department's webpage.

Please note the Australian Council of Human Rights Authorities has also made a submission on the exposure drafts of the 'Religious Freedom Bills'. That submission is on behalf of, and endorsed by, Equal Opportunity Tasmania. This submission is made in conjunction with the Australian Council of Human Rights Authorities' submission.

As Anti-Discrimination Commissioner, I am responsible for administering the *Anti-Discrimination Act 1998* (Tas). The *Anti-Discrimination Act 1998* (Tas) prohibits both direct<sup>8</sup> and indirect<sup>9</sup> discrimination on the basis of religious belief or affiliation<sup>10</sup>, and on the basis of religious activity<sup>11,12</sup> as well as the incitement to hatred, serious contempt or severe ridicule of a person or group of people on the basis of religious belief or affiliation or religious activity.<sup>13</sup>

At the same time, and consistent with current Australian discrimination law, the *Anti-Discrimination Act 1998* (Tas) imposes obligations on all people, including those who hold religious belief or affiliation, not to discriminate or engage in prohibited conduct against persons who have attributes protected under discrimination law. I note, however, that if the draft *Religious Discrimination Bill 2019* were enacted in its current form, this current and consistent approach would no longer apply.

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<sup>8</sup> As defined in section 14 of the *Anti-Discrimination Act 1998* (Tas).

<sup>9</sup> As defined in section 15 of the *Anti-Discrimination Act 1998* (Tas).

<sup>10</sup> *Anti-Discrimination Act 1998* (Tas) s 16(o).

<sup>11</sup> *Anti-Discrimination Act 1998* (Tas) s 16(p).

<sup>12</sup> *Anti-Discrimination Act 1998* (Tas) s 16.

<sup>13</sup> *Anti-Discrimination Act 1998* (Tas) s 19(d).

## The proposed prohibition of discrimination on the basis of religious belief or activity

I am supportive of discrimination on the basis of religious belief or activity being prohibited by Commonwealth law. This would strengthen anti-discrimination protections for Australians and would better meet Australia's obligations under the *International Covenant on Civil and Political Rights*.

Clause 7 of the draft *Religious Discrimination Bill 2019* prohibits direct discrimination on the basis of religious belief or activity and I am supportive of this.

Clause 8 of the draft *Religious Discrimination Bill 2019* prohibits indirect discrimination on the basis of religious belief or activity. In my view, indirect discrimination on the basis of religious belief or activity should be prohibited by Commonwealth law. The indirect discrimination provisions in the draft *Religious Discrimination Bill 2019* have been drafted differently to indirect discrimination provisions in other Australian anti-discrimination laws, however.

For example, in Tasmania indirect discrimination is defined as follows:

### **15. Indirect discrimination**

- (1) Indirect discrimination takes place if a person imposes a condition, requirement or practice which is *unreasonable in the circumstances* and has the effect of disadvantaging a member of a group of people who –
- (a) share, or are believed to share, a prescribed attribute; or
  - (b) share, or are believed to share, any of the characteristics imputed to that attribute – more than a person who is not a member of that group.<sup>14</sup> (*emphasis added*)

In my experience in dealing with complaints of indirect discrimination, to further the purposes and objectives of anti-discrimination legislation, a broad approach ought to be adopted and all the circumstances be considered in determining whether or not a condition, requirement or practice is unreasonable, and hence, unlawful.

The draft *Religious Discrimination Bill 2019* narrows the reasonableness test. The effect of this would be to make it easier for complainants to establish conditions, requirement and practices are unlawful. This is because (unlike other Australian discrimination legislation) certain conduct will be deemed to be unreasonable, regardless of the relevant circumstances.

I am not supportive of those sub paragraphs of clause 8 under the headings:

- '*Conditions that are not reasonable relating to statements of belief*'; and
- '*Conditions that are not reasonable relating to conscientious objections by health*

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<sup>14</sup> *Anti-Discrimination Act 1998* (Tas) s 15.

