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31 January 2020

Human Rights Unit
Integrity Law Branch
Integrity and Security Division
Attorney-General's Department
Australian Government
By email to: [FoRConsultation@ag.gov.au](mailto:ForConsultation@ag.gov.au)

Dear Attorney-General

Re: Religious Discrimination Bill 2019 – Second Exposure Draft

Thank you for the opportunity to provide a submission on the Second Exposure Draft of the Religious Discrimination Bill 2019 (the draft Bill).

I support the right of everyone to freedom of religion and belief and to protections from discrimination on the ground of religious belief or activity (including protection for those who do not hold a religious belief or engage in religious activity).

However, in my respectful opinion, the draft Bill goes too far and unjustifiably undermines the protection of the enjoyment of other human rights and freedoms, including by children and young people.

I feel that it is important for me to point out that over the past year I have consulted with almost 200 children and young people who have shared with me the matters that are important to them and their communities and which they would like to see given greater consideration, so as to make Tasmania a better place for children and young people. These matters fall into seven themes, one of which is 'equity and diversity'. So, for example, children and young people have told me that:

I think it is important that older people set a good example for younger people so they can learn to be good citizens. People should act kindly and caring towards each other but only some people do. Young people could think of ways to help older people act more respectfully and responsibly.

CCYP Ambassador, Southern Tasmania.

I think that to make Australia a better place everyone should respect each other. We could show them some actions about respect and how to respect each other and being kind and encouraging.

CCYP Ambassador, Southern Tasmania.

I think that children need to be kinder to each other. There is a lot of bullying going on and this is putting pressure on children. It makes them unhappy. I think that we need to change the way children look after each other and in this way I think that we can help each other become happier and healthier.

CCYP Ambassador, Northern Tasmania.



... Children deserve to grow up in a community that is accepting of everyone, regardless of gender, sexuality, race or religion ... I want the next generation to have no clue what sexism, racism and homophobia is.

CCYP Ambassador, Northern Tasmania.

I would ask that you take the views of these children and young people into account in considering the issues raised by the draft Bill and, most particularly, in considering the appropriateness of the proposal to override section 17(1) of Tasmania's Anti-Discrimination legislation.

Role of the Commissioner for Children and Young People (Tas)

The Commissioner for Children and Young People is an independent statutory officer responsible to the Parliament of Tasmania and established under the *Commissioner for Children and Young People Act 2016* (Tas) (the CCYP Act).

The CCYP Act sets out the guiding principles, functions and powers of the Commissioner and includes specific provisions which acknowledge the independent and impartial role of the Commissioner.

The Commissioner's general functions (section 8 of the CCYP Act) include:

- a) Advocating for all children and young people in the State generally.
- b) Acting as advocate for a detainee under the *Youth Justice Act 1997*.
- c) Researching, investigating and influencing policy development into matters relating to children and young people generally.
- d) Promoting, monitoring and reviewing the wellbeing of children and young people generally.
- e) Promoting and empowering the participation of children and young people in the making of decisions, or the expressing of opinions on matters that may affect their lives.
- f) Assisting in ensuring the State satisfies its national and international obligations in respect of children and young people generally.
- g) Encouraging and promoting the establishment by organisations of appropriate and accessible mechanisms for the participation of children and young people in matters that may affect them.

Section 3 of the CCYP Act describes the principles which govern the manner in which I perform my role as Commissioner as follows:

Principles to be observed:

- (1) The Commissioner or any other person performing a function, or exercising a power, under this Act, must –
 - (a) do so according to the principle that the wellbeing and best interests of children and young people are paramount; and
 - (b) observe any relevant provisions of the United Nations *Convention on the Rights of the Child*.



Consistent with my statutory functions, my comments below focus on matters that are particularly relevant to promoting and protecting the rights, wellbeing and best interests of children and young people in Tasmania.

Protection from discrimination on the ground of religious belief or activity

Article 18 of the *International Covenant on Civil and Political Rights* (ICCPR) recognises that everyone has the right to freedom of thought, conscience and religion:

Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject 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.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

The United Nations *Convention on the Rights of the Child* (CRC) also recognises that children have the right to freedom of thought, conscience and religion:

Article 14

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.
2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.
3. Freedom to manifest one's religion or beliefs may be subject 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.

