



Equal Opportunity



Tasmania

Anti-Discrimination Amendment Bill 2016 released for consultation on 29 August 2016

Response of the Anti-Discrimination Commissioner (Tas)

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Introduction and overview

This submission responds to the invitation to comment on the draft Anti-Discrimination Amendment Bill 2016 received by my office on 29 August 2016.

The draft Bill is not a straightforward amendment to discrimination law. In this submission, I deal in detail with the following concerns about the draft Bill:

1. That the proposed amendments may not have the proposed effect on the way in which complaints alleging breaches of sections 17(1) and 19 are dealt with, because:
 - a. the tests in proposed sections 64(1A)(a) and (1B) are no different from the current tests applied;
 - b. the proposed extension of the defence in section 55 will require judicial or quasi-judicial consideration to determine its application and the Commissioner is not empowered to make such determinations.
2. That the proposed amendments add to the potential legal complexity of dealing with complaints and increase the possibility of shifting the focus of the complaint-handling processes of the Act from early, low cost, non-litigious approaches, to complex and overly legalistic approaches at an early stage.
3. That the proposed amendments will affect the way in which people understand their rights and responsibilities, even if this is based on a misconception of the law. This is because of the effect of government providing special protection to a particular type of conduct—conduct for religious purposes—that causes harm to people on the basis of their race, age, disability, sexual orientation, gender, marital status, pregnancy, breastfeeding, gender identity, lawful sexual activity, relationship status, family responsibilities, intersex, parental status, religious belief or affiliation, or religious activity.

The Bill appears to be entirely inconsistent with the Government's stated recognition of 'the benefits of a rich and culturally diverse Tasmanian community' and wanting 'to do everything [it] can to discourage racially motivated attacks by ensuring there is a specific consequent'. The announced proposed changes to sentencing for racially motivated attacks seems to recognised that racially motivated crimes are a serious public ill, yet the proposed changes to the *Anti-Discrimination Act 1998* (Tas) will undermine the important work of prevention of such attacks by moderating the very speech and actions that can incite people to such attacks.

I urge the Government to reconsider the Bill in its entirety and, in the event the Government decides to proceed with amended changes, that it consult widely allowing sufficient time for those most affected to fully understand and consider the impacts of the proposed changes.

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ANTI-DISCRIMINATION COMMISSIONER (TAS)

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The amendments in summary

The proposed amendments are to be made to the *Anti-Discrimination Act 1998* (Tas) (the Act). They will change:

- the existing exception to section 17(1) and section 19: section 55;
- the powers of the Anti-Discrimination Commissioner to reject a complaint: section 64;
- the powers of the Anti-Discrimination Commissioner to dismiss a complaint: section 71;
- the powers of the Anti-Discrimination Tribunal to dismiss a complaint: section 99.

Amending the exception in section 55

This is an exception to conduct alleged to breach section 17(1) and section 19. It is available as a defence to a person found to have breached these sections. It only needs to be argued if a breach of section 17(1) or 19 is established.

The proposed amendment in relation to section 55 is to amend the existing exception to provide a defence where:

- a) conduct, which a reasonable person would have anticipated would cause humiliation, ridicule, intimidation, insult or offence on the basis of race, age, disability, sexual orientation, gender, marital status, pregnancy, breastfeeding, gender identity, lawful sexual activity, relationship status, family responsibilities, intersex, or parental status (prohibited under section 17(1)), has been done publicly and **reasonably** and in good faith for academic, artistic, scientific, **religious** or research purposes¹;

and

- b) conduct, that is capable of inciting others to hatred, serious contempt or severe ridicule on the basis of race, disability, sexual orientation, lawful sexual activity, religious belief, religious affiliation or religious activity (prohibited under section 19), has been done publicly and **reasonably** and in good faith for academic, artistic, scientific, **religious** or research purposes².

It therefore seeks to reduce the protection against such conduct on the basis of:

- race: protected under section 17(1) and 19;
- disability: protected under section 17(1) and 19;
- sexual orientation: protected under section 17(1) and 19;
- lawful sexual activity: protected under section 17(1) and 19;
- religious belief or affiliation: protected under section 19;
- religious activity: protected under section 19;

¹ Anti-Discrimination Amendment Bill 2016 (Tas) cl 4.

² Anti-Discrimination Amendment Bill 2016 (Tas) cl 4.

- age: protected under section 17(1);
- gender: protected under section 17(1);
- marital status: protected under section 17(1);
- pregnancy: protected under section 17(1);
- breastfeeding: protected under section 17(1);
- gender identity: protected under section 17(1);
- relationship status: protected under section 17(1);
- family responsibilities: protected under section 17(1);
- parental status: protected under section 17(1);
- intersex: protected under section 17(1).

Amending the Commissioner’s powers in section 64 to reject a complaint

Section 64 provides that the Commissioner may reject a complaint (or part of a complaint) in specified circumstances. The decision to reject or part reject a complaint can be reviewed by the Anti-Discrimination Tribunal.³

The proposed amendments in relation to section 64 are to add two new subsections to mandate that the Commissioner **must** reject a complaint (or part of a complaint) if:

- a) a reasonable person, having regard to all the circumstances, would not have anticipated that the person by or in respect of whom the complaint is made would be offended, humiliated, intimidated, insulted or ridiculed by the conduct⁴;

and

- b) a reasonable person, having regard to all the circumstances, would not regard the public act as constituting incitement of, or as the case may be, hatred towards, serious contempt for, or severe ridicule of the person or persons by or in respect of whom that complaint is made on whichever of the grounds referred to in section 19(a), (b), (c) and (d) is relevant to the complaint⁵;

and

- c) satisfied that, by virtue of section 55, section 17(1) does not apply to the conduct⁶;

and

³ *Anti-Discrimination Act 1998* (Tas) s 65(2).

⁴ Anti-Discrimination Amendment Bill 2016 (Tas) cl 5: proposed new section 64(1A)(a).

⁵ Anti-Discrimination Amendment Bill 2016 (Tas) cl 5: proposed new section 64(1B)(a).

⁶ Anti-Discrimination Amendment Bill 2016 (Tas) cl 5: proposed new section 64(1A)(b).

d) satisfied that, by virtue of section 55, section 19 does not apply to the conduct⁷.

Amending the Commissioner's powers in section 71 to dismiss a complaint

Section 71 of the Act provides that the Commissioner may dismiss (or part dismiss) a complaint at the completion of investigation in specified circumstances. The decision to dismiss or part dismiss a complaint can be reviewed by the Anti-Discrimination Tribunal.⁸

The proposed amendment in relation to section 71 is to add a new subsection to mandate that the Commissioner **must** dismiss a complaint (or part of a complaint) if:

a) satisfied that it is a complaint that the Commissioner ought to have rejected under section 64(1A) or (1B).⁹

Amending the Tribunal's powers in section 99 to dismiss a complaint

Section 99 of the Act provides that the Tribunal may dismiss a complaint in specified circumstances. The decision to dismiss a complaint can be appealed to the Supreme Court of Tasmania.¹⁰

The proposed amendment in relation to section 99 is to add a new subsection to mandate that the Tribunal **must** dismiss a complaint if:

a) satisfied that the Commissioner ought to have rejected the complaint under section 64(1A) or (1B).¹¹

⁷ Anti-Discrimination Amendment Bill 2016 (Tas) cl 5: proposed new section 64(1B)(b).

⁸ *Anti-Discrimination Act 1998* (Tas) s 71(3).

⁹ Anti-Discrimination Amendment Bill 2016 (Tas) cl 6: proposed new section 71(1A).

