



Equal Opportunity Tasmania

Religious Discrimination Bill 2019

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

October 2019

Equal Opportunity Tasmania

(the office of the Anti-Discrimination Commissioner)

Phone: 1300 305 062 (in Tasmania) or (03) 6165 7515

E-mail: office@equalopportunity.tas.gov.au

Web SMS: 0409 401 083

Translating and Interpreting Service: 131 450

National Relay Service

TTY Users: Phone 133 677 then ask for 1300 305 062

Speak and Listen: 1300 555 727 then ask for 1300 305 062

Office: Level 1, 54 Victoria St, Hobart TAS 7000

Post: GPO Box 197, Hobart TAS 7001

www.equalopportunity.tas.gov.au

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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 direct¹ and indirect² discrimination on the basis of religious belief or affiliation³, and on the basis of religious activity^{4,5}, 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.⁶

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.

¹ As defined in section 14 of the *Anti-Discrimination Act 1998* (Tas).

² As defined in section 15 of the *Anti-Discrimination Act 1998* (Tas).

³ *Anti-Discrimination Act 1998* (Tas) s 16(o).

⁴ *Anti-Discrimination Act 1998* (Tas) s 16(p).

⁵ *Anti-Discrimination Act 1998* (Tas) s 16.

⁶ *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.⁷ (*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*

⁷ *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.⁸ There are similar provisions in the *Sex Discrimination Act 1984* (Cth)⁹, *Age Discrimination Act 2004* (Cth)¹⁰, and *Racial Discrimination Act 1975* (Cth).¹¹

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.

⁸ *Disability Discrimination Act 1992* (Cth) s 13(3).

⁹ *Sex Discrimination Act 1984* (Cth) s 10.

¹⁰ *Age Discrimination Act 2004* s 12.

¹¹ *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'.¹² 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:

¹² '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.¹³

...

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.¹⁴

...

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.¹⁵

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-*

¹³ *Durston v Anti-Discrimination Tribunal (No 2)* [2018] TASSC 48 at [53].

¹⁴ *Ibid* at [66].

¹⁵ *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'.¹⁶ 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).¹⁷

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.

¹⁶ *Qantas Airways Limited v Lustig* [2015] FCA 253 at 91.

¹⁷ 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.'¹⁸ 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).

¹⁸ 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'.