However, both Article 18(3) of the ICCPR and Article 14(3) of CRC acknowledge freedom to manifest one's religion or beliefs may be limited. As Tasmania's Anti-Discrimination Commissioner said in her submission to the Expert Panel on Religious Freedom Protection in Australia:

Under international human rights law, distinction is made between the freedom to **choose and hold a religious belief**, which is regarded as absolute and not capable of any limitation, and the freedom to **manifest one's belief**, which may legitimately be subject to reasonable limits.¹

¹ Anti-Discrimination Commissioner (Tas), *Submission by the Anti-Discrimination Commissioner (Tas) to the Expert Panel on Religious Freedom Protection in Australia*, December 2017, https://equalopportunity.tas.gov.au/_data/assets/pdf_file/0007/443266/17.12.22-EOT-Submission-to-Religious-Freedom-Review.PDF; Human Rights Committee, *General Comment 22, Article 18* (48th session, 1993) UN Doc HRI/GEN/1 Rev 1 at 35 (1994) [3]–[4].



In my opinion, it is particularly important to reiterate that the right to manifest one's belief or religion is qualified because of the potential for a person to manifest their religion or beliefs in ways that infringe the fundamental rights and freedoms of others.

It is also important to acknowledge that the right to freedom of religion, conscience and belief includes:

- a) The right to choose and change religious belief.
- b) The freedom to manifest religion or belief publicly and privately alone or with others, in worship, teaching, practice or observance.
- c) The right to have no religion or to have non-religious beliefs protected.
- d) The right not to be coerced in any way that might impair a person's ability to have or adopt a religion or belief of their own choice.
- e) The liberty of parents or legal guardians to ensure that their children receive a religious or moral education in conformity with their own convictions.
- f) The freedom of thought, and freedom of conscience.²

By way of a summary, it is also useful to keep in mind the following points when considering the draft Bill:

- We *all* have fundamental rights to equality before the law and non-discrimination regardless of our beliefs, as outlined in Article 2(1) and Article 26 of the ICCPR. As is noted by the Expert Panel in its report on its religious freedom review:

...in accordance with article 26, people of faith are entitled not to be discriminated against on the basis of their faith and are entitled to equal and effective protection against discrimination on the ground of their religion. Similarly, those who adhere to atheistic, agnostic or other belief systems are also entitled not to be discriminated against on that basis, and to an equal and effective protection against such discrimination.³

- Article 2 of the CRC guarantees to all children a right to non-discrimination:

Article 2

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

² Australian Human Rights Commission submission to the Expert Panel February 2018, pp9-10, https://www.humanrights.gov.au/sites/default/files/ahrc_20180214_religious_freedom_review_submission_0.pdf

³ Report of the Expert Panel - Religious Freedom Review, p91, <https://www.ag.gov.au/RightsAndProtections/HumanRights/Documents/religious-freedom-review-expert-panel-report-2018.pdf>



- While “the human right to freedom of religion or belief has a communal or ‘associational’ dimension”, the Special Rapporteur on freedom of religion and belief has noted that “**it is a right held by individuals and not by religions or religious organisations**. The right is not designed to protect particular convictions, truth claims or belief systems (religious or otherwise)” [emphasis added].⁴
- Rights are indivisible, and there is no hierarchy of rights – in other words, no one right takes precedence over another:

Australia does not get to choose, for example, between protecting religious freedom and providing for equality before the law. It must do both under its international obligations. Sometimes this will mean one right will ‘give way’ to another, but this must occur within the framework provided by international law.⁵

Does the draft Bill achieve its aims?

This draft Bill is described in the Explanatory Notes as a Bill which prohibits discrimination on the ground of religious belief or activity in key areas of public life (paragraph 1).

Religious belief or activity is defined broadly under this Bill to include holding, or not holding, a religious belief and engaging in, not engaging in, or refusing to engage in, a lawful religious activity.

As is acknowledged in the Explanatory Notes at paragraphs 4 and 5:

The right to freedom of religion protects both the freedom to have or adopt a religion or belief and the freedom to manifest that belief. The right to freedom of religion importantly not only protects people who hold religious beliefs, but also protects the right not to hold a religious belief and the right not to engage in religious activities. In addition to these rights, international human rights law also protects the right not to be discriminated against on the basis of one’s religious belief or activity, and the right to equal effective protection against such discrimination.

All Australians, regardless of their religious belief or activity, should be able to participate fully in our society. All people are entitled not to be discriminated against on the basis of their religious belief or activities in public life and are entitled to the equal and effective protection of the law.

These are sentiments I support – everyone has the right to be protected from discrimination on the basis of religious belief or activity, and I acknowledge the need to strengthen anti-discrimination protections in this sphere of life.

At paragraphs 7, 8 and 9 (respectively) of the Explanatory Notes it is said that:

..... this Bill will introduce comprehensive federal protections to prohibit discrimination on the basis of a person’s religious belief or activity in a wide range of areas of public life, including in relation to employment, education, access to premises, the provision of goods, services and facilities, and accommodation. This will ensure that all people are able to hold and manifest their faith, or lack thereof, in public without interference or intimidation.