¹⁰ *Anti-Discrimination Act 1998* (Tas) s 100(2).

¹¹ Anti-Discrimination Amendment Bill 2016 (Tas) cl 7.

What is the impact?

In considering whether the proposed amendments reflect the public interest by balancing allegedly competing interests, two preliminary questions need to be considered in relation to these amendments:

1. What is the harm that will come from retaining the Act in its current form? And
2. What is the harm that will come from passing these amendments?

The question for our Parliament is whether the alleged harm of retaining the Act in its current form outweighs the alleged harm of amending the Act.

In my submission, the potential or alleged harm that could arise from making the proposed amendments greatly outweighs the potential or alleged harm of retaining the Act in its current form.

The alleged or potential harm of retaining the Act in its current form

The harm that it is being suggested results from the current Act is that some people feel concerned that they are limited in what they can say, for fear of a complaint being made against them under the Act.

So long as people speak respectfully and on the issues rather than attacking or making demeaning comments about individuals or groups because they have a particular attribute, they will not be the subject of a complaint that goes beyond the assessment stage. So long as they do not speak in ways that encourage others to feel hatred, serious ridicule or severe contempt towards others because they have a particular attribute, they will not be the subject of a complaint that goes beyond the assessment stage. They will, in fact, not even be aware a complaint has been made unless the complainant advises them of this directly.

To date the Act does not appear to have prevented people participating in public debate about marriage equality or a range of other issues of public interest. It has not, for example, prevented the Catholic Church from continuing to make available in its original form the *Don't Mess With Marriage* booklet.¹²

The alleged or potential harm of amending the Act

The harm that is known to come from people with particular characteristics being subjected to discrimination and related derogatory and demeaning speech and action is to cause people with those characteristics to question their right to be a part of the community, to lower their self esteem, to silence them and, at worst, to cause them to inflict harm on themselves.

¹² The booklet is available online at a number of locations, including <<https://www.catholic.org.au/acbc-media/media-centre/media-releases-new/1691-same-sex-marriage-pastoral-letter-a5-booklet>>, as well as the website of the Catholic Archdiocese of Sydney, the website of the Catholic Bishops of Australia, the website of the Catholic Archdiocese of Melbourne, Australian Policy Online, and the website of Australian Marriage Forum.

I am reminded of the words of a student in the Living in Between project. Roda Kenyi who says, in the Living in Between project report:

Racism is like a spear wounding you. One racist remark can cancel out 100 friendly things people do. I am told to ignore it, walk away but that does not stop the feeling that I will never fit in, never belong here.¹³

Another student states¹⁴:

Racism can make you feel sad and bad about yourself. It hurts and if we keep ignoring it, they will think we are okay with it and that it doesn't matter. We are not okay with it. Words can hurt, they can cause depression and violence. Racist words can kill because they can make you feel so bad and isolated.

All of the students' words are strong reminders that words and name-calling are harmful.

As a community we need to have effective tools to challenge such behaviour, not simply rely on good will—which can sadly be lacking—to moderate people's behaviour.

We have both criminal and civil laws, made by our parliaments, to establish what is required and expected of people in our society.

In relation to the matters under consideration I believe it is important that as a community we send clear messages that we are a civil society that has expectations of conduct that are reflected in our laws.

¹³ Tasmanian Centre for Global Learning, *Living in Between: Diversity Education through Storytelling: Project Report 2011* (2011) [8] <<http://www.alcorso.org.au/key-project/>>.

¹⁴ Ibid, 8.

Rationale for the Bill is not sustainable

I refer to the letter received from Ms Catherine Vickers of the Department of Justice of 29 August 2016, which states:

The Government is proposing changes to the *Anti-Discrimination Act 1998* (the Act) to ensure that there is an appropriate balance between providing protection from discrimination and unlawful conduct whilst allowing for genuine public debate and discussion on important issues.

...

The draft Bill proposes amendments to the exception in section 55:

to introduce a reasonableness test, so that the exception will only apply if the act was done reasonably and in good faith; and

to make it clear that the exception applies in section 55 if the public act was done for religious purposes.

The draft Bill also makes amendments to the Act in response to concerns that the threshold for acceptance of a complaint is too low.

The threshold

I will turn first to the concern that the threshold for acceptance of a complaint is too low. First and foremost, I note that the *Anti-Discrimination Act 1998 (Tas)* (the Act) is one of very few civil jurisdiction laws that imposes any threshold whatsoever to bringing and pursuing a claim. There is no such threshold for common law claims of negligence or defamation, for example, or for statutory claims under industrial laws. I am unable to identify any area of civil law protection where a threshold exists to a person bringing and pursuing a legal claim.

I note that other state, territory and federal discrimination laws have no such threshold. In her advice to me on the Bill, Kate Eastman SC has observed:

These provisions of the Act operate differently to the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act) and other comparable State/Territory laws. For example, s 46P of the AHRC Act does not require the Australian Human Rights Commission to make a decision whether to accept or reject a complaint. A complaint will be accepted. The Commission's powers to dispose of the complaint occur after investigation and on the grounds set out in s 46PH of the AHRC Act.

In the ACT, for example, the Commission's decision on whether or not to consider a complaint is only subject to administrative decision judicial review. There have been no applications for such a review in the last 12 years.

This is similar to other state and territory jurisdictions. Judicial review processes are much less accessible to individuals, such as complainants and individuals respondents, involved in legal

processes (compared to organisations, which are more likely to be respondents) because of the cost of filing and the legal complexity of presenting arguments in the Supreme Court.

The scheme of the ACT discrimination law does not include a right of review. The legislation specifically states the ACT Civil and Administrative Tribunal (ACAT) ‘need not consider any exception in the *Discrimination Act 1991* ... or exemption ... unless the ACAT has information suggesting the exception or exemption applies to the Act’.

The assessment process and threshold

When a complaint is received by the Tasmanian Anti-Discrimination Commissioner, the Commissioner must consider whether or not the complaint falls within the jurisdiction of the Act and satisfies the requirements of a valid complaint. This assessment must be completed within 42 calendar days of receipt.¹⁵ The outcome of the assessment is to ‘accept’ or ‘reject’ the complaint.¹⁶

This decision is made on the basis of the complaint received. The questions the Commissioner needs to consider include:

- Does the complaint allege conduct that took place in the 12 months before the complaint was received?¹⁷
- Does the complaint allege conduct that, if true, would disclose a breach of the Act in the form of discrimination and/or one or more forms of prohibited conduct?¹⁸
- Does an exception so clearly apply that the complaint will inevitably fail?
- Does an immunity apply?

The test for a breach of section 17(1)

Specifically, in relation to an alleged breach of section 17(1), in order for that allegation to be ‘accepted’ for investigation and dispute resolution under the Act, the Commissioner must consider the alleged conduct and be satisfied that:

- (a) the complainant felt humiliated, intimidated, insulted, ridiculed or offended by the alleged conduct; and
- (b) this was related to one or more of the attributes listed in that section; and

¹⁵ *Anti-Discrimination Act 1998* (Tas) s 64(2).

¹⁶ *Anti-Discrimination Act 1998* (Tas) s 64(2) and (3).

¹⁷ *Anti-Discrimination Act 1998* (Tas) s 63. This section does permit the Commissioner to extend the time available to make the complaint if she or he is satisfied it is reasonable to do so. There are cases that set out how the time limit is to be applied and what the Commissioner must consider in order to be satisfied about extending the time limit.

¹⁸ *Anti-Discrimination Act 1998* (Tas) ss 14–21.