*practitioners’.*

**Clause 8(3)-(4): Conditions that are not reasonable relating to statements of belief**

Clause 8(3) of the draft *Religious Discrimination Bill 2019* provides that if a ‘relevant employer’ (an employer with revenue of at least \$50 million, and not a public body) imposes an ‘employer conduct rule’ that has the effect of restricting or preventing an employee from making a ‘statement of belief’ outside of work, this will be unreasonable conduct (unless it is necessary to avoid unjustifiable financial hardship).

The effect of clause 8(3) is to make it easier for an employee to establish religious discrimination by a ‘relevant employer’. It would be easier for the employee to establish discrimination, as the employer’s conduct will be deemed to be unreasonable without having to take into account all of the relevant circumstances.

Not taking into account all of the relevant circumstances, may lead to results that a reasonable person may find absurd. For example, a reasonable person may expect an organisation that is established to provide support to women, would have rules in place ensuring its employees do not engage in misogynistic conduct. Yet if the draft *Religious Discrimination Bill 2019* was enacted, the law could stipulate such rules are unreasonable. This could lead to legal outcomes that do not meet community expectations.

Further, as a result of the definition of ‘statement of belief’ in clause 5 of the draft *Religious Discrimination Bill 2019*, clause 8(3) also treats people who are religious, and people who are not religious, unequally. For a person who is not religious, for them to be protected they must have made a statement about religion. For a person who is religious, the statement can be about anything, so long as it is their religious belief. This has the effect of privileging religious speech over other speech.

I am also concerned clause 8 of the draft *Religious Discrimination Bill 2019* will impose different obligations on organisations, depending on how much money they make. There is also potential for the Bill to impose different obligations on an organisation if the organisation’s revenue fluctuates from year to year.

**Clause 8(5)-(6): Conditions that are not reasonable relating to conscientious objections by health practitioners**

Clause 8(5) of the draft *Religious Discrimination Bill 2019* provides that where State or Territory law provides for conscientious objection, a rule that restricts or prevents a health practitioner from conscientiously objecting is deemed not to be reasonable and the rule will amount to indirect religious discrimination.

Clause 8(6) of the draft *Religious Discrimination Bill 2019* provides that where State or Territory law does not make provision for conscientious objection, a rule that restricts or prevents conscientious objection will be deemed to be not reasonable, unless the rule is necessary to avoid an ‘unjustifiable adverse impact’ on:



- the provision of the relevant health service; or
- the health of a person who is seeking that health service.

The effect of clause 8(6) is to potentially make unlawful a health service provider's rules relating to health practitioners undertaking procedures, providing information, prescriptions, or referrals.

This would result in patients losing the ability to access medical procedures, or obtain information, prescriptions and referrals. In my view, it would be against the public interest to prioritise a person's religious belief over another person's right to access health care.

## Clause 10: Religious bodies may act in accordance with their faith

Clause 10 of the draft *Religious Discrimination Bill 2019* exempts a 'religious body' for conduct carried out in good faith that reasonably conforms to its doctrines, tenets, beliefs or teachings.

Clause 10 would cover a broad range of conduct. Clause 10(1) states the clause applies to conduct that 'may reasonably be regarded as being in accordance with' religious beliefs etc. This broad approach would capture a wide range of conduct, so long as it had some connection with religious belief.

Further, the definition of 'religious body' set out in Clause 10(2) is extremely broad. The broad definition of 'religious body' could have the consequence of permitting discrimination in a wide range of areas, including schools, charities, hospitals and aged care homes.

## Treating human rights equally

Currently, Australian anti-discrimination law operates so Commonwealth and State anti-discrimination legislation works concurrently together, and neither overrides the other.

For example, section 13 of the *Disability Discrimination Act 1992* (Cth) states: 'This Act is not intended to exclude or limit the operation of a law of a State or Territory that is capable of

operating concurrently with this Act.<sup>15</sup> There are similar provisions in the *Sex Discrimination Act 1984* (Cth)<sup>16</sup>, *Age Discrimination Act 2004* (Cth)<sup>17</sup>, and *Racial Discrimination Act 1975* (Cth).<sup>18</sup>

The equivalent provision in the draft *Religious Discrimination Bill 2019* has the note: ‘Nothing in this subsection detracts from the operation of Part 4’. Part 4 of the draft *Religious Discrimination Bill 2019* is the part relating to ‘statements of belief’. This would have the effect that a statement of belief retains priority over all other discrimination laws.

