



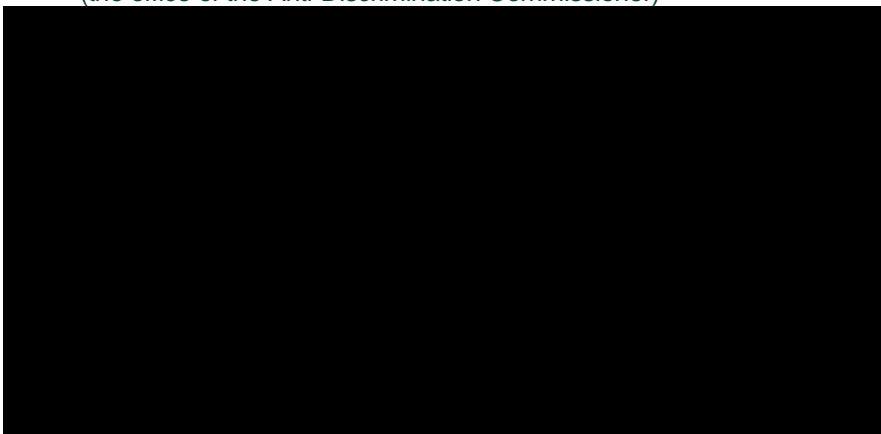
Equal Opportunity Tasmania

Religious Freedom in Australia

Submission by the Anti-Discrimination Commissioner (Tas) to
expert panel on Religious Freedom Protection in Australia

December 2017

Equal Opportunity Tasmania
(the office of the Anti-Discrimination Commissioner)



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Introduction

Thank you for providing me with an opportunity to contribute to the Expert Panel Review of Religious Freedom in Australia.

My interest in these matters relates to the relationship between the freedom of religion and belief and other human rights. It also relates to whether an appropriate balance can be struck between ensuring freedom of religion or belief in Australia—including those beliefs that do not accord with those held by mainstream religious groups—and ensuring human rights and freedoms that may be infringed by actions arising from particular beliefs. Further, it is important to consider how such a balance can best be struck.

These are matters that require careful consideration. Striking the right balance between religious views and beliefs and the voices of those who do not share those views or beliefs is at the heart of many current civil and political debates.

This submission outlines the protections available to those of faith. These protections enable people to freely hold a particular religious belief or affiliation or engage in particular religious activities.

I also examine the relevant limitations—grounded in international law—on those internationally recognised rights and approaches that enable competing international human rights to be considered. These limitations include that religious organisations and people who hold religious beliefs have obligations under discrimination law that may sometimes require them to curtail the public expression of those views and beliefs

Australia is a nation of many faiths and values. This is a hallmark of the multicultural and diverse country that we have become. Underpinning this diversity, however, must be a commitment to tolerance and respect not only between those of different faiths, but also from and to those who do not have a religious faith.

Inevitably this will lead to tension. Balancing the right to freedom of religion with freedom of expression or other rights and freedoms can and does invoke strongly held views.

There is not—and never should be—an unfettered license to discriminate, either as a basis for a particular religious view to take precedence or as a basis to stifle the expression of religious belief.

It is the way in which the balancing of those rights is undertaken that is critical to lawmakers and to bodies, such as my own, that are responsible for interpreting and applying those laws.


The right to be protected against discrimination on the basis of religion is recognised and protected through specific aspects of discrimination law in some states and territories, including various statutory defences in those laws. Commonwealth discrimination law does not include statutory protection from discrimination on the basis of religion, but some legislation, including the

Sex Discrimination Act 1984 (Cth), exempts religious bodies from having to comply with some aspects of that law.¹

Overall, it is my view that the way in which Tasmanian discrimination law approaches these issues is sound. The *Anti-Discrimination Act 1998* (Tas) provides a mechanism for the protection of people from discrimination on the basis of their religious belief, affiliation or activity (however named in different state and territory discrimination laws), whilst at the same time providing protection against unlawfully discrimination against others who do not share such belief, affiliation or activity.

I consider that should greater protections be sought to protect religious freedoms, that a Charter of Human Rights should be enacted recognising the global rights of all Australian citizens.

I would be happy to elaborate on these matters should you wish me to do so.



Sarah Bolt
ANTI-DISCRIMINATION COMMISSIONER (TAS)

¹ See, for example, *Sex Discrimination Act 1984* (Cth) ss 37 and 38. Section 37 provides exemptions for the ordination or appointment of priests, ministers of religion or members of any religious orders and various other matters. Section 38 provides exemptions for educational institutions established for religious purposes.