- (c) a reasonable person would have anticipated, in all the circumstances, that the complainant would feel humiliated, intimidated, insulted, ridiculed or offended as a result of the alleged conduct.

If the Commissioner is not satisfied that all three of these elements are present, the allegation must be rejected as it is not disclosed by the complaint.

The test for a breach of section 19

Specifically, in relation to an alleged breach of section 19, in order for that allegation to be 'accepted' for investigation and dispute resolution under the Act, the Commissioner must consider the alleged conduct and be satisfied that¹⁹:

- a) the alleged conduct was 'a public act'; and
- b) it was 'capable of inciting intense dislike or hostility towards a person or group of persons or grave scorn for a person or extreme derision of a person or group of persons... of arousing reactions at the extreme end of the scale'²⁰; and
- c) it did this on the basis of a person or group's race, disability, religious belief or affiliation, religious activity, sexual orientation or lawful sexual conduct.

If the Commissioner is not satisfied that all three of these elements are present, the allegation must be rejected as it is not disclosed by the complaint.

Basis for reject

Complaints may be rejected by the Commissioner for a number of reasons, including, for example, on:

- one or more of the grounds sent out in section 64, including that it does not relate to discrimination or prohibited conduct²¹ as defined in the Act, or that it is trivial, vexatious, misconceived or lacking in substance.²²
- on the basis the complaint was made outside the time limit in section 63 and the Commissioner is not satisfied it is reasonable to extend the time to complain;
- the basis that the person making the complaint does not have standing under section 60 to make the complaint;
- the basis that an immunity, such as judicial immunity, applies to the alleged conduct;
- on the basis that the alleged conduct does not have sufficient connection to Tasmania;
- on the basis that the alleged respondent is a Commonwealth entity.

¹⁹ This is discussed in more detail later in this document.

²⁰ Wood v Gerke & Anor [2007] TASADT 03 (2 April 2007) [85].

²¹ *Anti-Discrimination Act 1998* (Tas) s 64(1)(b).

²² *Anti-Discrimination Act 1998* (Tas) s 64(1)(a).

Complaints can include allegations of more than one breach of the Act. Each alleged breach is considered separately in the assessment process and a decision made on each alleged breach.

Data on acceptance and rejection

In 2015–16, 69% of complaints received under the Act were not rejected, that is, they were accepted. The remaining 31% were rejected.

I have reviewed all of the breaches alleged in complaints finalised in 2015–16. Of these:

- there were 61 allegations of breaches of section 19 of the Act: I rejected 41 of these allegations (67%) at the assessment stage predominantly because they did not satisfy the test set out in section 19,²³
- there were 146 allegations of breaches of section 17(1) of the Act: I rejected 60 of these allegations (41%) at the assessment stage predominantly because they did not satisfy the test set out in section 17(1).²⁴

In relation to both section 17(1) and section 19, it is clear that the rate of rejection of allegations of breaches of these sections is higher than the general rate of rejection of complaints (31%).

This level of rejection does not, in my submission, indicate a ‘low threshold’ for acceptance, either of complaints generally or of allegations of breaches of sections 17(1) or 19 in particular.

Balancing protections with genuine public debate

In relation to achieving ‘an appropriate balance between providing protection from discrimination and unlawful conduct whilst allowing for genuine public debate and discussion on important issues’, I have previously stated my view that there is no evidence that the balance is not currently appropriate. In seeking to amend the Act, the Government has not provided evidence to this effect.

I note that until 2013, there were no concerns raised about any absence of balance in respect of section 17(1). The review of the Act conducted in 2006 did not identify this as an issue. Nor were any issues raised about the supposed ‘low threshold’ for acceptance either in the discussion paper, the submissions received or the final report.

During the Parliamentary debates, the issue of ensuring appropriate protection of the right to freedom of speech was raised. Following extensive Parliamentary debate, the Act was amended

²³ Of the remaining allegations of incitement in breach of section 19, 50% were resolved or withdrawn, and 20% were combined with another complaint involving the same parties, thereby reducing the administrative impact on the parties. In total, 90% of these allegations were finalised by my office before the investigation was completed.

²⁴ Of the remaining allegations of breaches of section 17(1), 67% were resolved or withdrawn, and 3% were combined with another complaint involving the same parties. In total, 82% of these allegations were finalised by my office before the investigation was completed.

to include section 17(1) in the exception in section 55. Before then, the issue of section 17(1) impairing in some inappropriate way freedom of speech or expression had not been raised. The amendment made to the Act, with effect from 1 January 2014, provided access to the defence in section 55 in relation to section 17(1).

I am able to identify only three cases during my term as Commissioner in which the section 55 defence has been raised or argued by the respondent while the complaint was being dealt with by my office. In one case, the complaint was withdrawn before the investigation was finalised, in the other two the complaint was resolved by conciliation.

The impact of unfettered speech on the freedom of speech of marginalised community members

Careful consideration needs to be given to the impact on disadvantaged and marginalised groups of allowing—specifically for religious purposes—attribute-linked offensive, humiliating, ridiculing, insulting or intimidating speech, and of permitting speech or actions that are capable of inciting hatred, serious contempt or severe ridicule on the basis of a person’s race, disability, religious belief, affiliation or activity or sexual orientation or lawful sexual conduct.

One particular effect is to exclude those people from participating in public discussion for fear of being further targeted with hatred and ridicule, etc. I refer you to, for example, the recent article, ‘On the marriage equality plebiscite, let’s not confuse free speech with a free-for-all’ by Professor Katharine Gelber, Professor of Politics and Public Policy at the University of Queensland.²⁵ In that article, Professor Gelber observed:

Those who support an open discussion tend to assume that more public debate is inherently better than less. There is an assumption that any type of speech enhances, rather than detracts from, the quality of public discourse.

What this view fails to understand is that all speech is not necessarily good. In fact, sometimes speech can harm by marginalising, excluding, and discriminating against other people in ways that actually prevent them from participating in the debate, and therefore from practising their own freedom of speech. We know this from studies of the effects of hate speech.

At its core, the principle of free speech suggests it is a public good because it enables people to engage in the deliberation that is essential to them forming their own views of a good life, holding those views in an informed way, and engaging in the self-governance that legitimates democracy.

...

But this principle contains an implication within it that is not always recognised. This is the implication that in order for free speech to do all those good things that it is meant to do, as many people as possible need to be able to participate in it.

And to make sure that as many people as possible can participate in the good thing that is free speech, we need to establish the requisite enabling conditions.

²⁵ Katherine Gelber, ‘On the marriage equality plebiscite, let’s not confuse free speech with a free-for-all’, *The Conversation* (31 August 2016) <<https://theconversation.com/on-the-marriage-equality-plebiscite-lets-not-confuse-free-speech-with-a-free-for-all-64587>>.

This means it is reasonable to ask people to exercise the responsibility that is intrinsically linked with a free speech right. This is the responsibility to speak well, by which I mean not harming by excluding, marginalising or discriminating against others in ways that mean they are not able to participate in the debate fully and openly.

Like any right, the free speech right carries with it commensurate responsibilities – primarily, the responsibility not to harm others...

The current provisions of the Act ensure that responsibility is met. At the same time, it enables people to express their views and opinions on matters of public interest. It recognises that speech and actions that target a person or group because of their race, disability, age, gender, religious belief, sexual orientation, etc, can and do cause real and lasting harm. This harm is preventable if we establish the appropriate limits on conduct.

The laws of a society are made to guide or constrain our behaviour and actions as members of that society. Discrimination laws guide our behaviour and actions to ensure that people who are members of groups that have been historically disadvantaged and marginalised are not subjected to ongoing discrimination and marginalisation by others.