This is contrary to established discrimination law principles, and contrary to the principle of human rights being equal. I note that Recommendation 3 of the *Religious Freedom Review* (Report of the Expert Panel, dated 18 May 2018) recommended that anti-discrimination legislation ‘reflect the equal status in international law of all human rights, including freedom of religion.’ The draft *Religious Discrimination Bill 2019* goes against this recommendation and gives statements of belief unequal and priority status.

## Overriding State law

Clause 41 of the draft *Religious Discrimination Bill 2019* provides that a ‘statement of belief’:

- does not constitute discrimination for the purpose of any Australian anti-discrimination law;
- does not contravene s 17(1) of the *Anti-Discrimination Act 1998* (Tas); and
- does not contravene a provision of a law ‘prescribed by the regulations’.

The draft *Religious Discrimination Bill 2019* is not particularly clear in defining what is meant by a ‘statement of belief’. Clause 5 of the Bill provides a ‘statement of belief’ is a statement of a ‘religious belief’. ‘Religious belief’ is defined to mean ‘holding a religious belief’. This is not helpful drafting.

I strongly oppose the draft *Religious Discrimination Bill 2019* overriding State discrimination law as, for the reasons given below, it curtails State sovereignty, diminishes existing human rights protections, and will severely limit access to justice.

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<sup>15</sup> *Disability Discrimination Act 1992* (Cth) s 13(3).

<sup>16</sup> *Sex Discrimination Act 1984* (Cth) s 10.

<sup>17</sup> *Age Discrimination Act 2004* s 12.

<sup>18</sup> *Racial Discrimination Act 1975* (Cth) s 6A.

I note the Commonwealth Attorney-General's public assurances that the draft *Religious Discrimination Bill 2019* 'is not intended to displace state law'.<sup>19</sup> Yet, contrary to established discrimination law principles in Australia, the draft *Religious Discrimination Bill 2019* explicitly displaces and overrides State law.

The *Anti-Discrimination Act 1998* (Tas) is legislation passed by the Tasmanian Parliament to protect Tasmanians. In 2017, the Tasmanian Government attempted to exempt religious speech from the operation of section 17(1) of the *Anti-Discrimination Act 1998* (Tas). Community groups in Tasmania, in particular groups representing people with disability, gave information to the Tasmanian Parliament about how vulnerable Tasmanians would be negatively impacted by the State allowing offensive, humiliating, intimidating, insulting and intimidating conduct to be directed toward them under the guise of religion. The Tasmanian Parliament maintained the protections in the *Anti-Discrimination Act 1998* (Tas). It would be wrong for the Commonwealth to override the decision of the Tasmanian Parliament that Tasmanians should be protected from discrimination and offensive, humiliating, intimidating, insulting and intimidating conduct.

The Explanatory Notes for the Exposure Draft of the *Religious Discrimination Bill 2019* state at paragraph 422 that section 17(1) of the *Anti-Discrimination Act 1998* (Tas) should be overridden due to 'its broad scope and demonstrated ability to affect freedom of religious expression'. This statement is not correct.

Section 17(1) of the *Anti-Discrimination Act 1998* (Tas) contains a 'reasonable person' test: conduct is only unlawful if a reasonable person, having regard to all the circumstances, would have anticipated that the affected person would be offended, humiliated, intimidated, insulted or ridiculed. Further, section 55 of the *Anti-Discrimination Act 1998* (Tas) provides a defence to section 17(1):

**55. Public purpose**

The provisions of section 17(1) and section 19 do not apply if the person's conduct is –

- (a) a fair report of a public act; or
- (b) a communication or dissemination of a matter that is subject to a defence of absolute privilege in proceedings for defamation; or
- (c) a public act done in good faith for –
  - (i) academic, artistic, scientific or research purposes; or
  - (ii) any purpose in the public interest.