⁴ Report of the Expert Panel - Religious Freedom Review, p26, <https://www.ag.gov.au/RightsAndProtections/HumanRights/Documents/religious-freedom-review-expert-panel-report-2018.pdf>

⁵ Report of the Expert Panel - Religious Freedom Review, p13, <https://www.ag.gov.au/RightsAndProtections/HumanRights/Documents/religious-freedom-review-expert-panel-report-2018.pdf>



This Bill will bring legislative protections for religious belief and activity to the same standard as those already afforded under federal anti-discrimination law to discrimination on the basis of age, disability, sex, sexual orientation, gender identity, intersex status, family responsibilities, marital or relationship status, pregnancy or potential pregnancy, breastfeeding, race, colour, national or ethnic origin, descent or immigrant status.

In addition, this Bill is intended to promote attitudinal change, to ensure that people are judged on their capacity and ability, rather than on generally unfounded negative stereotypes that some may have about people who hold certain religious beliefs or undertake certain religious activities.

Clause 3 of the draft Bill introduces an objects clause which specifies that in giving effect to the objects of this Act, regard is to be had to the indivisibility and universality of human rights, and their equal status in international law, and the principle that every person is free and equal in dignity and rights.

In my opinion, as currently drafted, the draft Bill does not provide adequate protection from discrimination on the ground of religious belief or activity for those who do not hold a religious belief or engage in religious activity – instead, it privileges and prioritises the protection of freedom of religious expression over other well-accepted and recognised rights such as the right not to be discriminated against on the basis of one’s sex, pregnancy, sexual orientation, gender identity, marital status, race or disability, in a way which disproportionately affects their enjoyment.

Therefore, this draft Bill does not do what it is said that it does in paragraph 8 of the Explanatory Notes, and, in my opinion will not operate in a way which is consistent with the sentiments expressed in the proposed objects clause.

To demonstrate the above, I have outlined below my understanding of the operation of some – but not all – Clauses in the draft Bill which have the unacceptable outcomes I have described, noting that my lack of comment on other Clauses should not be seen to indicate agreement with them or otherwise.

Who may make a complaint of discrimination?

Clause 7 of the draft Bill defines direct discrimination on the ground of religious belief or activity:

A person discriminates against another person on the ground of the other person’s religious belief or activity if:

- (a) the person treats, or proposes to treat, the other person less favourably than the person treats, or would treat, another person who does not have or engage in the religious belief or activity in circumstances that are not materially different; and
- (b) the reason for the less favourable treatment is the other person’s religious belief or activity.

Clause 8 defines indirect discrimination on the ground of religious belief or activity:

Indirect discrimination

- (1) A person discriminates against another person on the ground of the other person’s religious belief or activity if:
 - (a) the person imposes, or proposes to impose, a condition, requirement or practice; and



- (b) the condition, requirement or practice has, or is likely to have, the effect of disadvantaging persons who hold or engage in the same religious belief or activity as the other person; and
- (c) the condition, requirement or practice is not reasonable.

“Person” is not defined in the draft Bill, which means that section 2 of the *Acts Interpretation Act 1901* applies and that, as acknowledged by the Explanatory Notes:

- 64. ... Section 2C of the *Acts Interpretation Act* provides that expressions used to denote persons generally, such as person, include a body politic or corporate as well as an individual.
- 66. The Act is intended primarily to protect individuals from discrimination and does not envisage that non-natural persons, such as bodies corporate, will hold or engage in religious beliefs or activities. However, the Act does not preclude bodies corporate or other non-natural persons from being ‘persons aggrieved’ for the purposes of the AHRC Act in appropriate cases.

This means that a non-natural person – such as a body corporate – could allege that it has been discriminated against on the basis of religious belief or activity, a situation which I understand is highly unusual and inconsistent with human rights treaties.

As I understand the situation, anti-discrimination laws are designed to protect individuals from discrimination on the basis of specified attributes – not corporations. Furthermore, as was acknowledged by the Expert Panel, citing the Special Rapporteur on freedom of religion or belief, the right to freedom of religion or belief in Article 18 of the ICCPR is a right held by individuals and not by religions or religious organisations.⁶

Although I support an approach in which discriminatory conduct – whether engaged in by a natural person, body corporate or body politic – is prohibited, I recommend that it is made clear in the draft Bill that a complaint of discrimination on the basis of religious belief or activity may only be made by or on behalf of a natural person or an individual.