The impact of the changes on protections under the Act

The proposed changes will affect provisions that protect people from being negatively targeted because of their race, age, gender, sexual orientation, disability, religion, pregnancy, marital status and more.

This is a significant change and would potentially permit a person to assert that their actions were based on religious views or doctrines—irrespective of how outdated or inconsistent with a modern pluralist society or community standards—those views or doctrines might be.

In 2006, an Australian religious leader was publicly reported as having said, in response to reports of rapes of women in public places²⁶:

If you take out uncovered meat and place it outside on the street, or in the garden or in the park, or in the backyard without a cover, and the cats come and eat it ... whose fault is it, the cats or the uncovered meat?

The uncovered meat is the problem.

If she was in her room, in her home ... no problem would have occurred.

The religious leader described women as ‘weapons’ used by ‘Satan’ to control men.

In 2002, a religious leader made a number of statements about Islam including, for example²⁷:

Muslims are demons

People do study for six to seven years they become true Muslims. And we call them terrorists, but they are true Muslim; they have read the Qur’an, they have understood it and now they are practising it, that is the connection between the Qur’an and terrorism

Muslims intend to take over Australia and declare it an Islamic nation

Muslims derive money from drugs, so they make a lot of money and they can spread Islam and fulfil their desire

In 2016, another religious leader was the subject of an article in *The Australian*:

²⁶ Online article, ‘Australian cleric suspended over "meat" sermon’, *Reuters* (online), 27 October 2006 <<http://www.reuters.com/article/us-religion-australia-islam-idUSSYD30067720061027>>.

²⁷ *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria Inc* [2006] VSCA 284 (14 December 2006) [25]. These alleged statements were considered by Victorian courts and tribunals under the *Racial and Religious Tolerance Act 2001* (Vic).

A patron of the Australian Family Association has compared homosexuality to incest and bestiality...

Given the breadth of what is encompassed by 'religion', there are similarly diverse and, at time, extremely negative and hurtful views expressed as religious views about, for example, disability, minority races, single parents and members of other religions. The expression of all of these views would potentially be afforded protection under the proposed amendments. Whether or not they are could be subject to extensive litigation (as has been the case in other jurisdictions) and individual complainants (the majority of whom are unrepresented²⁸) would be unlikely to be able to pursue such litigation.

The proposed amendments will undermine existing work to reduce harm

The proposed changes undermine concurrent campaigns that acknowledge the potential for language to normalise or make acceptable particular forms of discrimination.

The potential of language to create negative circumstances is recognised by all Governments in Australia through, for example, the current campaign to prevent family violence. In Tasmania, the training that is required to be completed by all State Servants includes the following:

Sexist jokes and language reflect and reinforce sexist attitudes. They excuse and perpetuate the gender stereotyping and discrimination against women that underpins violence. The most consistent predictor for support of violence by men is their agreement with sexist attitudes.

Every time someone makes a sexist comment, joke or discriminates on the basis of gender, it becomes more acceptable, lessens people's respect for women, and erodes women's self-worth.

In providing information to State Servants on the barriers that women experience to reporting violence, the training states:

Barrier: Inappropriate language, such as sexist language or sexually explicit jokes within the workplace, can be controlling, an abuse of power and can reinforce gender inequality which underpins violence against women.

We can all take action to prevent and respond to inappropriate language and harassment within the workplace and create a supportive, respectful culture for all employees. This includes safely challenging behaviour, talking to your mates or co-workers about the issue or reporting discrimination, harassment, bullying or sexist behaviours. These behaviours may also be a breach of the *Anti-Discrimination Act 1998* (Tas).

²⁸ See, Anti-Discrimination Commissioner, *Annual Report 2014–15* (2015) 44. The report also notes that the majority of respondents have either legal or advocacy support.

If discriminatory or marginalising sexist language can shape what society—or individuals—regard as acceptable treatment of women, and if—as such campaigns argue—there is a link between such effects and acts of aggression or violence against such targets, then this applies equally to other disadvantaged or minority groups, including people from non-English speaking backgrounds, members of visible minorities, people with disability, gay men, lesbians, people who are transgender or intersex, and members of particular religious faiths.

The proposed amendments undermine the strong message the Government is seeking to send about violence, and equally about bullying and respectful behaviour in schools.

The amendments would also have the potential to limit the Commissioner’s capacity to deal with complaints about sexist, racist, etc, slogans on commercial vehicles, such as those operated by Wicked Campers, that have been the subject of significant public concern, including from members of the Government.

Many people are capable of rejecting disparaging and hateful views of disadvantaged or minority groups. Some, however, are influenced by those views.

The privileging of certain views arising from the introduction of these amendments has the added potential to send a message to a broader spectrum in the community that hate speech and attribute-based bullying is okay. It supports the position that it is okay to publicly express views that a reasonable person would anticipate would cause a person to feel humiliated, intimidated, insulted, ridiculed or offended because of their personal circumstances or characteristics, or that are capable of inciting hatred, serious contempt or severe ridicule.

The impact on promoting the recognition and approval of acceptable attitudes, acts and practices

While I address below the potential technical impacts of the amendments on the law, I am concerned also at their capacity to undermine the important work of the Commissioner to ‘promote the recognition and approval of acceptable attitudes, acts and practices relating to discrimination and prohibited conduct’.²⁹

I am also concerned about their capacity to send two damaging messages to our community:

1. That government says it is okay to say things that are derogatory of and hurtful to others because of their characteristics (including ones over which they have no control).
2. That people who are the subject of such derogatory and hurtful comments will believe they no longer have any protection in law, because government has chosen to prioritise freedom of speech for a particular group over protection from discrimination and related conduct.

²⁹ *Anti-Discrimination Act 1998* (Tas) s 6(b). This section sets out the statutory functions of the Commissioner.

Issues arising from proposed changes to section 55

The draft Bill seeks to amend section 55 in two ways:

1. To introduce a reasonableness test; and
2. To include reference to a public act done for religious purposes.

The inclusion of these provisions (without any other amendments), would potentially extend the grounds on which a respondent could assert a defence applies if their conduct was found to have breached section 17(1) or section 19 of the *Anti-Discrimination Act 1998* (the Act).

Section 55 comes within the exceptions provisions of the Act. Exceptions are defences whereby otherwise unlawful conduct is not unlawful if the respondent person or organisation can establish on the balance of probabilities that the circumstances are such that the exception properly applies.³⁰ Exceptions operate in circumstances where there has been conduct that is found to fall within the scope of the various forms of conduct that are specified in the Act to be unlawful conduct. Exceptions do not automatically exclude entities or particular conduct from the reach of discrimination law. For the exception under the Act to apply, the case for the application to particular circumstances must be made by the person or organisation alleged to have breached the Act, and be capable of being objectively sustained. Section 101 provides that a person (or organisation) who relies on an exception as a defence to a complaint is to prove that exception on the balance of probabilities.

Two issues arise in relation to any determination as to whether a section 55 defence has been made out.

- The first is about the lawfulness of making such a determination at the assessment stage of the complaints process.
- The second is about the approach that should be adopted in making an assessment of the conduct and whether the defence properly applies.

Lawfulness of determining a section 55 defence at assessment

On the first point, complaints are accepted or rejected on the basis of the information available to the Commissioner during the assessment stage.

