CCYP
Commissioner for Children and Young People Tasmania

Your Ref:
Our Ref: 839

2 October 2019

Human Rights Unit, Integrity Law Branch, Integrity and Security Division
Attorney-General's Department
Australian Government
By email to: FoRConsultation@ag.gov.au

Dear Attorney-General

Re: Religious Discrimination Bill 2019 – Exposure Draft

Thank you for the opportunity to provide a submission in relation to the exposure draft of the Religious Discrimination Bill 2019 (the draft Bill).

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.

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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.

Preliminary comments

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]

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 and 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]

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[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].

[2] Australian Human Rights Commission submission to the Expert Panel February 2018, pages 9-10, 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

- 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.

- The right to freedom of thought, conscience and religion belongs to everyone — 'the religious, the non-religious and those moving towards, away from, or between religions. The right protects freedom of thought, conscience and religion, not religion as such'. [4] Furthermore, Article 18 of the CCPR guarantees the freedom to manifest a religion or belief either individually or in community with others, and in public or private. 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).[5]

- 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. [6]

  It is also useful to recall the purpose of discrimination laws as outlined by the Australian Human Rights Commission (AHRC) in its *Discussion Paper – Priorities for Federal Discrimination Law Reform*:

  - To eliminate discrimination as it is experienced by persons with particular attributes and where experienced in certain areas of life.
  - To ensure equality before the law for everyone in the community.
  - To promote recognition and acceptance within the community of the principle that all people have the same fundamental rights as the rest of the community.

[4] 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
[5] 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
[6] 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

- To reflect Australia's international human rights commitments to prevent discrimination and promote equality.[7]

The AHRC also says in that Discussion Paper that discrimination law should 'positively contribute to a reduction of discrimination in society and a greater realisation of equality on a continual basis'[8].

Furthermore, the AHRC says '[a]ny reform to discrimination law should improve protection across the community. It should not involve creating new forms of discrimination against any sector of society'.[9]

Comment

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. In support of this view, I refer to my comments below on some – but not all – of the Clauses of the draft Bill, 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 5 of the draft Bill defines "person" as follows:

> **person** has a meaning affected by the *Acts Interpretation Act 1901*
>
> Note:
> Under section 2C of the *Acts Interpretation Act 1901*, an expression that is used to denote a person includes a body corporate, which may include a religious body or other religious institution.

The effect of this definition is to provide that a corporation may make a complaint of discrimination on the ground of religious belief or activity, a conclusion confirmed by the Explanatory Notes to the draft Bill which are extracted below:

> 76. The note under the definition of person notes that a body corporate may include a religious body or other religious institution. Religious body is defined in subclause 10(2). The term 'other religious institutions' is intended to refer to bodies which are conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion but do not constitute a religious body for the purposes of subclause 10(2) because they engage solely or primarily in commercial activities.
>
> 77. This note is not intended to extend the definition of person beyond the meaning given by the Acts Interpretation Act, but is intended to clarify on the face of the Act that a body corporate (which may include a religious body or other religious institution) is a person for the purpose of this Act.

[7] Australian Human Rights Commission, *Discussion paper: Priorities for federal discrimination law reform*, October 2019, p6, https://www.humanrights.gov.au/our-work/rights-and-freedoms/publications/discussion-paper-priorities-federal-discrimination-law
[8] Australian Human Rights Commission, *Discussion paper: Priorities for federal discrimination law reform*, October 2019, p7, https://www.humanrights.gov.au/our-work/rights-and-freedoms/publications/discussion-paper-priorities-federal-discrimination-law
[9] Australian Human Rights Commission, *Discussion paper: Priorities for federal discrimination law reform*, October 2019, p7, https://www.humanrights.gov.au/our-work/rights-and-freedoms/publications/discussion-paper-priorities-federal-discrimination-law

78. As such, it is open for a body corporate to make a complaint under this Act alleging that it had been discriminated against on the basis of its religious belief or activity. In order to make such a complaint, a body corporate must be able to establish that it has or engages in a religious belief or activity.

79. For example, a religious body corporate which was refused a facility booking in order to undertake a religious activity, such as for communal prayer, may be able to make a complaint under this Act that the refusal constituted discrimination on the basis of the body's religious belief or activity. [10]

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.[11] I am not aware of any anti-discrimination legislation in Australia which would permit a corporation to make a complaint of unlawful discrimination in its own right.

On the above basis, I do not support the definition of "person" as described in Clause 5 of the draft Bill and 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.