Rights and obligations under Tasmanian discrimination law

The *Anti-Discrimination Act 1998* (Tas) prohibits discrimination, and specified related conduct including incitement and provides for the investigation and conciliation of, and inquiry into, complaints about such conduct.

Taken together, it is my view that the provisions in the Tasmanian Act provide significant protection for people from discrimination and related conduct on the basis of their faith (including activities related to that faith) in areas of public life.

Discrimination

Section 16(o) of the Tasmanian 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 grounds of religious activity. Religious belief or affiliation is defined in section 3 of the Tasmanian Act 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’.

Under the Tasmanian Act, discrimination is defined to include both ‘direct’ and ‘indirect’ discrimination.²

Direct discrimination on the basis of religious belief, affiliation or activity occurs when a person is treated less favorably than another person because of his or her religious belief, affiliation and/or activity.³ Indirect discrimination on the basis of religious belief, affiliation or activity occurs when a condition, requirement or practice disadvantages a person or group of people who share a religious belief, affiliation and/or activity where that condition, requirement or practice is unreasonable in the circumstances.⁴

Discrimination on any of these grounds is unlawful if it occurs in connection with employment, education, training, provision of facilities, goods and services, accommodation, membership and activities of clubs, the administration of any law of the State or State program, industrial awards, enterprise agreements or industrial agreements.⁵

² *Anti-Discrimination Act 1998* (Tas) s 14(1).

³ *Anti-Discrimination Act 1998* (Tas) s 14(2).

⁴ *Anti-Discrimination Act 1998* (Tas) s 15.

⁵ *Anti-Discrimination Act 1998* (Tas) s 22.

During 2016-17, 10 complaints received by my Office alleged discrimination on the basis of religious belief or affiliation and 5 complaints alleged discrimination on the basis of religious activity.⁶

At the same time, discrimination law imposes obligations on all people, including those who hold religious belief or affiliation, not to discriminate against persons who have characteristics or attributes protected under discrimination law. This includes the obligation to not discriminate (or engage in related conduct⁷) based on (among other things) a person's race, age, gender, sexual orientation, religious belief or affiliation, marital status, gender identity or parental status.⁸

The Tasmanian Act includes exceptions that permit conduct that would otherwise be unlawful discrimination. Under the Act, an exception operates as a defence to a complaint of unlawful discrimination or, in limited cases, to other conduct that is made unlawful by the Act. The Tasmanian Act specifies that a person (or organisation) who seeks to rely on an exception 'as a defence to a complaint is to prove that exception on the balance of probabilities'.⁹

Section 27(1)(a) provides the exception that a religious institution may discriminate against a person on the grounds of gender 'if it is required by the doctrines of the religion of the institution'.

Section 42 provides the exception that a person may discriminate against a person on the grounds of race 'in relation to places of cultural or religious significance if the discrimination – ... is in accordance with – ... the customs of the culture; or ... the doctrines of the religion; and ... is necessary to avoid offending the cultural or religious sensitivities of any person of the culture or religion'.

I am not aware of any complaints made under the Tasmanian Act in which either of these exceptions were raised by the respondent as a defence to the complaint.

In addition, exceptions are provided on the basis of religious belief or affiliation and religious activity in the following circumstances:

51. Employment based on religion

- (1) A person may discriminate against another person on the ground of religious belief or affiliation or religious activity in relation to employment if the participation of the person

⁶ Equal Opportunity Tasmania, *Annual Report 2016-17* p32.

⁷ *Anti-Discrimination Act 1998* (Tas) Part 4, Division 2.

⁸ *Anti-Discrimination Act 1998* (Tas) s 16(a)–(s). The Tasmanian Act specifies 22 attributes on which it is unlawful to discriminate.

⁹ *Anti-Discrimination Act 1998* (Tas) s 101.

in the observance or practice of a particular religion is a genuine occupational qualification or requirement in relation to the employment.

- (2) A person may discriminate against another person on the ground of religious belief or affiliation or religious activity in relation to employment in an educational institution that is or is to be conducted in accordance with the tenets, beliefs, teachings, principles or practices of a particular religion if the discrimination is in order to enable, or better enable, the educational institution to be conducted in accordance with those tenets, beliefs, teachings, principles or practices.