The well-established test to be applied at this stage is whether the conduct is capable of amounting to a breach of the Act on the basis of the information provided by the complainant. Whether an exception relevantly applies to the conduct does not (and cannot generally) form the basis for the Commissioner's decision at this stage. The exception to this principle is where 'the application of an exception under the Act is so clear that the complaint is hopeless' (*Delaney v Liberal Party of Australia (Tas)* [2008] TASADT 2 (27 February 2008) [29]). This point is made

³⁰ *Anti-Discrimination Act 1998* (Tas) s 101.

clear in the reasoning of the Tribunal in *Mohring re Break O'Day Council* (Unreported, Anti-Discrimination Tribunal, Brett M, 27 January 2004 [6]) in which the Tribunal states:

...I note that the onus of establishing such an exemption [referring to the exception found in section 48 of the Act] falls on the Respondent and accordingly the applicability of those sections is not, in my view, an appropriate matter to consider in deciding whether or not to accept a complaint for investigation.

Approach to be adopted to assessing the conduct and the potential defence

Where there is a dispute between the parties about 'facts' that are relevant to proving or disproving a breach or an exception, determinations about whether an exception applies (for example, whether the act was done reasonably and in good faith for religious purposes) can only be properly decided by the Tribunal at an Inquiry held under Division 4 of Part 6 of the Act.

The legal principles in relation to this point are clear (*Delaney v Liberal Party of Australia* (Tas) [2008] TASADT 2 (27 February 2008) [26]):

Accordingly, the test in the Tasmanian context is whether the Tribunal considers the exception so completely answers the claim that the claim is obviously hopeless or is untenable noting that at Inquiry the respondent will have the onus of satisfying the Tribunal that the exception applies.

It is not generally open to the Commissioner to dismiss a complaint on the basis of conclusions about whether an action was taken in 'good faith' or in the 'public interest' in circumstances where the respondent's true purpose is unclear.

As noted above, in this regard, this level of scrutiny does not generally apply to the operation of discrimination law in other jurisdictions at preliminary stages. Complaints made to the Australian Human Rights Commission, for example, are not subject to an accept/reject determination. The complaint proceeds directly to investigation. It is only at the completion of this stage that the Commission has the power to decide not to deal with the complaint and terminate it. The complainant may then take their complaint to court.³¹

³¹ This differs from the scheme established under the Tasmanian Act in that a complaint that is dismissed can be subject to a review by the Tribunal. If the Tribunal overturns the Commissioner's dismissal decision, the Tribunal then conducts an inquiry into the complaint. If the complaint is not dismissed and conciliation does not result in the complaint being resolved, it is automatically referred to the Tribunal. Alternatively, the Commissioner may directly refer a complaint that is not dismissed to the Tribunal for inquiry.

Under the federal law, a complaint will only go to the Federal Court or Federal Circuit Court if the complainant decides to continue with it beyond the federal Commission. Referral to the court is not an automatic result of any decision of the federal Commission.

Similarly, in the ACT, Queensland, Victoria, New South Wales, South Australia, Western Australia, and the Northern Territory, decisions about whether the conduct described in a complaint is covered by the relevant Act are not reviewable at an early stage (akin to the assessment process under the Tasmanian Act), other than potentially through judicial review in the Supreme Court of each jurisdiction.

Impact arising from proposed amendments to section 64

The proposal to introduce new provisions in section 64 mandating that the Commissioner **must** reject complaints made under sections 17(1) and 19 in circumstances where she or he is satisfied that by virtue of section 55, section 17(1) or 19 do not apply to the public act, appears to have the potential to alter the functions of the Commissioner as prescribed under section 6 of the *Anti-Discrimination Act*.

Section 6 provides:

6. Functions of Commissioner

The Commissioner has the following functions:

- (a) to advise and make recommendations to the Minister on matters relating to discrimination and prohibited conduct;
- (b) to promote the recognition and approval of acceptable attitudes, acts and practices relating to discrimination and prohibited conduct;
- (c) to consult and inquire into discrimination and prohibited conduct and the effects of discrimination and prohibited conduct;
- (d) to disseminate information about discrimination and prohibited conduct and the effects of discrimination and prohibited conduct;
- (e) to undertake research and educational programs to promote attitudes, acts and practices against discrimination and prohibited conduct;
- (f) to prepare and publish guidelines for the avoidance of attitudes, acts and practices relating to discrimination and prohibited conduct;
- (g) to examine any legislation and report to the Minister as to whether it is discriminatory or not;
- (h) to investigate and seek to resolve complaints;
- (i) to collect and analyse data relating to complaints;
- (j) any other prescribed functions.

The Commissioner's role is investigatory and conciliatory. Neither the Commissioner nor her/his staff has the power to decide whether or not there has been a breach of the Act. Discrimination law both here in Tasmania and in other jurisdictions is strongly grounded in the principles of low-cost access to justice, timely processes, and alternative dispute resolution.

In making the determination required under proposed sections 64(1A)(b) and (1B)(b), the Commissioner would need to ensure procedural fairness to the parties: both the respondent and the complainant. The range of factors identified above indicates that such a decision should not properly be made without a hearing on the issues, with all parties provided with an opportunity to tender evidence, challenge that evidence and make legal submissions. This is properly the role of the Tribunal, rather than the Commissioner. To empower the Commissioner to conduct such a hearing may require further amendments and is inconsistent with the scheme of the Act, which divides the investigative and dispute resolution processes (specifically within the role of the Commissioner) and determinative approaches (specifically within the role of the Tribunal).

The Bill is silent on the procedural implications of the Commissioner finding that a section 55 defence is **not** established. Were the Commissioner, for example, to not be satisfied that a section 55 defence applies, the complainant would arguably be placed in a position of significant advantage with regard to the terms under which the complaint might be settled. Further, a party affected by such a decision would have the option of judicial review in the Supreme Court available to them. This latter aspect adds to the legal cost and complexity of the proceedings for the parties at an early stage of the process, and increases the risk of legal costs to the Crown.

It would also make discrimination law in Tasmania operate in a very different way to other laws: both civil and criminal. In laws in Australia, a person is not required to present and argue a defence until the person bringing the claim has presented and argued their case that there has been a breach of the law. While some defences—in both criminal and civil law—may so obviously apply that they can be determined by either the prosecutor or an administrative decision maker, this is the only time that a defence would effectively bar a claim from proceeding at all.

The application of section 55³²

The proposed amendment to include public acts done ‘reasonably and in good faith ... for religious purposes’ in section 55 will make that defence available to all complaints made under sections 17 and 19 of the Act.

Public acts done for religious purposes, which would otherwise be in breach of sections 17(1) or 19 on the basis of race, gender, disability, age, religious belief, or other specified attributes would be caught, as well as those on the basis of sexual orientation.

Any claim that the proposed changes will bring Tasmanian law into alignment with other jurisdictions is not accurate. The most recent amendments made to discrimination law in Australia were to extend the protections available. In 2016, the *Discrimination Act 1991* (ACT) was amended to add disability to protection from incitement. The relevant provisions in the ACT do not provide a defence for actions done for religious purposes.

The inclusion of ‘reasonably’

The addition of the term ‘reasonably’ brings this defence into line with that found, for example, in:

- the *Anti-Discrimination Act 1977* (NSW) in relation to racial vilification³³, transgender vilification³⁴, and homosexual vilification³⁵;
- the *Discrimination Act 1991* (ACT) in relation to incitement (referred to as ‘vilification’) on the basis of race, disability, sexuality, gender identity or HIV/AIDS status³⁶;
- the *Anti-Discrimination Act 1991* (Qld) in relation to incitement (referred to as ‘vilification’) on the basis of race, religion, sexuality or gender identity³⁷;
- the *Racial and Religious Tolerance Act 2001* (Vic) in relation to incitement (referred to as ‘vilification’) on the basis of race or religion³⁸;
- the *Racial Discrimination Act 1975* (Cth) in relation to public conduct that offends,

³² I have sought Senior Counsel’s advice on the legal impacts of the provisions, and of the proper interpretation of the proposed terms. I am waiting for that advice to be finalised.