The Supreme Court of Tasmania has considered section 17(1) of the *Anti-Discrimination Act 1998* (Tas), noted its benefits and held it does not infringe benefits of freedom of communication. In *Durston v Anti-Discrimination Tribunal (No 2)* [2018] TASSC 48, Brett J said:

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<sup>19</sup> 'Christian Porter says religious freedom bill won't erode state LGBT protections', *Guardian Australia*, <<https://www.theguardian.com/australia-news/2019/jul/12/christian-porter-says-religious-freedom-bill-wont-erode-state-lgbt-protections>>

In my view, the primary purpose of the Anti-Discrimination Act is to prevent conduct which discriminates against or otherwise adversely impacts upon a person, because that person possesses or shares a defined attribute with others. Such legislation seeks to prevent and redress conduct which is seen as unjust, divisive and anathema to modern society. Accordingly, the Act has the higher purposes of the individual protection of all members of society and the overall maintenance and enhancement of social cohesion. The consequential benefits of the achievement of these purposes is the enhanced capacity of all members of the community to express views and participate in the political and social life of the community. As already discussed, I am of the view that these purposes are compatible with the maintenance of the system of representative government prescribed by the Constitution.<sup>20</sup>

...

Further, I accept the necessity of s 17, because it directly targets conduct which is contrary to the purpose sought to be achieved by the statute.<sup>21</sup>

...

I do not think that it is either necessary or desirable for me to be any more prescriptive about the meaning or application of s 55. It is sufficient to observe that the application of the section in any particular case will depend upon the circumstances of that case. Ultimately, the concepts of "good faith" and "for a purpose in the public interest" will be matters for judgment by the court or tribunal in question. A broad interpretation is appropriate, and many cases will turn on factual questions. For example, a verbal attack on a person or group of persons on the basis of a prescribed attribute which is ostensibly in the public interest, but in reality has as its dominant purpose the causation of insult and offence to persons sharing that attribute, will be unlikely to satisfy either requirement. On the other hand, legitimate debate about the same subject-matter, conducted with a conscientious attempt to avoid the effects to which s 17 refers, and conducted solely for the purpose of putting a view, at least perceived by the maker to be for the benefit of the public, will be likely to fall within the exception. The question for me in this case is whether this provision creates sufficient space for legitimate public debate and comment so as to satisfy the test of adequacy in balance. Having regard to the broad construction discussed above, and in particular the wide and flexible ambit of s 55, I am satisfied that the answer to that question must be in the affirmative.<sup>22</sup>

The practical effect of clause 41 (read in conjunction with the note to clause 60) of the draft *Religious Discrimination Bill 2019* will be that when a respondent to a complaint under the *Anti-*

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<sup>20</sup> *Durston v Anti-Discrimination Tribunal (No 2)* [2018] TASSC 48 at [53].

<sup>21</sup> *Ibid* at [66].

<sup>22</sup> *Ibid* at [75] – [76].

*Discrimination Act 1998* (Tas) alleges they made a 'statement of belief' the complaint would fail. This would significantly impact access to justice.

The *Anti-Discrimination Act 1998* (Tas) is State legislation and where complaints cannot be otherwise resolved, they are referred to a State tribunal, the Anti-Discrimination Tribunal, for determination.

If the draft *Religious Discrimination Bill 2019* were to be enacted, it would become Commonwealth legislation. Clause 41 of the draft *Religious Discrimination Bill 2019* would provide a defence to complaints made under the *Anti-Discrimination Act 1998* (Tas) (i.e. where the person has made a 'statement of belief').

The Tasmanian Anti-Discrimination Tribunal cannot deal with complaints involving a Federal question (such as the defence available in clause 41), as it does not have jurisdiction to do so, even if the raising of the defence is 'fanciful'.<sup>23</sup> Similarly, as Anti-Discrimination Commissioner, I cannot refer a complaint involving a Federal question to the Anti-Discrimination Tribunal, as to do so would be an error of law (this is because the Tribunal would lack jurisdiction to deal with the complaint).<sup>24</sup>

In *Fenton v Mulligan* (1971) 124 CLR 367 Barwick CJ said at 373:

... if federal jurisdiction is attracted at an stage of the proceedings, there is no room for the exercise of a State jurisdiction which apart from any operation of the *Judiciary Act* the State court would have had ... there is no State jurisdiction capable of concurrent exercise with federal jurisdiction invested in the State court.