51A. Admission of person as student based on religion

- (1) A person may discriminate against another person on the ground of religious belief or affiliation or religious activity in relation to admission of that other person 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.
- (2) Subsection (1) does not apply to a person who is enrolled as a student at the educational institution referred to in that subsection.
- (3) Subsection (1) does not permit discrimination on any grounds referred to in section 16 other than those specified in that subsection.
- (4) A person may, on a ground specified in subsection (1), discriminate against another person in relation to the admission of the other person as a student to an educational institution, if the educational institution's policy for the admission of students demonstrates that the criteria for admission relates to the religious belief or affiliation, or religious activity, of the other person, the other person's parents or the other person's grandparents.

52. Participation in religious observance

A person may discriminate against another person on the ground of religious belief or affiliation or religious activity in relation to –

- (a) the ordination or appointment of a priest; or
- (b) the training and education of any person seeking ordination or appointment as a priest; or
- (c) the selection or appointment of a person to participate in any religious observance or practice; or
- (d) any other act that –
 - (i) is carried out in accordance with the doctrine of a particular religion; and

- (ii) is necessary to avoid offending the religious sensitivities of any person of that religion.

Again, I am not aware of any complaints in which any of these exceptions have been raised by a respondent as a defence to a complaint.

The Tasmanian Act also contains general exceptions. These permit discrimination in the following circumstances:

23. Charities

A person may –

- (a) include a discriminatory provision in a document or instrument that provides exclusively for charitable benefits wholly or partly for persons with a prescribed attribute; and
- (b) do any act that is required to give effect to that provision.

24. Actions required by law

A person may discriminate against another person if it is reasonably necessary to comply with –

- (a) any law of this State or the Commonwealth; or
- (b) any order of a commission, court or tribunal.

25. Disadvantaged groups and special needs

A person may discriminate against another person in any area if it is for the purpose of carrying out a scheme for the benefit of a group which is disadvantaged or has a special need because of a prescribed attribute.

26. Equal opportunities

A person may discriminate against another person in any program, plan or arrangement designed to promote equal opportunity for a group of people who are disadvantaged or have a special need because of a prescribed attribute.

Incitement

Section 19(d) of the Tasmanian Act make it unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of a person or group of persons on the grounds of religious belief or affiliation or religious activity.

During 2016-17, 6 complaints received by my Office alleged incitement to hatred, serious contempt or severe ridicule on the basis of religious belief, affiliation or activity.¹⁰

The Act contains an exception (defence) to an allegation of incitement:

55. Public purpose

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

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

There is one case in which this defence was raised.

¹⁰ Equal Opportunity Tasmania, *Annual Report 2016-17* p36.

International law

The rights to freedom of thought and conscience, and of religion and belief are well recognised in international law.

Article 2 of the *Universal Declaration of Human Rights* (the *Universal Declaration*) deals with the human right to be free from discrimination on a number of bases, including religion.¹¹

Additionally, article 18 of the *Universal Declaration* provides that ‘everyone has the right to freedom of thought, conscience and religion’.

These rights and freedoms are given formal legal effect in articles 2 and 18 of the *International Covenant on Civil and Political Rights* (ICCPR) in similar terms:

Article 2

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

...

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.

...

The ICCPR also provides that:

- advocacy of religious hatred which amounts to incitement to discrimination, hostility or violence must be prohibited by law (article 20)
- everyone is entitled to equality before the law and equal protection of the law without discrimination on the ground of religion among other grounds (article 26), and
- minority groups are entitled to profess and practice their own religion (article 27)

¹¹ *Universal Declaration of Human Rights* GA res 217A, 3rd sess, 183rd plen mtg, UN Doc A/810 at 71 (1948).

Australia is a State Party to the ICCPR, having ratified it in 1980.¹² This means Australia is obliged to promote, protect and fulfil the rights contained in the Covenant.

The *Declaration on the Elimination of All forms of Intolerance and of Discrimination based on Religion or Belief* proclaimed by the UN General Assembly elaborates on Article 18 of the ICCPR.¹³

The right to freedom of religion and belief is, however, not an absolute right and may be limited.

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's one belief**, which may legitimately be subject to reasonable limits.¹⁴

Article 18(3) of the ICCPR gives expression to this principle:

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.

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.

This is of particular significance given the role that religious organisations play in the delivery of educational and other services and their role as a major employer and provider of public services within communities, including in Australia. Whereas in private people should be largely free to practice their religion and religious beliefs, in the public sphere it is important to ensure the infringements of other rights do not occur as a result the manifesting of religious or other beliefs.