³³ *Anti-Discrimination Act 1977* (NSW) s 20C.

³⁴ *Anti-Discrimination Act 1977* (NSW) s 38S.

³⁵ *Anti-Discrimination Act 1977* (NSW) s 49ZT.

³⁶ *Discrimination Act 1991* (ACT) s 67A. Disability was added in 2016.

³⁷ *Anti-Discrimination Act 1991* (Qld) s 124A. This was added to the Queensland Act in 2001.

³⁸ *Racial and Religious Tolerance Act 2001* (Vic) ss 7 and 8.

humiliates, intimidates or insults on the basis of race, colour, national or ethnic origin.³⁹

I note in this regard, however, that what is prohibited under the NSW Act is more extensive than what is covered by section 17(1) or 19 of the Tasmanian Act and, unlike the Tasmanian Act, can in more the case of more extreme actions result in prosecution for an offence.⁴⁰ The ACT, Queensland and Victoria also provide for the possibility of more extreme actions resulting in prosecution for an offence.⁴¹

However, to the extent that the amendments seek to add ‘reasonably’ to the defence in section 55, this is an appropriate amendment.

The inclusion of ‘religious purposes’

The extension of the exception for ‘religious purpose’ only applies in the NSW Act to transgender, homosexual or HIV/AIDS vilification. It is available in relation to ‘religious discussion or instruction purposes’ in relation to transgender or HIV/AIDS vilification.⁴² It applies to ‘religious instruction ... purposes’ in relation to homosexual vilification. The exceptions in relation to homosexual vilification were added to the NSW Act in 1993, in relation to HIV/AIDS vilification in 1994 and transgender vilification in 1996.

Section 11 of the *Racial and Religious Tolerance Act 2001* (Vic) provides a defence for ‘any statement, publication, discussion or debate made or held, or any other conduct engaged in, for— (i) any **genuine** academic, artistic, religious or scientific purpose’.

Neither the *Discrimination Act 1991* (ACT) nor the *Anti-Discrimination Act 1991* (Qld) include ‘religious purposes’ or anything similar in the similar defences.⁴³ Nor does the *Racial Discrimination Act 1975* (Cth).⁴⁴

³⁹ *Racial Discrimination Act 1975* (Cth) s 18D.

⁴⁰ It includes not only promoting or being capable of inciting hatred, serious contempt or severe ridicule, but also expressing hatred towards, serious contempt for or severe ridicule of: *Anti-Discrimination Act 1977* (NSW) ss 20B(c), 38R(c), 49ZS. The NSW Act also makes more extreme racial, transgender, homosexual ‘vilification’ open to prosecution, with consent of the Attorney General, as an offence with a maximum penalty of 50 penalty units for an individual or up to 6 months imprisonment: *Anti-Discrimination Act 1977* (NSW) ss 20D, 38T, 49ZTA.

⁴¹ *Discrimination Act 1991* (ACT) s 67; *Anti-Discrimination Act 1991* (Qld) s 131A, added to the Queensland Act in 2001. *Racial and Religious Tolerance Act 2001* (Vic) ss 24 and 25.

⁴² *Anti-Discrimination Act 1977* (NSW) s 38S(2)(c).

⁴³ *Discrimination Act 1991* (ACT) s 66(2)(c).

⁴⁴ *Racial Discrimination Act 1975* (Cth) s 18D(b). I note the provision requires the purpose to be ‘genuine’.

Given the lack of ‘religious purpose’ in some other state or territory defences, the inclusion in the Tasmanian Act will not provide protection against complaint (or against a complaint proceeding beyond assessment) if the material is communicated in forms that cross state or territory borders. This is much more common with use of social media, the internet and broadcasting. Such conduct could be the subject of a vilification complaint in NSW, the ACT, and Queensland on a range of grounds, and Federally in respect of racial vilification.

Rather, it would mean that members of disadvantaged and marginalised groups in Tasmania would be afforded less protection under state law than members of such groups in some other parts of Australia, and, in the case of racial vilification, would have to complain to the Australian Human Rights Commission rather than to the Tasmanian Anti-Discrimination Commissioner.

It is this element of the proposed amendment to the defence in section 55 that is cause for concern.

Giving religious views a privileged status

To privilege or give special status to acts done for religious purposes in this way can be argued to represent a fundamental curtailing of the reach of the Act in ways not envisaged by its original drafters. It potentially goes well beyond the public interest element of the test and beyond what is necessary to protect freedom of religion or freedom of expression. The Government does not propose to similarly privilege the key form of speech that is central to an effective democracy: political speech.

To privilege religious speech also suggests that the rule of law—the principle that every person and organisation, including the government, is subject to the same law—is not seen to apply where a religious purpose can be argued. This is most likely to apply to people of religion and religious organisations. To displace the rule of law to privilege religion in a secular state is a serious step indeed.

Inciting or offensive or derogatory acts against those who access a legal right to abortion, for example, would also be capable of being caught by the proposed defence. The same would apply to the views of religious people on any number of public issues, including the views of members of other religions, euthanasia, the role of women in society, views about the ‘purpose’ of disability, and single parent or same-sex adoption or fostering. Effectively, any action of any religious person or stemming from any religious belief would be capable of being covered by the exception.

In effect, the provisions of the draft Bill would privilege religious views in public debate without providing equivalent protections to those who challenge those views. Protection would not be extended, for example, to those who held equally strong, but opposing, views to those of religious people.

While some may argue that this is consistent with freedom of expression, thought and belief, or freedom of religion, I note that the international human rights law framework does not make these

rights paramount. Freedom of religion includes the right to ‘manifest one’s religion or beliefs’ and is subject⁴⁵:

... only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

Further, the internationally protected freedom of expression is expressed as carrying with it ‘special duties and responsibilities’⁴⁶:

It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.

It appears incongruent that in circumstances where a complaint is made by a person of faith against someone who has been critical of the views of a church or religious body, the respondent to that complaint would arguably not also be able to avail themselves of the same protections.

The intent appears to be to effectively provide those who convey, teach or proselytise a religious belief with immunity from complaint. It is not, however, clear that the proposed amendments will, in any event, provide this immunity.⁴⁷

⁴⁵ *International Covenant on Civil and Political Rights*, Article 18. Opened for signature 19 December 1966, GA Res 2200A (XXI) (entered into force 23 March 1976, entered into force for Australia 13 November 1980).

⁴⁶ *International Covenant on Civil and Political Rights*, Article 19.

⁴⁷ As noted earlier, I have sought advice on the legal impacts of the provisions.

Requirement to reject if the conduct done for ‘religious purposes’

As it applies to section 55, the proposed amendments defines religious purposes to include (but not limited to) conveying, teaching, or proselytising a religious belief.

There are several issues about the way in which this concept may be interpreted.

For the purposes of these provisions, it would be necessary to determine whether the conduct was genuinely for ‘religious purposes’. The issue then arises as to how this might be proven. Should, for example, an article identified by a complainant as the basis for complaint be exempt because it was written by a church official or is it necessary to determine whether the views have some genuine basis in religious ideology regardless of their author? Would posting an article on a religious website, for example, be sufficient to establish that the conduct or view was linked to religious purposes?