Statements of belief

Clause 42 of the draft Bill has been redrafted so that it now provides that a statement of belief, **“in and of itself”** [emphasis added] does not constitute discrimination for the purposes of any discrimination law, nor contravene section 17(1) of Tasmania’s *Anti-Discrimination Act 1998* (Tas). However, this protection does not apply to a “statement of belief”:

- a) that is malicious; or
- b) that would, or is likely to, harass, threaten, seriously intimidate or vilify another person or group of persons; or
- c) that is covered by paragraph 28(1)(b).

Note: Paragraph 28(1)(b) covers expressions of religious belief that a reasonable person, having regard to all the circumstances, would conclude counsel, promote, encourage or urge conduct that would constitute a serious offence.

⁶ Report of the Expert Panel - Religious Freedom Review, p26, <https://www.ag.gov.au/RightsAndProtections/HumanRights/Documents/religious-freedom-review-expert-panel-report-2018.pdf>



An improvement on the First Exposure Draft Bill is that the statement also needs to be made in good faith and is now **limited to written or spoken words** [my emphasis]:

statement of belief: a statement is a **statement of belief** if:

- (a) the statement:
 - (i) is of a religious belief held by a person (the **first person**); and
 - (ii) is made, in good faith, by written or spoken words by the first person; and
 - (iii) is of a belief that a person of the same religion as the first person could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of that religion; or
- (b) the statement:
 - (i) is of a belief held by a person who does not hold a religious belief; and
 - (ii) is made, in good faith, by written or spoken words by the person; and
 - (iii) is of a belief that a person who does not hold a religious belief could reasonably consider to relate to the fact of not holding a religious belief.

To understand how statements of belief are intended to be protected, I refer to the following paragraphs in the Explanatory Notes:

- 532. *This provision acts as an exception to a complaint of discrimination, or other relevant conduct. **It is not intended to otherwise affect the meaning or interpretation of anti-discrimination law, including the tests of direct or indirect discrimination.*** [emphasis added]
- 533. *This provision is intended to protect the rights to freedom of expression and freedom of religion by ensuring that a person may express their religious belief in good faith regardless of Commonwealth, state or territory anti-discrimination laws that might have otherwise made that statement unlawful.*
- 534. *A key aspect of protecting the right to freedom of religion is protecting the ability of individuals to explain, discuss and share their fundamental beliefs. Protecting the freedom to express religious beliefs civilly and as part of public discourse is an essential part of maintaining a healthy and functioning democracy.*
- 535. *This clause does not protect the expression of all beliefs generally, but solely relates to the making of 'statements of belief'. 'Statement of belief' is defined in subclause 5(1) to include two types of statements.*
- 536. *Firstly, paragraph (a) of the definition provides that a statement constitutes a statement of belief if it is made in good faith by written or spoken words and is of a religious belief which is held by the person making the statement and that a person of the same religion could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of the religion.*
- 537. *Paragraph (a) refers to 'religious belief' only, which is intended to be a narrower concept to the attribute of religious belief or activity. In particular, it is not intended that religious belief for the purposes of this paragraph includes not holding a religious belief.*



538. *This definition is limited to beliefs which are genuinely held by the person making the statement. The definition will not capture religious beliefs which may not reasonably be considered to be in accordance with the doctrines, tenets, beliefs or teachings of the relevant religion.*
539. *For example, a statement made in good faith by a Christian of their religious belief that unrepentant sinners will go to hell may constitute a statement of belief. However, a statement made in good faith by that same person that all people of a particular race will go to hell may not constitute a statement of belief as it may not reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of Christianity.*
541. *Secondly, paragraph (b) of the definition of statement of belief provides that a statement constitutes a statement of belief if it is made in good faith by written or spoken words by a person who does not hold a religious belief and is of a belief that a person who does not hold a religious belief could reasonably consider to relate to the fact of not holding a religious belief.*
546. *Paragraphs (a) and (b) are intended to provide similar levels of protection to statements of belief made by persons with and without a religious belief. These provisions ensure that those who do not hold a religious belief are able to make statements of belief in the same way as those who do hold a religious belief, noting that statements which are non-religious in nature are not protected by this clause.*
548. *In addition, these definitions are limited to statements which are made by written or spoken words. It is not intended that this would capture broader expressions of a person's religious belief, such as through action or other illustrations. As such, this clause solely exempts oral and written expressions of belief, and does not capture any form of behaviour that goes beyond the making of a statement such as employment decisions, decisions not to provide goods, services, or facilities or the destruction of religious symbols.*
549. *For example, a statement by a doctor to a transgender patient of their religious belief that God made men and women in his image and that gender is therefore binary may be a statement of belief, provided it is made in good faith. However, a refusal by that doctor to provide medical services to a transgender person because of their religious belief that gender was binary would not constitute a statement of belief as the refusal to provide services constitutes an action beyond simply stating a belief, and therefore may constitute discrimination on the basis of gender identity.*