This means that when a respondent to a complaint under the *Anti-Discrimination Act 1998* (Tas) said that they were making a 'statement of belief' when engaged in the discriminatory or prohibited conduct, the complaint would fail for want of jurisdiction.

I note clause 41(2) attempts to put some limitations on a 'statement of belief', and says clause 41 will not apply to statements that are, for example, malicious or likely to incite hatred. However, due to the federal diversity issue, neither I nor the Anti-Discrimination Tribunal would be able to consider this. This means that where a person made a statement of belief that incited hatred, and someone made a complaint about this under the *Anti-Discrimination Act 1998* (Tas), the complaint would still fail. When the respondent said they were making a 'statement of belief', they would be raising a federal question that neither I nor the Anti-Discrimination Tribunal could determine.

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<sup>23</sup> *Qantas Airways Limited v Lustig* [2015] FCA 253 at 91.

<sup>24</sup> There is a limited exception to this; being if the defence is 'colourable' in that the federal question has been raised for the improper purpose of fabricating jurisdiction: *Qantas Airways Limited v Lustig* [2015] FCA 253 at 88; *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd* (2000) 104 FCR 564 at 88.

I note Simeon Beckett, a barrister with experience in discrimination law, has publicly said this issue makes the draft *Religious Discrimination Bill 2019* 'so procedurally flawed it is bound to fail' and 'it is the procedural mess the defence [in clause 41] would deliver for everyone that will fatally undermine the government's aim.'<sup>25</sup> I agree with this analysis.

To give some examples:

- **Equal Opportunity Tasmania received a complaint from a man who was sacked because he was living with his partner, but not married to her**

Equal Opportunity Tasmania received a complaint from a worker living with his de facto partner. The employer discovered the man was living with his partner but not married to her. The employer told the man that it was their religious belief that this was sinful behaviour. The worker told his employer that it was his private life and had nothing to do with his work.

The worker was able to make a complaint under the *Anti-Discrimination Act 1998* (Tas), which was successfully resolved through conciliation.

If the draft *Religious Discrimination Bill 2019* was law, the complaint would not have been able to be dealt with under the *Anti-Discrimination Act 1998* (Tas).

- **Child with disability bullied at school**

The *Anti-Discrimination Act 1998* (Tas) also applies to education. If a child is bullied in school as a result of having a disability, they are currently protected by the Act and could lodge a complaint.

If the draft *Religious Discrimination Bill 2019* was law, the complaint would not be able to be dealt with under the *Anti-Discrimination Act 1998* (Tas) if the bullies said they were stating their religious beliefs.

- **Misogynistic behaviour**

The *Anti-Discrimination Act 1998* (Tas) also works to ensure women and men are treated equally. If a woman is humiliated, intimidated or harassed on the basis of her gender, she is able to make a complaint.

If a person has a religious belief that women are not equal to men, and stated that belief to women he worked with and humiliated, intimidated or harassed them, the affected women would currently be able to make a complaint under the *Anti-Discrimination Act 1998* (Tas).

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<sup>25</sup> Simeon Beckett, 'Key protection in religious discrimination bill is fatally flawed', *Sydney Morning Herald* (18 September 2019) <<https://www.smh.com.au/national/key-protection-in-religious-discrimination-bill-is-fatally-flawed-20190917-p52s3n.html>>

If the draft *Religious Discrimination Bill 2019* was law, that type of complaint would not be able to be dealt with under the *Anti-Discrimination Act 1998* (Tas).