I note in this context that organisations such as the Australian Bureau of Statistics and others have acknowledged the difficulty of attaining a precise description of what constitutes ‘religion’⁴⁸:

A precise definition of the concept of religion, or of what generally constitutes a ‘religion’, is difficult, because of the intangible and wide-ranging nature of the topic.

Generally, a religion is regarded as a set of beliefs and practices, usually involving acknowledgment of a divine or higher being or power, by which people order the conduct of their lives both practically and in a moral sense.

This method of defining religion in terms of a mixture of beliefs, practices, and a supernatural being giving form and meaning to existence, was used by the High Court of Australia in 1983. The High Court held that ‘the beliefs, practices and observances of the Church of the New Faith (Scientology) were a religion in Victoria’.

As part of the ruling, it was stated that:

For the purposes of the law, the criteria of religion are twofold: first, belief in a Supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief, though canons of conduct which offend against the ordinary laws are outside the area of any immunity, privilege or right conferred on the grounds of religion.

The above definition is useful in describing the nature of all the entities included in the classification, apart from the renamed broad group 7 ‘Secular Beliefs and Other Spiritual Beliefs and No Religious Affiliation’.

⁴⁸ Australian Bureau of Statistics, *Australian Standard Classification of Religious Groups* (Cat No. 1266.0, 2016)

For example:

- Buddhism is universally accepted as a religion because, although it does not acknowledge a personal God, it contains elements of belief in supernatural principles as well as canons of conduct
- Confucianism is regarded as a religion, even though it involves no overt belief in the supernatural, because it provides a moral code for its adherents and because it contains elements of belief in supernatural principles.

Not all philosophies which involve beliefs about the nature of life or codes of behaviour are accepted as religions. For example:

- Marxism, although regarded as a religion by some, is more generally regarded as a political philosophy based on a coherent set of beliefs, without any supernatural or spiritual component, and is therefore excluded from the classification.

The extent of opinion as to what constitutes a religion, practical considerations, and generally held notions about the nature of philosophies, organisations and institutions, all play a role in defining religion or identifying the concepts that underpin religion. These elements complement the more stringent notions of belief, accepted and wide-spread practices and canons of conduct, and a supernatural being or principle, included in the definition of religion.

ABS standard classification of religious groups offers in excess of 1,200 separate classifications, ranging from Zen Buddhism to the Sacred Feminine and including atheism and humanism.

In many circumstances there would insufficient information in a complaint to determine whether the alleged respondent is associated with a religious group or otherwise links the conduct to a religious viewpoint. Indeed, in the cases referred to below in the extract of Ms Eastman's advice, the full details of how the alleged conduct was said to be covered by a defence related to religion did not become clear until the complaints had progressed far beyond the initial complaint being dealt with by the equivalent of the Anti-Discrimination Commissioner.

In some circumstances, the views of religious proponents may be deliberately presented in a way that minimises the author's link to a religious body or are presented from a 'non-religious' perspective.

I also note the observations of Kate Eastman SC in her preliminary advice to me:

The expression religion will take its ordinary meaning but resort to dictionary meanings may not be helpful for the reasons explained in *OV & OW v Members of the Board of the Wesley Mission Council* [2010] NSWCA 155. In the context of s 116 of the Constitution, the High Court has been called on to define religion on a number of occasions... [however] religion and religious beliefs are not confined to established and organised religious bodies or institutions.

However, recent Australian judicial authority confirms that an exception of this kind is only available to an individual. In *Christian Youth Camps Ltd v Cobaw Community Health Services*

Ltd (2014) 308 ALR 615, Maxwell P and Neave JA said an exception based on acting for a religious purpose will only apply to natural persons because the right to freedom of religious belief can only be enjoyed by natural persons. Because a corporation is not a natural person and has ‘neither soul nor body’, it cannot have a conscious state of mind amounting to a religious belief or principle.

...

The assessment of whether an individual has acted for a religious purpose will require an assessment of fact. The religion in issue will have to be identified. Whether conduct or a public act is done for a religious purpose (as opposed to another or mixed purpose) will need to be determined. Whether there is a religious purpose may turn on an assessment of the religion’s doctrines and teachings. The assessment will also involve assessing whether the conduct or public act is done reasonably and in good faith. The *Cobaw* case highlights the great difficulties in undertaking such an assessment. It will be an almost impossible task for the Commissioner to undertake at the time a complaint is lodged and without any relevant information or explanation from the individual respondent.

The proposed amendments requiring the Commissioner to determine facts in dispute, matters of religious doctrine and legal interpretation seem to considerably extend the powers of the Commissioner. A question that needs to be asked and answered before the amendments are finalised is whether these proposed powers are within the current scope of the Commissioner’s functions and powers as set out in the Act.⁴⁹ If not, consideration will need to be given to related amendments to extend the power and functions of the Commissioner. This has the very real potential to significantly change the way in which discrimination law in Tasmania operates.

⁴⁹ *Anti-Discrimination Act 1998* (Tas) ss 6 and 7.

Requirement to reject a complaint in other circumstances

Other than in circumstances where a section 55 defence is made out, proposed changes to section 64(1A) would require the Commissioner to reject a complaint if satisfied that

A reasonable person, having regard to all the circumstances, would not have anticipated that the person by or in respect of whom the complaint is made would be offended, humiliated, intimidated, insulted or ridiculed by the conduct

It is arguable, however, that this provision does nothing more than re-state the terms of section 17(1)⁵⁰:

A person must not engage in any conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of an attribute referred to in section 16(e), (a), (b), (c), (d), (ea), (eb) and (k), (f), (fa), (g), (h), (i) or (j) in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed.

The Commissioner cannot (and does not) currently accept a complaint if the Commissioner forms the view that a reasonable person, having regard to all the circumstances, would **not** have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed.

Proposed amendments to section 64(1B) would require the Commissioner to reject a complaint if satisfied that:

A reasonable person, having regard to all the circumstances, would not regard the public act as constituting incitement of, or as the case may be, hatred towards, serious contempt for, or severe ridicule of the person or persons by or in respect of whom that complaint is made on whichever of the grounds referred to in section 19(a), (b), (c) and (d) is relevant to the complaint.

Section 19 requires that:

A person, by a public act, must not incite hatred towards, serious contempt for, or severe ridicule of, a person or a group of persons on the ground of –

- (a) the race of the person or any member of the group; or
- (b) any disability of the person or any member of the group; or
- (c) the sexual orientation or lawful sexual activity of the person or any member of the group;
or

⁵⁰ This view is supported by the preliminary advice of Ms Eastman of Senior Counsel.

- (d) the religious belief or affiliation or religious activity of the person or any member of the group.

Again, it is not clear that the proposed amendment affects the obligations on or factors to be considered by the Commissioner in assessing an allegation of a breach of section 19.⁵¹

The test for incitement under the Act has been considered extensively by the Anti-Discrimination Tribunal. In *Wood v Gerke & Anor* [2007] TASADT 03 (2 April 2007), for example:

It is noted that the Act does not define the words “incite”, “hatred”, “contempt” or “ridicule” appearing in s19. Section 19 of the Act is similar to legislation from other jurisdictions in Australia and these terms have been considered by equal opportunity tribunals from those jurisdictions.

...