Faith-based organisations are major providers of educational services and are responsible for the running and management of many independent schools in Australia. Similarly, religious organisations are often major providers of social services such as hospitals, aged-care facilities and employment agencies. Whereas in some circumstances it is considered appropriate that the

¹² *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, GA Res 2200A (XXI), 999 United Nations Treaty Series 171, Australian Treaty Series 1980 No 23, UN Doc A/6316 (1966) (entered into force 23 March 1976, entered into force for Australia 13 November 1980, except Article 41 which entered into force on 29 January 1993).

¹³ United Nations General Assembly, *Declaration on the Elimination of all forms of Intolerance and Discrimination based on Religion or Belief* (adopted 25 November 1981) UNGA A/RES/36/55

¹⁴ Human Rights Committee, *General Comment 22, Article 18* (48th session, 1993) UN Doc HRI/GEN/1 Rev 1 at 35 (1994) [3]–[4].

providers and recipients of those services share the same faith as the religious body under whose auspices the service is provided, this will not always be the case.

So, for example, while it is permissible for a religion to require that a person who is seeking to oversee or lead the rites and/or rituals of that religion must share the tenets, beliefs, teachings, principles and practices of that religion, it is not readily arguable that a person employed as a cleaner or gardener for an organisation run by that same religion should share the tenets, beliefs, teachings, principles and practices of that religion. Under discrimination law, the concept of genuine occupational qualifications or requirements is to be used to determine reasonable limits beyond which such restrictions or requirements should not apply.

Nor is it appropriate for an organisation that is a provider of services run by a religion to limit the provision of those services based on irrelevant considerations or reference to irrelevant personal attributes such as a person's sex, disability, race, sexual orientation or gender identity.

It is important therefore that where the views of religious organisations are given preference this is done in the way that is least restrictive of the rights of others within the community.

The way in which these considerations are taken into account has been given considerable attention in international and national law.

In relation to national law, for example, criteria based on well-established legal principles has been adopted by the Parliamentary Joint Committee on Human Rights to determine whether and in what way a human right can be limited.¹⁵ These criteria provide that a right may be limited in circumstances where the limitation¹⁶:

1. is **prescribed by law** and has a clear legal basis;
2. is necessary in pursuit of a **legitimate objective**;
3. is **rationally connected** to the legitimate objective (the limitation must not be arbitrary, irrational or ineffective);
4. is **proportionate** to the objective being sought (least restrictive);
5. is **not retrogressive** (does not take deliberate steps backward that negatively affect the enjoyment of established rights).

The framework for applying these principles is clear. To determine whether any limitation on the rights of an individual or group of individuals is justified, it is necessary to establish the importance of the right being interfered with, the reason for the interference, whether it is a legitimate reason

¹⁵ Parliamentary Joint Committee on Human Rights, Commonwealth, *Guidance No. 1: Drafting statements of compatibility* (2014).

¹⁶ Ibid.

and whether the limit is rationally connected to that reason. It is also necessary to ask whether a lesser degree of interference is available and, overall, whether the end justifies the means.¹⁷

For such limits to even be necessary, however, it is critical that there is a clear connection between the conduct and the doctrines of the religion.

Recognition of minority religious and non-religious views and groups

Protection against discrimination because of religious belief or affiliation and religious activity is not restricted to mainstream religious views.

Article 18 of the ICCPR, and discrimination laws that give effect to parts of it, are understood to protect 'belief' and 'religion' in very broad terms¹⁸:

Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms 'belief' and 'religion' are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The [United Nations Human Rights] Committee therefore views with concern any tendency to discriminate against any religion or belief for any reason, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility on the part of a predominant religious community.

Similarly, under the Tasmanian Act religious belief or affiliation is defined 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'.¹⁹

¹⁷ Lady Hale, 'Religion and Sexual Orientation: The clash of equality rights' (Paper presented at Comparative and Administrative Law Conference, Yale Law School, 7 March 2014).

¹⁸ Human Rights Committee, *General Comment 22, Article 18* (48th session, 1993) UN Doc HRI/GEN/1 Rev 1 at 35 (1994) [2].

¹⁹ *Anti-Discrimination Act 1998* (Tas) s 3.

Balancing rights in law and practice

Issues recently on the Federal Government's agenda and reforms proposed by the Tasmanian State Government to Tasmanian discrimination law provide examples of where a balance between rights and obligations under discrimination law were required to be considered. The following provides my views on these matters.

A factual summary of a complaint by Ms Martine Delaney received under the *Anti-Discrimination Act 1998* (Tas) is also provided as background for the Expert Panel.