Preventing complaints being dealt with under the *Anti-Discrimination Act 1998* (Tas) where a respondent alleges they were making a 'statement of belief' would restrict access to justice for people. From my experience as Anti-Discrimination Commissioner, I am aware people choose to lodge complaints under State anti-discrimination legislation, rather than Commonwealth legislation, as the process can be quicker, is more informal, and there is a presumption against costs. These are significant factors in providing access to justice. In my view it would be against the public interest to deny this avenue of complaint to people in situations where a person alleges (even fancifully) they were making a 'statement of belief'.





## Australian Council of Human Rights Authorities

### Submission to the Australian Government regarding the Religious Freedom Bills

Dear Attorney-General,

The Australian Council of Human Rights Authorities (“ACHRA”) welcomes the opportunity to make a submission in response to the Australian Government’s package of legislative reforms on religious freedom released on 29 August 2019, including the exposure drafts of the Religious Discrimination Bill 2019, Religious Discrimination (Consequential Amendments) Bill 2019, and the Human Rights Legislation Amendment (Freedom of Religion) Bill 2019.

ACHRA is comprised of the State, Territory and Federal Human Rights and Discrimination Authorities and this submission is made on behalf of the following ACHRA members;

- Anti-Discrimination Board of New South Wales
- Australian Capital Territory Human Rights Commission
- Equal Opportunity Tasmania
- Northern Territory Antidiscrimination Commission
- Queensland Human Rights Commission
- South Australian Equal Opportunity Commission
- Victorian Equal Opportunity and Human Rights Commission
- Western Australian Equal Opportunity Commission

Individual authorities will consider making their own submission. Where they do, this submission should be read in conjunction with those to ensure jurisdiction-specific issues are fully understood.

Each authority has an important role in administering anti-discrimination and human rights law. Additionally, authorities promote equal opportunity and human rights across all levels of government, including the Australian Government.

ACHRA exists to promote the work of each of the authorities, share resources and information, as well as formulate coordinated responses to issues that impact across respective jurisdictions.

In general, ACHRA’s position on the reform measures can be characterised as follows;

- To the extent that the Draft Exposure Bills conform with orthodox and current anti-discrimination legislative frameworks, ACHRA is supportive of the introduction of religious belief as a protected ground in Commonwealth legislation
  - To the extent that the Draft Exposure Bills depart from orthodox anti-discrimination legislation, and in particular where the Bills override existing state protections and law, ACHRA does not support these measures
  - ACHRA supports the staged implementation plan inclusive of additional consultation via the Australian Law Reform Commission, as proposed by Dr Sarah Moulds from the University of South Australia, School of Law.
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Further information on ACHRA's positions are provided, in brief, in the following pages and we look forward to seeing a revised Bill before Parliament over the coming months.

(signed)

Dr Niki Vincent, Chair,  
Australian Council of Human Rights Authorities  
30 September 2019

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## **ACHRA SUBMISSION (Cont'd)**

### **Introduction**

ACHRA is a network of the authorities established in each State, Territory and Commonwealth jurisdiction to administer anti-discrimination and, where relevant, human rights legislation.

As a network of the authorities working at the coal face of human rights and anti-discrimination, the expertise and experience represented is significant.

### **Discrimination Law Principles**

ACHRA welcomes the move by the Australian Government to introduce protections for all Australians on the basis of religious belief or the absence of religious belief.

Australia is a richly diverse society, including many faith traditions. To date, protections available for those who hold to a particular faith or spirituality tradition have been inconsistent, often depending on which jurisdiction the person lives, whether their faith was visible through religious dress or appearance, or whether they constituted a particular 'ethnic group'.

ACHRA supports the objects of the proposed Bill which recognises Australia's international human rights law obligations. The principle that all are free and equal in dignity necessarily gives rise to the need for religious freedom. However, the protected ground of religious belief is only one of many freedoms and rights available to all who are 'free and equal in dignity'.

ACHRA is of the view that Commonwealth law should represent the strongest standards in discrimination and human rights law. Commonwealth law should also be a safety net to ensure that all Australians enjoy a set of minimum protections, irrespective of jurisdiction.