It is therefore convenient to reiterate those conclusions about the case law and set them out as follows:

“Relevant cases that have considered the meaning of these terms and the approach to be adopted in determining whether conduct amounts to inciting hatred include the following: *Burns v Dye* (2002) NSWADT 32, *Turner v State Transit Authority & nor* (2004) NSWADT 8, *Kazak v John Fairfax Publications Limited* (2000) NSWADT 77, *Wagga Wagga Aboriginal Action Group & Ors v Eldridge* (1995) EOC 92-701, *Amalgamated Television Services Pty Ltd v Marsden* (1998) 43 NSWLR 158, *Burns v Radio 2UE Sydney Pty Ltd & Ors* (2004) NSWADT 267, *Western Aboriginal Legal Service Limited v Jones & anor* (2000) NSWADT 102, *Harou-Sourdon v TCN Channel Nine Pty Limited* (1994) EOC 92-604 and *Velosky & Anor v Karagiannakis & Ors* (EOD) NSWADTAP 18.

The principles derived from these cases concerning matters relevant to this case are now well established and it is not necessary to canvass here the cases in detail. Those principles are summarised as follows:

- The word “incite” should be given its ordinary and plain meaning, namely, to urge, spur on, stir up, animate, stimulate or prompt to action.
- It is not necessary to prove that there was an intention to “incite” or that people were actually incited to hatred, serious contempt or severe ridicule. Rather the test is whether the public act was capable of inciting others to feel hatred or serious contempt or severe ridicule. Merely engaging in conduct that conveys hatred or expresses serious contempt or severe ridicule is not unlawful.

⁵¹ Again, this view is supported by the preliminary advice of Ms Eastman of Senior Counsel.

- The words “hatred”, “contempt” and “ridicule” are to be given their ordinary meaning noting that the latter two are qualified by the adjectives “serious” and “severe” respectively. Thus the public act must be capable of inciting intense dislike or hostility towards a person or group of persons or grave scorn for a person or extreme derision of a person or group of persons. The conduct must be capable of arousing reactions at the extreme end of the scale.
- The aspect of the conduct complained of must be assessed within the context of the entire statement or publication.
- In determining whether the public act is capable of inciting others to feel hatred a question arises as to the characterisation of the audience. **The proper approach is to consider the impact upon an ordinary, reasonable person [emphasis added].** The range of people captured by this test includes people who are not immune from susceptibility to incitement but excludes those who hold prejudiced views or are malevolently inclined.
- It must be established that the offending public act must incite hatred towards, serious contempt for or severe ridicule of a person or a group of persons *on the ground of* one of the attributes listed in sub-paragraphs (a) – (d) of s19 of the Act. The phrase “on the ground of” means a “significant factor”, “a substantially contributing factor” and “a casually operative effect” or “an operative ground”. There must be a casual [*sic*] connection between the attribute and the feelings of hatred, serious contempt or severe ridicule that are incited by the public act.”

Even if the conduct could be said to convey hatred or express serious contempt or severe ridicule, it must also be capable of arousing reactions of intense dislike or hostility toward a person or group of persons at the extreme end of the scale. All of the principles above are currently applied by the Commissioner in assessing allegations of breaches of section 19 of the Act. In light of the stringency of these principles, it is perhaps not surprising that 67% of allegations of incitement were rejected in cases finalised in 2015–16.

Implications of rejection or dismissal

Any decision made by the Commissioner to reject or dismiss a complaint is reviewable at Tribunal. The decision does not automatically bring an end to the complaint.

A greater emphasis on rejecting complaints at early stages in the complaint processes removes the capacity to use the provisions of the Act that allow for early resolution of a complaint and shifts the emphasis toward more costly and litigious approaches. Further, review by the Tribunal of a decision to reject a complaint occurs in circumstances where the named respondent has not been notified of the application or have the capacity to intervene. This is because unlike a decision to dismiss a complaint, a decision to reject is made at the commencement of the complaint process.

I note in this context also that decisions made by the Commissioner under the Act are also subject to review under the *Judicial Review Act 2000* (Tas) and that this leaves the way open for named respondents to seek to have set aside a decision to accept a complaint. This raises the prospect, however, that decisions made under the Act will be subject to increased scrutiny in the Supreme Court. This is likely to cause additional costs and delays on the parties, the process and the Crown.

Further, and importantly, I also make mention of the principles of statutory construction on which the Act is based. A matter given recent consideration by the Pearce J (*Ablitt v the Anti-Discrimination Commissioner* [2016] TASSC 12 (18 March 2016) [29–30] as follows:

The Act is remedial and beneficial legislation. It is intended to remedy injustice and inequality and promote equality of opportunity. In its title the Act is expressed to be an Act "to prohibit discrimination and other specified conduct". The *Acts Interpretation Act 1931*, s 8A, provides that an interpretation that promotes the purpose or object of the Act is to be preferred to an interpretation that does not promote the purpose or object. The principle that particular statutory provisions must be read in light of their purpose is of particular significance in the case of legislation which protects or enforces human rights: *Waters v Public Transport Corporation* [1991] HCA 49; (1991) 173 CLR 349 per Mason CJ and Gaudron J at 359; *AB v Western Australia* (2011) 244 CLR 390 at [24]. As Brennan and McHugh JJ stated in *IW v City of Perth* [1997] HCA 30; (1997) 191 CLR 1 at 12:

"... beneficial and remedial legislation, like the [Equal Opportunity] Act, is to be given a liberal construction. It is to be given 'a fair, large and liberal' interpretation rather than one which is 'literal or technical'. Nevertheless, the task remains one of statutory construction. Although a provision of the Act must be given a liberal and beneficial construction, a court or tribunal is not at liberty to give it a construction that is unreasonable or unnatural."

It is important to bear in mind that not all discrimination or insulting or offensive conduct, even if based on gender or marital status or any of the other prescribed attributes (excepting inciting hatred), is contrary to the Act. **Section 22** confines the application of the Act to particular areas of activity. Discriminatory or prohibited conduct outside those areas of activity is not in breach of the provisions of the Act, and the Act has no application to it. No doubt that is because, as

was pointed out by Brennan and McHugh JJ in *IW v City of Perth*, the legislation attempts to accommodate various competing interests. Those interests must include the individual rights and freedoms of persons against whom complaints are made, as well as the interests of victims of discrimination and prohibited conduct. Thus, as their Honours explained at 15:

"... when ambiguities arise, they should not hesitate to give the legislation a construction and application that promotes its objects. Because of the restricted terms of a particular statute, however, even a purposive and beneficial construction of its provisions will not always be capable of applying to acts that most people would regard as discriminatory."

Lastly, I note that at least among some of the major lobby groups in this area, the understanding was that the purpose of the changes was to set aside or limit the application of sections 17(1) and 19 during the period of debate surrounding a plebiscite to determine support or otherwise for marriage equality.

As I have indicated earlier, the changes proposed have the capacity to exclude from scrutiny conduct that is much broader in scope than that related to sexual orientation or the ability to speak out in relation to marriage equality. Nothing in the Bill suggests that the protections provided under sections 17(1) and 19 are being temporarily limited rather than permanently restricted.

Other outstanding amendments to the Act

In December 2014, I provided a Minute to the Attorney General asking her to seek amendments to the Act to be drafted to correct several oversights in the drafting of the 2014 amendments to the Act. One of these was the inadvertent removal of protection of people who are transgender or intersex from the protections in section 19. The other was an error in a heading for a section in the Act.

The protection was inadvertently removed because the definition of sexual orientation was amended to remove transgender. This was done as part of the broader change to separately recognise 'gender identity' and 'intersex' as protected attributes under the Act. There is nothing to indicate that the protection previously afforded under section 19 to people who are transgender was intended to be removed.

This oversight could be corrected with the simple addition of a sub-section specifying transgender and intersex to section 19(1) of the Act.

The Attorney General signed the Minute on 3 January 2015, however, the Government has not yet progressed that reform.