I understand concerns⁷ were raised that the “statement of belief” Clause in the First Exposure Draft Bill (Clause 41) could provide a federal defence to complaints under State anti-discrimination law, raising complex issues related to jurisdiction to determine the complaint. It appears from the Explanatory Notes that this re-drafted Clause is intended to overcome this concern:

550. *Subclause 42(1) provides that a statement of belief, in and of itself, does not contravene certain provisions of Commonwealth, state and territory anti-discrimination law. As such, this clause will not operate to exempt discriminatory conduct, or a series of conduct, merely because it has been accompanied by a statement of belief. Although the statement of belief is not, in and of itself, discriminatory, this clause will not affect the determination of whether associated conduct constitutes discrimination.*
551. *In addition, it is not intended that this clause would affect the ability of a complainant to bring statements of belief forward as evidence in support of a discrimination complaint concerning separate conduct. For example, a statement of belief, whilst not constituting discrimination in and of itself, may provide evidence that the reason for the less favourable treatment (that is, the*

⁷ See for example the submission by the Law Council of Australia, *Religious Freedom Bills*, 3 October 2019 and the October 2019 submission by the Anti-Discrimination Commissioner of Tasmania.



conduct the subject of the complaint) was the other person's attribute, and so assist in establishing an element of the test of direct discrimination.

Whether the re-drafted Clause actually operates in the manner described in the Explanatory Notes remains to be seen and is more properly a matter for those with technical legal expertise.

Having said this, it seems to me that the new test – that a “statement of belief” is not “in and of itself” discriminatory in the manner described in Clause 42 – is unnecessarily complicated and confusing, which will lead to uncertainty about the operation of this Clause.

What do the terms “malicious” or “seriously intimidate” mean? Can a disagreement about interpretation and categorization of a statement of belief still raise issues of jurisdiction to determine a complaint?

Furthermore, paragraph (a) of the definition in Clause 5 provides that a statement constitutes a statement of belief if it is made in good faith by written or spoken words, is of a religious belief which is held by the person making the statement, and **that a person of the same religion could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of the religion**. This is a broad test, which would appear capable of protecting statements of belief based on what could be considered by some to be extreme and/or contentious religious views, which may not be agreed to by a majority of members of a particular religion, and no matter how offensive to individuals or to a group and/or groups of individuals. It would also appear that the draft Bill intends protecting statements of belief even if they promote discriminatory attitudes.

For the above reasons – and for reasons outlined in the next section of this submission – I do not support the manner in which the draft Bill proposes protecting statements of belief.

Overriding Tasmania's *Anti-Discrimination Act 1998* (Tas)

As already noted, Clause 42 provides that a statement of belief does not contravene sub-section 17(1) of Tasmania's *Anti-Discrimination Act 1998*.

This, in my opinion, undermines existing rights and protections determined as appropriate by Tasmania's Parliament and is contrary to the accepted approach which is that Commonwealth anti-discrimination laws are generally intended to operate concurrently with the anti-discrimination laws of the States and Territories.

It is said at paragraph 534 of the Explanatory Notes:

A key aspect of protecting the right to freedom of religion is protecting the ability of individuals to explain, discuss and share their fundamental beliefs. Protecting the freedom to express religious beliefs civilly and as part of public discourse is an essential part of maintaining a healthy and functioning democracy.

I am not clear how the draft Bill would ensure that those whose freedom to express religious beliefs is being protected, express those beliefs ‘civilly’, given the intended operation of Clause 42.

Section 17(1) of Tasmania's *Anti-Discrimination Act* prohibits conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of specified protected attributes, 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.



These protected attributes are gender, race, age, sexual orientation, lawful sexual activity, gender identity, intersex variations of sex characteristics, marital status, relationship status, pregnancy, breastfeeding, parental status, family responsibilities and disability.

Section 55 of Tasmania's Anti-Discrimination Act provides a defence to section 17(1) for certain conduct, including a public act done in good faith for academic, artistic, scientific or research purposes or for any purpose in the public interest. It is not clear to me why this 'public interest' defence is not sufficient or available for those who wish to promote publicly their particular religious views.

By specifically overriding section 17(1) of Tasmania's Anti-Discrimination Act, protection is provided for the expression of written or spoken religious beliefs which would offend, humiliate, intimidate or ridicule, so long as those statements are not malicious, would, or are likely to harass, seriously intimidate, threaten, or vilify another person or group of persons, or contravene paragraph 28 1(b) of the draft Bill. As I have already observed, it seems to me there is nothing in this Clause or in the definition of "statement of belief" that would protect people – especially children and young people – from harmful, offensive and discriminatory statements (see my comments in the preceding section of this submission).