General exemption for religious bodies

I understand the Australian Law Reform Commission has been asked to consider whether religious exemptions to prohibitions on discrimination contained in existing anti-discrimination laws (Commonwealth, state and territory) should be limited or removed altogether while also guaranteeing the right of religious institutions to conduct their affairs in a way which is consistent with their religious ethos.[12]

It is the case that should this draft Bill in its current form become law, religious institutions will be able to rely on the existing exceptions contained in anti-discrimination legislation as well as exemptions and protections based on religious belief and activity etc as outlined in the draft Bill. In my respectful opinion, this has the potential to create a confusing legislative framework which may inadvertently operate in a way that unjustifiably undermines other rights and freedoms, particularly the rights to non-discrimination and equality before the law. It is, in my opinion, unfortunate that we do not have the benefit of the ALRC's findings to assist with consideration of this draft Bill. This is particularly the case when one considers clause 10 of the draft Bill.

Clause 10 of the draft Bill provides:

10 Religious bodies may act in accordance with their faith

(1) A religious body does not ***discriminate*** against a person under this Act by engaging, in good faith, in conduct that may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion in relation to which the religious body is conducted.

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[10] *Exposure Draft of the Religious Discrimination Bill 2019 Explanatory Notes,* https://www.ag.gov.au/Consultations/Documents/religious-freedom-bills/explanatory-notes-religious-discrimination-bill.pdf

[11] 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

[12] Review into the Framework of Religious Exemptions in Anti-discrimination Legislation, Altered Terms of Reference 29 August 2019, https://www.alrc.gov.au/inquiry/review-into-the-framework-of-religious-exemptions-in-anti-discrimination-legislation/altered-terms-of-reference-29-august-2019/

(2) ***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 charity that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion (other than a registered charity that engages solely or primarily in commercial activities); 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).

(3) This section applies despite anything else in this Act.

As is outlined in the Explanatory Notes to the draft Bill:

159. Clause 10 provides that certain conduct engaged in by religious bodies in accordance with their faith is not covered by the prohibition of discrimination under this Act.

160. 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 under this Act.

161. Subclause 10(1) provides that a religious body does not discriminate against another person under this Act by engaging in conduct in good faith that may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion in relation to which the body is conducted.

162. This provision applies to conduct in all of the areas of public life protected in Part 3, Divisions 2 and 3. The application of this provision 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.

163. This provision solely relates to the ability of religious bodies to discriminate against a person on the basis of that person's religious belief or activity. This provision does not affect the operation of other Commonwealth anti-discrimination law and does not provide a basis for religious bodies to engage in conduct in accordance with their religious beliefs which discriminates against persons on the basis of other protected attributes (such as age, sex, disability or race).[13]

I do not support Clause 10 in its current form for reasons including the following:

a. *The provision of goods and services by registered charities and other religious organisations.*

Because of the way in which the term "religious body" is defined, it is conceivable that a registered charity as described in clause 10(2)(b) or any other body as described in clause 10(2)(c) could, in the provision of goods and services, engage in conduct which would otherwise amount to unlawful discrimination on the basis of religion. This could occur, for example, in relation to the provision of contracted services such as the provision of out-of-home care, counselling, health services or housing.

[13] *Exposure Draft of the Religious Discrimination Bill 2019 Explanatory Notes,* https://www.ag.gov.au/Consultations/Documents/religious-freedom-bills/explanatory-notes-religious-discrimination-bill.pdf

In my opinion, there is no justification for allowing religious discrimination in the provision of commercial services – regardless of whether the relevant body or institution engages primarily or solely in commercial activities – particularly where the relevant services are intended to be accessed by all sectors of the community and not just by those who hold a particular religious belief or engage in particular religious activities.

Consequently, I recommend that Clause 10 be amended so that the exemption does not apply to conduct connected with commercial activities.

b. *Religious educational institutions*

Clause 10 would permit an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion, to discriminate on the ground of religion if it engages, in good faith, in conduct that *may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings* of the religion in relation to which the educational institution is conducted.

It is not entirely clear to me how the exemption would operate alongside section 38 of the *Sex Discrimination Act 1984* (SDA) and those provisions in the Tasmanian *Anti-Discrimination Act 1998* which permit discrimination against a student based on religion (see section 51A). This is because the exemption for religious educational institutions in the SDA permits discriminatory conduct where the conduct is engaged in in good faith *in order to avoid injury to the religious susceptibilities of adherents of that religion or creed* – a stricter test than that contained in Clause 10.

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 meaning "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.[14] 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 religion.[15] 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 the 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 basis of religion in admission as well as in other educational activities and against existing students.