Marriage Amendment (Same-Sex Marriage) Bill

In January 2017, Equal Opportunity Tasmania made a submission to the Senate Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill.²⁰

In that submission, we indicated support for provisions that permit a minister (or religious equivalent) of religion to refuse to solemnise a marriage on the basis that it is against the doctrines, tenets or beliefs of his or her religion. This approach would provide appropriate protection for formal religious processes for solemnising marriage where the religion does not embrace marriage other than between a man and woman.

The submission argued, however, that the way in which the proposed exemption applying to ministers of religion was drafted imported protections that were inordinately broad and should be amended. Of particular concern was the proposal that would permit a minister of religion to refuse to solemnise a marriage because of his or her 'conscientious' beliefs.

A conscientious belief is 'a belief that involves a fundamental and long-standing conviction of what is morally right or morally wrong (whether or not it is religiously based) and is so compelling that the person is duty bound to obey it'.²¹

The concept imports notions of morality as a basis for guiding behaviour. As noted above, these notions may or may not be grounded in religious belief.

It was our view that such a provision went well beyond what might be required to strike the right balance in the *Marriage Act*.

As outlined at the time, just as we would find it inappropriate to allow a minister of religion to refuse to marry two people of diverse racial background or to refuse to solemnise a marriage between divorcees based purely on their conscientious belief that the union was morally

²⁰ Anti-Discrimination Commissioner (Tasmania), *Submission to the Senate Select Committee on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill* (Equal Opportunity Tasmania, 2017) <http://equalopportunity.tas.gov.au/news_and_events/report_papers_submissions>.

²¹ Lexis Nexis, *Concise Australian Legal Dictionary* (5th ed, 2015).

inappropriate, so the union of a two people other than a man and women should not be subject to such a distinction in and of itself.

The proposed provision would have enable a minister of religion to refuse to solemnise a marriage between a two individuals of the same sex purely based on their moral objection to such a union. As we argued at the time this would take the proposed exception beyond the authority of religious bodies and the proper protection of freedom of religion. It would result in a situation where the personal moral views of individuals with diverse religious beliefs are able to override the moral and legal standards of society as a whole.

Further, we did not support exemptions being available to marriage celebrants to permit them to refuse to solemnise marriages because of a personal objection to same-sex marriage. Other than the civil celebrant satisfying him or herself of the legal right of the couple to marry, there should be no further exceptions available to those who conduct civil ceremonies. Civil celebrants are standing in the shoes of the state when they solemnise a marriage and, as such, should not be permitted to discriminate on any of the grounds protected under discrimination laws as these laws are an expression of the state's view.

To extend exceptions to the obligation to solemnise a marriage beyond that required to meet the religious obligations of ministers of religion (whose opposition to marriage is based on the doctrines, tenets or beliefs of religious bodies or organisations) goes beyond what is necessary to protect freedom of religion. Because it results in infringement of the right to equality and the right to freedom from discrimination, it fails to achieve an appropriate balance between these rights.

Such exceptions would institutionalise inequality before the law for same-sex individuals who wish to marry.

We expressed a strongly held view that Australia's civil legal framework should commence from a position of equality before the law and that any proposals to infringe or curtail those rights should be strictly limited to that which is necessary to meet the competing right of freedom of religion.

The Exposure Draft Bill proposed, for example, to permit a religious body or a religious organisation to refuse to make a facility available or provide goods or services for the purposes of solemnisation of marriage between two people (other than between a man and woman) or for purposes reasonably incidental to the solemnisation of such a marriage, if:

- a) the refusal conforms to the doctrines, tenets or beliefs of the religion of the religious body or religious organisation; or
- b) the refusal is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

To introduce such exemptions would perpetuate inappropriately discriminatory provisions in law in Australia. In our submission, we argued that the effect of the proposed provisions would be to enable religious bodies or organisations to discriminate against two people (other than a man and woman) who wish to use facilities or contract for the provision of services that are otherwise offered and available to the public by those bodies and organisations because the purpose of doing so is to get married.

An exception of this nature if adopted into law would see the Commonwealth interfere with state and territory laws by overriding those laws that prohibit discrimination in the provision of facilities, goods and services based on sexual orientation.

A florist or supplier of flowers, an organisation hiring out a hall, an organisation that provides cake-making services all would be able to refuse to provide that service or facility arguing they are a religious body or organisation and to provide that service or facility would:

- not conform with the doctrines of the religious body or organisation that runs or owns those services or manages those facilities;
- would impinge on the religious susceptibilities of adherents of that religion.