The effect of privileging statements of religious belief in the way proposed in the draft Bill will mean that complaints will no longer be able to be made under section 17(1) of Tasmania's Anti-Discrimination Act about the following if the statement is a "statement of belief" as defined in the draft Bill:

- A child with a disability being bullied at school by another child who asserts that children with disability are suffering divine punishment;
- A young unmarried mother is told by a work colleague that she is living in sin;
- A young gender fluid person who is accessing a service is told they will go to Hell because of their gender identity.

These attitudes underpin and justify discriminatory conduct and bullying of children and young people who, because of a particular attribute, are seen as different and unworthy of respect.

I also question the extent to which the proposal to protect statements of belief in the manner outlined in the draft Bill is consistent with our international obligations to provide protection to children and young people from discrimination and to promote equality before the law.

Additionally, I reiterate the comments I made in my October 2019 submission on the First Exposure Draft of this Bill – that privileging statements of belief in the way proposed by the draft Bill (especially Clause 42) has real potential to undermine the work underway in Tasmania to create a bully-free State – "a state of kindness".

On 25 July 2019, the Hon. Jeremy Rockliff, Deputy Premier, Minister for Education and Training, and Minister for Mental Health and Wellbeing, hosted a meeting with key community and business leaders to discuss ways in which action can be taken to stop and respond to bullying in Tasmania. The Communique released on 25 July 2019 outlines key actions to be further explored:

- The creation of a bully-free State – "a state of kindness";
- Reaching a shared community understanding of what bullying is and is not;



- Building an evidence base to measure prevalence, what is working and what is not, and reporting on it.

The Communique acknowledges also that:

- Bullying is a serious problem that can only be prevented through a shared effort, supported by each of us as individuals.
- Bullying can happen to anyone, anywhere, at any age and can cause harm to physical and/or mental wellbeing, and in extreme cases, can lead to tragic consequences.⁸

On the above basis, I do not support Clause 42 of the draft Bill or the way in which “statement of belief” is defined in sub-paragraph (a)(iii) of the definition in Clause 5.

Religious bodies may act in accordance with their faith etc

Clause 11 of the draft Bill provides that certain conduct engaged in by religious bodies is not discrimination for the purposes of this draft Bill.

According to the Explanatory Notes:

211. *This provision is not framed as an exception to the prohibition of discrimination under Part 3. Rather, this clause clarifies that the conduct outlined in this provision is not, in and of itself, discrimination on the grounds of religious belief or activity. Nothing in the provision permits religious bodies to discriminate on grounds that are prohibited under other anti-discrimination laws (such as discrimination on the grounds of disability, which is prohibited under the Disability Discrimination Act).*
212. *Subclause 11(1) provides that a religious body does not discriminate against another person under this Act by engaging in conduct in good faith **that a person of the same religion as the religious body could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of that religion.** [emphasis added]*
213. *Subclause 11(3) provides that a religious body does not discriminate against another person under this Act by engaging in **conduct in good faith to avoid injury to the religious susceptibilities of adherents of the same religion as the religious body.** [emphasis added]*
214. *These subclauses apply to **conduct in all of the areas of public life protected in Part 3, Divisions 2 and 3.** The application of these provisions to all areas of public life recognises the importance of the right to freedom of religion, including the freedom to manifest one’s religion through worship, observance, practice and/or teaching in community with others. [emphasis added]*

Importantly, according to the Explanatory Notes (Paragraph 215):

The notes under subclauses 11(1) and (3) clarify that these provisions solely relate to defining conduct that is not considered to be discrimination against a person on the basis of that person’s religious belief or activity for the purposes of this Act. The provisions do not affect the operation of other Commonwealth anti-discrimination law, including, for example, the Sex Discrimination Act, and therefore do not provide a basis for religious bodies to engage in conduct in accordance with their religious beliefs or to avoid injury to religious susceptibilities of persons of their religion which discriminates against persons on the basis of other protected attributes (such as age, sex, disability or race).

⁸ http://www.premier.tas.gov.au/releases/stop_and_prevent_bullying_forum_in_hobart



“Religious body” is defined in subclause 11(5) as follows:

Religious body means:

- (a) an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion; or
- (b) a registered public benevolent institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion; or
- (c) any other body that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion (other than a body that engages solely or primarily in commercial activities);

but does not include an institution that is a hospital or aged care facility, or that solely or primarily provides accommodation.