In the formulation of our view on the Draft Exposure Bills, the following principles are paramount:

- the need for consistent Commonwealth legislated protections for all Australians, irrespective of their jurisdiction
- the need to respect state sovereignty through the provision of model Commonwealth legislation, enabling the States and Territories to apply and/or develop concurrent legislation, where desirable to do so
- that all people are treated equally before the law and have equal access to the law.

To the extent that these reforms create consistent protections for all Australians on the basis of religious belief, and remedies for where and when discrimination occurs, ACHRA welcomes them.

Protecting religious freedom is a matter of balance and proportionality. Religious freedom, and the protection of it, does not require that other rights be displaced. In fact, the very nature of much of the work of ACHRA members is to balance these rights and interests through education, conciliation and through tribunal and other court mechanisms.

It would be antithetical to the work of ACHRA members to have to insist that any one human right is protected above another. ACHRA is of the view that in its current form, the draft legislation

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which establishes religious belief as a protected attribute will displace other rights and/or well established policy positions.

In general, ACHRA members are concerned that:

- the introduction of the proposed reforms, in their current format, are inconsistent with other Commonwealth discrimination legislation, and further complicate the protections available, increasing the difficulty people will have in understanding which attribute is protected in which circumstances
- provisions which directly or indirectly seek to displace existing federal, State and Territory laws, after years of local education and guidance by ACHRA members, will mean significant disruption and unintended consequences for businesses and service users whom have sought to be compliant with local codes of practice and best practice models
- the proposed reforms privilege religious belief above other hard-won protections.

### **Health Practitioner Conduct Rule**

The sections relating to health practitioner conduct are of significant concern for ACHRA members.

The current draft legislation makes an extraordinary incursion into the legislative and policy objectives of both the Commonwealth health department and the State/Territories. The draft legislation privileges the religious belief of a health practitioner above any other right or policy objective, such as equitable access to health care in regional areas.

Not only do the current Bills privilege a health practitioner's religious belief above patient rights, it provides no protections for those patients who can foreseeably be impacted by this Bill. Such protections should include a requirement for objecting practitioners to provide a respectful and timely notification to the patient of their conscientious objection, information on their options, an offer of a timely and effective referral to an appropriate alternative health practitioner, and notification of their conscientious objections to the health service provider.

ACHRA members are concerned that:

- there is no guidance in which services conscientious objection might be appropriate, therefore any health practitioners captured within the current definition, may conscientiously object to any service where they claim that objection is linked to a religious tenant
  - the test of 'unjustifiable adverse impact' is too high a threshold to appropriately balance the rights of patients, particularly LGBTIQ+ patients and/or regional and remote patients
  - the reforms undermine state policy objectives where many have established mechanisms for dealing with conscientious objection in policy health directives or in non-legislative instruments, which could be overridden by the Bill
  - the reform potentially conflicts with health practitioner professional codes of conduct.
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## **Section 41 and a Statement of belief**

Section 41 of the Exposure Draft Bill provides that a 'statement of belief' (not being malicious etc.,) that 'may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion' do not constitute discrimination.

What exactly a statement of belief is in this context is not clear, but may, for example, include a verbal comment from an employer to a prospective employee.

In addition to the lack of clarity on what a statement of belief is, the section explicitly rolls back protections afforded to Tasmanians. Not only is this another incursion into a state jurisdiction, it goes against the principles of best practice with regard to discrimination legislation, in particular that Commonwealth law should be 'model' so as to allow concurrent protections in all jurisdictions.

Additionally, the wording 'may reasonably be regarded' is essentially a broader protection than available to religious bodies under other religious exemption legislation, such as s 37 of the *Sex Discrimination Act 1984* (Cth) or s 82 of the *Equal Opportunity Act 2010* (Vic). There is no rationale provided for this departure from standard religious exemption tests, the scope of which has been established through case law.

Section 41 also raises the real possibility that state tribunals will not have the jurisdiction to decide matters where section 41 is used as a defence as tribunals cannot decide a federal question of law.