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[14] 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

[15] Section 51A(1) of the *Anti-Discrimination Act 1998* (Tas). Please refer to s51A in its entirely 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.

I do not support the exemption in Clause 10 for relevant educational institutions because it appears to have a broader scope than that contained in the SDA and in the Anti-Discrimination Act. In my opinion there is potential for unintended adverse consequences with regard to the protection of other rights and freedoms guaranteed to children and young people by international instruments.

Statements of belief

Clause 41 of the draft Bill provides that statements of belief do not constitute discrimination for the purposes of any discrimination law and specifically overrides section 17(1) of the *Tasmanian Anti-Discrimination Act 1998*. The Clause is set out below:

> **41 Statements of belief do not constitute discrimination etc.**
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> (1) A statement of belief does not:
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> (a) constitute discrimination for the purposes of any anti-discrimination law (within the meaning of the *Fair Work Act 2009*); or
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> (b) contravene subsection 17(1) of the *Anti-Discrimination Act 1998* of Tasmania; or
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> (c) contravene a provision of a law prescribed by the regulations for the purposes of this paragraph.
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> (2) Subsection (1) does not apply to a statement:
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> (a) that is malicious; or
>
> (b) that would, or is likely to, harass, vilify or incite hatred or violence against another person or group of persons; or
>
> (c) that is covered by paragraph 27(1)(b).
>
> Note: Paragraph 27(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.

A statement of belief is defined as follows:

> ... a statement is a ***statement of belief*** if:
>
> (a) the statement:
>
> (i) is of a religious belief held by a person; and
>
> (ii) is made by the person in good faith; and
>
> (iii) is of a belief that may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion; or
>
> (b) the statement:
>
> (i) is made by a person who does not hold a religious belief; and
>
> (ii) is of a belief held by the person that arises directly from the fact that the person does not hold a religious belief; and
>
> (iii) is made in good faith; and
>
> (iv) is about religion.

According to the Explanatory Notes:

401. 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.

402. 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.

403. 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.

404. Firstly, paragraph (a) of the definition provides that a statement constitutes a statement of belief if it is made in good faith and is of a religious belief which is held by the person making the statement and that may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion.

405. Paragraph (a) refers to 'religious belief' only which is intended as 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.

406. 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 regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the relevant religion.

409. 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 a person who does not hold a religious belief and is of a belief about religion held by the person that arises directly from the fact that the person does not hold a religious belief.

410. This paragraph ensures the provision protects the expression of atheist and agnostic beliefs.

411. This definition solely captures beliefs about religion which arise directly because the person does not hold a religious belief. This may include beliefs which dispute the existence of religion, or which criticise religion or aspects of religion, and which the person holds because they do not hold a religious belief. It is not intended that this definition would capture philosophical beliefs which are not directly connected to a lack of religious belief.

418. This provision applies solely to an action for discrimination under those Acts. This includes both direct and indirect discrimination, as well as racial discrimination under section 9 of the Racial Discrimination Act. It does not apply to harassment (including sexual harassment), vilification or incitement under an anti-discrimination law (within the meaning of Fair Work Act).[16]

As is pointed out by the Australian Human Rights Commission in its submission on the Religious Freedom Bills, discriminatory statements may amount to "less favourable treatment" in and of themselves and "may also provide evidence that other conduct, which is less favourable to a person, was undertaken for a prohibited reason".[17] Seen from this perspective, Clause 41 has the

[16] *Exposure Draft of the Religious Discrimination Bill 2019 Explanatory Notes,* https://www.ag.gov.au/Consultations/Documents/religious-freedom-bills/explanatory-notes-religious-discrimination-bill.pdf

[17] Australian Human Rights Commission Religious Freedom Bills – Submission to the Attorney-General's Department 27 September 2019 paragraph 84.

potential to undermine existing protections against unlawful discrimination, a situation I do not support.

By way of additional observation, 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" (refer paragraph 402 of the Notes above). This is in my opinion a particularly relevant question given that the draft Bill provides that a statement of religious belief does not contravene section 17(1) of the Tasmanian Anti-Discrimination Act.

Section 17(1) of the Tasmanian 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 the Anti-Discrimination Act provides an exception 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" exception 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 what may otherwise amount to discriminatory and/or harmful statements based on religious belief, which may underly, promote or justify discriminatory behaviour on the basis of attributes otherwise protected under anti-discrimination law.

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 it is argued that the statement amounts to the expression of a religious belief:

- children with disability are suffering from divine punishment and may therefore be bullied on this basis;
- a young unmarried mother is living in sin and therefore not worthy of support;
- 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.