Education

Clause 19 of the draft Bill provides that it is unlawful for an educational institution to discriminate against a person on the ground of the person’s religious belief or activity:

- a) in admission decisions or in relation to the terms and conditions of admission;
- b) by denying or limiting a student’s access to any benefit provided by the educational institution, by expelling the student or subjecting the student to any other detriment.

I support this Clause.

However, the effect of Clause 11 is that religious educational institutions may engage in conduct which is otherwise unlawful and discriminatory under the draft Bill if the conduct in question is in good faith and is reasonably considered to be in accordance with the doctrines, tenets and beliefs or teachings of that religion. This would appear to be capable of protecting actions – such as denying a student access to any benefit – on the basis that only students of a particular religion may benefit, or on the basis that only boys may benefit, because this is considered to be in accordance with the doctrines etc of the religious educational institution. If this is correct, I do not agree with what is proposed by the draft Bill.

In Tasmania, section 16(o) of the Anti-Discrimination Act prohibits direct and indirect discrimination on the grounds of religious belief or affiliation and section 16(p) prohibits direct and indirect discrimination on the ground of religious activity. Religious belief or affiliation is defined in section 3 as “holding or not holding a religious belief or view”, and religious activity is defined as “engaging in, or not engaging in, or refusing to engage in, religious activity”.

As outlined in the Tasmanian Anti-Discrimination Commissioner’s submission to the Expert Panel, Tasmania’s Anti-Discrimination Act contains various exceptions referable to religious institutions, religious belief or activity which would permit conduct that would otherwise be unlawful discrimination.⁹ Discrimination on the grounds of religious belief, affiliation or religious activity is permitted in relation to **admission** as a student to an educational institution that is or is to be conducted in accordance with the tenets, beliefs, teachings, principles or practices of a particular

⁹ Anti-Discrimination Commissioner (Tas), *Submission by the Anti-Discrimination Commissioner (Tas) to Expert Panel on Religious Freedom Protection in Australia*, December 2017, https://equalopportunity.tas.gov.au/data/assets/pdf_file/0007/443266/17.12.22-EOT-Submission-to-Religious-Freedom-Review.PDF



religion.¹⁰ Discrimination against an existing student, for example through disciplinary measures, suspension or expulsion is currently not permitted under Tasmanian law. Furthermore, discrimination is not permitted on the basis of any of the other protected attributes outlined in section 16 of Tasmania's Anti-Discrimination Act (such as gender identity, race, sexual orientation etc).

It appears to me that the draft Bill would allow a relevant educational institution to engage in otherwise discriminatory conduct on the ground of religious belief or activity in admission as well as in other educational activities, and against existing students. If so, I do not support the exemption in Clause 11 for relevant educational institutions because it appears to protect a broader range of discriminatory behavior than is currently permitted under the Tasmanian Anti-Discrimination Act.

The provision of goods and services by other religious bodies

If I have understood this Clause correctly, it appears to permit discrimination on the basis of religious belief or activity in, for example, the provision of goods and services by, for example, a relevant registered public benevolent institution. If the effect of this Clause is to permit a relevant faith based organisation engaged in the provision of social housing or health related services on behalf of government to preference members of their own religion, I do not support the Clause.

As I understand the situation, Clause 11 protection would not be available for a religious body that engages solely or primarily in commercial activities. What does "primarily" mean in this context?

In my opinion, there is no justification for allowing religious discrimination in the provision of commercial activities – regardless of whether the relevant body or institution engages primarily or solely in commercial activities. This is especially the case where the relevant activities are conducted by an organisation contracted by government to provide services to the community in general.

Consequently, I recommend that Clause 11 be amended so that it only protects conduct that is necessary to conform to the tenets and beliefs of a religion and does not extend protection to conduct or activities of a commercial nature that is engaged in by a faith-based institution.

Indirect discrimination on the ground of religious belief or activity: health practitioner conduct rules

Clause 8 of the draft Bill defines indirect discrimination on the ground of religious belief or activity. According to the Explanatory Notes:

113. *Indirect discrimination occurs where an apparently neutral condition, requirement or practice has the effect of disadvantaging people who hold or engage in a particular religious belief or activity.*
115. *Subclause 8(1) provides that it is discrimination to impose, or propose to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons who hold or engage in the same religious belief or activity as the aggrieved person.*
117. *Paragraph 8(1)(c) provides that the imposition of a condition, requirement or practice only constitutes indirect discrimination where that condition, requirement or practice is not reasonable. If a condition is reasonable in all of the circumstances, the imposition of that condition will not constitute unlawful discrimination. This reflects the need for people to be able to impose reasonable conditions, even where such conditions may disadvantage a group of people on the basis of their religious belief or activity.*

¹⁰ Section 51A(1) of the *Anti-Discrimination Act 1998* (Tas). Please refer to s51A in its entirety for a complete description of the circumstances in which discrimination on the ground of religious belief etc may occur in the context of educational institutions.