ACHRA members are concerned that:

- section 41 privileges the freedom of religious expression over the right to be free from discrimination by allowing for potentially harmful speech towards vulnerable communities
- the test of vilification, harassment, maliciousness etc., is very high and unlikely to provide any practical protection for those that may be the subject matter of such statements
- the test of 'reasonably regarded' is a lower threshold than in other religious exemption tests, with no clear associated policy objective
- section 41 is at odds with the policy objective of access to justice by virtue that any matter which rests on section 41 as a defence gives rise to complex legal questions with regard to the involvement of State tribunals

## **Employer restrictions on statements of belief**

Where an employer wishes to restrict an employee's statement of beliefs outside of work time, for example through a social media policy designed to conform employee behaviour with the values of the workplace, the proposed reforms will require a 'relevant employer', who earns over \$50 million per annum, to prove that without such a restriction, they would be subject to 'unjustifiable financial hardship'.

What is clear from the current version of the reforms is that unless discriminatory statements have an economic impact, the current government does not consider those statements discriminatory

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and/or does not consider that any member of the public ought to be afforded protection from discriminatory statements.

Additionally, it is not clear how a business would prove unjustifiable financial hardship in the abstract. It is quite likely that a business would only be able to prove realised instances of financial loss.

This is at odds with the stated objectives of the Bill in clause 3.

ACHRA members are concerned that:

- financial loss is not the only relevant circumstance that should be considered when deciding if statements are discriminatory
- proving unjustifiable financial loss is likely to be very hard prior to the financial loss being realised

### **Including religious bodies within the definition of a ‘person’**

The Bill takes the unprecedented step of including religious bodies within the definition of a ‘person’, meaning religious bodies enjoy human rights ordinarily provided only to natural persons<sup>(1)</sup>. A consequence of this is that religious bodies can make claims that they have been discriminated against – as persons – by other individuals or organisations <sup>(2)</sup>. For example, a religious charity and advocacy organisation may make a claim against a young trans woman for starting a petition calling for the organisation to lose its charity status due to transphobic comments.

This can be addressed by amending clause 5 so that ‘person’ refers only to natural persons.

### **Further consultation on the unorthodox measures and tests**

ACHRA members agree with the assessment of Dr Sarah Moulds that some of the novel features of the proposed Bills give rise to significant legal complexity.

Dr Moulds proposes a two-stage implementation and consultation process, where the more unconventional elements of the Bills are referred to the Australian Law Reform Commission (“ALRC”) for further investigation and consultation <sup>(3)</sup>.

ACHRA supports this proposal for the following reasons (inter alia):

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<sup>1</sup> In clause 5 the definition of a person is given the effect of section 2C of the Acts Interpretation Act 1901 (Cth). A note in clause 5 confirms that this intends to include a religious body or religious institution. This interacts with, for example, clauses 7 and 8 of the Bill, which protect a ‘person’ from direct and indirect discrimination (respectively).

<sup>2</sup> This is unprecedented in Australian discrimination law: Section 5 of the Equal Opportunity Act 2010 (Vic) defines a person as “an unincorporated association and, in relation to a natural person, means a person of any age”, which is mirrored in section 3 of the Racial and Religious Tolerance Act 2001 (Vic). A person means a “human being” under the Charter of Human Rights and Responsibilities Act 2006 (Vic). The meaning of “person” in section 2C of the Acts Interpretation Act 1901 (Cth) is not imported into Age Discrimination Act 2004 (Cth), Sex Discrimination Act 1984 (Cth), Disability Discrimination Act 1992 (Cth), and the Racial Discrimination Act 1975.

<sup>3</sup> Dr Sarah Moulds, Lecturer, School of Law, University of South Australia, Submission to The Hon Christian Porter, 26 September 2019. For a full list of Dr Moulds’ publications, see: <http://orcid.org/0000-0003-3246-0987>

- to minimise the unintended consequences likely to arise through the hasty introduction of complex law reform measures
- to ensure the final legislation reflects the best policy outcomes for those most affected by the changes, including individuals, businesses, and ACHRA members
- to allow adequate consideration of these more complex elements of the proposed Bill given the very short public consultation period.

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