Additionally, in my respectful opinion, privileging statements of belief in the way proposed by Clause 41 has the very 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.[18]

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

On the above basis, I do not support Clause 41 of the draft Bill.

Indirect discrimination on the ground of religious belief or activity.

Clause 8 of the draft Bill prohibits indirect discrimination on the ground of a person's religious belief or activity. It provides that indirect discrimination can occur where an apparently neutral condition, requirement or practice has the effect of disadvantaging people who have or engage in a particular religious belief or activity and the condition etc is not reasonable.

Clause 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. Clause 8(7) provides that the burden of proving that a condition, requirement or practice is reasonable in the circumstances rests with the person who imposed the condition, requirement or practice.

Clause 8(2) outlines the manner in which reasonableness is to be determined as follows (with my emphasis):

> (2) Subject to subsections (3), **(5) and (6),** whether a condition, requirement or practice is reasonable depends on all the relevant circumstances of the case, including the following:
>
> (a) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the condition, requirement or practice;
>
> (b) the feasibility of overcoming or mitigating the disadvantage;
>
> (c) whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the condition, requirement or practice;
>
> (d) if the condition, requirement or practice is an employer conduct rule—the extent to which the rule would limit the ability of an employee of the employer to have or engage in the employee's religious belief or activity.

[18] http://www.premier.tas.gov.au/releases/stop_and_prevent_bullying_forum_in_hobart

Clauses 8(5) and (6) - Conscientious objections by health practitioners – indirect discrimination

Clauses 8(5) and (6) deal with health practitioner conduct rules[19] which for the purposes of the draft Bill apply to conscientious objections based on beliefs which may reasonably be regarded as being in accordance with the doctrine, tenets, beliefs or teachings of the health practitioner's religion. Put simply, Clauses 8(5) and (6) deem health practitioner conduct rules of the relevant sort to be unreasonable in the circumstances described in each of Clauses 8(5) and (6).

As is noted at paragraph 137 of the Explanatory Notes, examples of health practitioner conduct rules may include rules which require doctors, nurses and other health practitioners to undertake procedures, or provide information, prescriptions, or referrals, related to services such as abortion, euthanasia, contraception or sterilisation, regardless of their religious conscientious objections to those services.

Further, at paragraph 139 with reference to Clauses 8(5) and (6), these provisions are said to reflect the significance of maintaining the ability for health practitioners to conscientiously object to providing certain health services in accordance with their religious beliefs and recognise that health practitioners should not be forced or coerced into acting in contravention of their fundamental religious beliefs.

If I have understood the draft Bill correctly, there is potential for a health practitioner to refuse to provide a health service on the basis of their religious belief or activity across the following broad range of health services:

> **health service** means a service provided in the practice of any of the following health professions:
>
> a. Aboriginal and Torres Strait Islander health practice;
>
> b. dental (not including the professions of dental therapist, dental hygienist, dental prosthetist or oral health therapist);
>
> c. medical;
>
> d. medical radiation practice;
>
> e. midwifery;
>
> f. nursing;
>
> g. occupational therapy;
>
> h. optometry;
>
> i. pharmacy;
>
> j. physiotherapy;
>
> k. podiatry;
>
> l. psychology.

As I noted earlier, the 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 (Article 18(3) ICCPR and Article 14(3) CRC).

[19] Defined in subclause 5(1) as a condition, requirement or practice that is imposed, or proposed to be imposed, by a person on a health practitioner that relates to the provision of a health service by a health practitioner, that would have the effect of restricting or preventing the practitioner from conscientiously objecting to providing the health service because of a religious belief or activity held or engaged in by that practitioner.

I am concerned that the above aspects of the draft Bill may unjustifiably prioritise the religious beliefs of a health practitioner over the right of children and young people to the highest attainable standard of health (Article 24 of the CRC). This is particularly so when one considers the broad range of health services which it seems may be denied on the basis of a conscientious objection based on religious beliefs.

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 Clauses 8(5) and (6) as outlined in the draft 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.[20] 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.

Based on the above, I am not convinced that it is necessary or appropriate for a health practitioner to be able to refuse to provide information, prescriptions, or referrals etc in the manner proposed by these Clauses.

Consequently, I do not support inclusion of Clauses 8(5) and 8(6) of the draft Bill on the basis that inclusion of these Clauses unjustifiably undermines the right of children and young people to the highest attainable standard of health and to non-discrimination in the provision of health services.

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 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.

[20] 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]

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.

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 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

Minister for Human Services, The Hon Roger Jaensch MP, Minister for Human Services