However, subclauses 8(6) and (7) provide that in certain circumstances, the imposition of health conduct rules is not reasonable, essentially allowing a health practitioner to conscientiously object to providing or participating in particular types of health services in accordance with their religious beliefs.

“Health service” is defined less broadly than in the First Exposure Draft of the Bill, however it still means a service provided in the practice of medical, midwifery, nursing, pharmacy or psychology health professions (refer to Clause 5) – a broad category of health services.

Subclause 5(1) defines “conscientiously object”:

a health practitioner ***conscientiously objects*** to providing or participating in a particular kind of health service if:

- (a) the health practitioner refuses to provide, or participate in, that kind of health service on the ground of his or her religious belief or activity; and
- (b) a person of the same religion as the health practitioner could reasonably consider the refusal to provide, or participate in, that kind of health service as being in accordance with the doctrines, tenets, beliefs or teachings of that religion.

Where state and territory laws allow health practitioners to conscientiously object to providing or participating in a particular kind of health service because of a religious belief or activity held or engaged in by the health practitioner, subclause 8(6) provides that a health practitioner conduct rule that is inconsistent with such a law is not reasonable and amounts to unlawful discrimination under the draft Bill. However, as I understand the situation, it is proposed that subclause 8(6) will not affect the imposition of conduct rules where a conduct rule *consistent with a state or territory law* limits the ability of a health practitioner to refuse to provide a service on the basis of conscientious objection.

Where a state or territory law does not provide for health practitioners to conscientiously object to providing or participating in certain kinds of health services, subclause 8(7) provides that a health practitioner conduct rule is not reasonable unless compliance with the rule is necessary to avoid an unjustifiable adverse impact on the ability of the person imposing the rule to provide the health service, or on the health of any person who would otherwise be provided with the health service. The burden of proving that compliance with a health practitioner conduct rule is necessary for these reasons rests with whoever imposed the rule (subclause 8(8)). In my opinion, this privileges conscientious objection on the basis of religious belief over other fundamental rights children and young people have, including the right to non-discrimination, equality before the law and to the highest attainable standard of health.

Notes to subclauses 8(6) and (7) state that these subclauses do not allow a health practitioner to decline to provide a particular kind of health service or health services generally to particular people or groups of people. The Note to subclause 8(6) goes on to say: “For example, refusal to prescribe contraception to single women may constitute discrimination under the *Sex Discrimination Act 1984*”. In my opinion, it is difficult to see how an individual who is denied a particular health service – for example, where a teenage single woman is denied access to contraceptives – could establish that a denial of service to them occurred in the context of a denial of this service to single women generally. If I have misunderstood the effect of this provision, it suggests that it is unnecessarily complex.



As I said in my submission on the First Exposure Draft of the Bill:

The Committee on the Rights of the Child has stated that signatories to the CRC should ensure that adolescents are not deprived of any sexual and reproductive health information or services due to providers' conscientious objections.¹¹ However, it appears that the draft Bill could allow denial of those health services to a young person because of the conscientious objections, based on religious belief of a health practitioner – and it is not clear whether a young person would have any remedy under anti-discrimination law where the denial of service was in part prompted by, for example, the fact that a young person was same sex attracted.

It is not clear to me why the issue of conscientious objection by a health professional cannot be addressed in the context of the test for indirect discrimination but without reference to or inclusion of subclauses 8(6) and (7) as outlined in the draft Bill. For this and other reasons mentioned above, I do not support that part of the draft Bill which addresses health practitioner conduct rules.

Conclusion

Thank you for the opportunity to comment on the draft Bill.

The short consultation period allowed on this draft Bill has unfortunately limited the scope of my submission. Furthermore, the short consultation period has limited my capacity to consult specifically on issues raised by this draft Bill.

I am very happy to discuss my submission in more detail should this be of assistance.

Yours sincerely

Leanne McLean
Commissioner for Children and Young People

cc *The Hon Peter Gutwein, Premier*

The Hon Jeremy Rockliff MP, Deputy Premier, Minister for Education and Training, Minister for Mental Health and Wellbeing

The Hon Elise Archer MP, Attorney General, Minister for Justice

The Hon Roger Jaensch MP, Minister for Human Services

¹¹ UN Committee on the Rights of the Child (CRC), General Comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), 17 April 2013, CRC/C/GC/15, page 15, available at: <https://www.refworld.org/docid/51ef9e134.html> [accessed 27 September 2019]