In summary, the extent to which religious groups should be exempt from discrimination law in order to protect religious freedoms is controversial and complex: defences that are too broad risk leaving people, including many lesbian, gay, bisexual, transgender or intersex Australians, with diminished protection against discrimination and related conduct with respect to services that are publicly offered and available to all other people in the community.

Amendment of the *Anti-Discrimination Act 1998 (Tas)*

In August 2016, the Tasmanian Government released a draft Bill which, among other things, proposed to introduce amendments to the Tasmanian Act that would ensure exceptions available under the Act applied in circumstances where an alleged breach of the incitement²² and prohibited conduct²³ provisions involved a public act done for religious purposes.

The inclusion of these provisions (without any other amendments), would have extended the grounds on which a respondent could assert that a defence applies if their conduct was found to have breached section 17(1) or section 19 of the Tasmanian Act.

The effect of the proposed changes would have been to allow, specifically for religious purposes, attribute-linked offensive, humiliating, ridiculing, insulting or intimidating public conduct, and permit public speech or actions that are capable of inciting hatred, serious contempt or severe ridicule on the basis of a person's race, disability, religious belief, affiliation or activity or sexual orientation or lawful sexual conduct.

If adopted the changes would have permitted a person to assert that their actions were based on religious views or doctrines—irrespective of how out-dated or inconsistent with a modern pluralist society, international laws or community standards—those views or doctrines might be.

²² *Anti-Discrimination Act 1998 (Tas)* s 19.

²³ *Anti-Discrimination Act 1998 (Tas)* s 17(1).

In responding to the draft Bill²⁴, my Office indicated that to privilege or give special status to acts done for religious purposes in this way represented a fundamental curtailing of the right to equality and the right to freedom from discrimination and would go well beyond what is necessary to protect freedom of religion or freedom of expression.

To privilege religious speech and actions in such a way suggests that the rule of law—the principle that every person and organisation, including government, is subject to the same law—should apply where a religious purpose can be argued. This would give special status to people of religion and religious organisations. As we argued at the time, to displace the rule of law to privilege religion in a secular state is a serious step indeed.

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

In effect, the provisions of the draft Bill would have privileged religious views in public debate without providing equivalent protections to those who challenge those views. In circumstances where a complaint is made by a person of faith against someone who has been critical of the views of a church or religious body, for example, the respondent to that complaint would be unlikely to be able to avail themselves of the defence. Protection would not be extended to those who held equally strong, but opposing, views to those of religious people.

While some may argue that this is consistent with freedom of expression, thought and belief, or freedom of religion, it was pointed out that the international human rights law framework does not make these rights paramount. As outlined earlier in this submission freedom of religion includes the right to ‘manifest one’s religion or beliefs’ is balanced by limitations necessary to protect the fundamental rights and freedoms of others.²⁵

Further, the internationally protected freedom of expression (found in article 19 of the ICCPR) is expressed as carrying with it ‘special duties and responsibilities’²⁶:

²⁴ Anti-Discrimination Commissioner (Tasmania), *Anti-Discrimination Amendment Bill 2016 released for consultation on 29 August 2016: Response of the Anti-Discrimination Commissioner (Tas)* (2016, Equal Opportunity Tasmania) < http://equalopportunity.tas.gov.au/news_and_events/report_papers_submissions>.

²⁵ *International Covenant on Civil and Political Rights*, Article 18. Opened for signature 19 December 1966, GA Res 2200A (XXI) (entered into force 23 March 1976, entered into force for Australia 13 November 1980).

²⁶ *International Covenant on Civil and Political Rights*, Article 19.

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

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

In many circumstances, there would insufficient information in a complaint to determine whether the alleged respondent is associated with a religious group or otherwise links the conduct to a religious viewpoint. This may be particularly so in circumstances where the views of religious proponents are deliberately presented in a way that minimises the author's link to a religious body or are presented from a 'non-religious' perspective.

The proposed Bill was ultimately rejected by the State's Upper House.

Complaint made by Ms Delaney

A complaint received under Tasmania's Anti-Discrimination Act against the Catholic Archbishop of Hobart, Julian Porteous, is often cited as an example of the overreach of discrimination law in relation to religious belief or activity.

For reasons of clarity, the following provides a summary of the factual matters in this case prepared by the former Anti-Discrimination Commissioner, Ms Robin Banks, to a question on notice from the Senate Select Committee public hearing on the Exposure Draft of the Marriage Amendment (Same-Sex Marriage) Bill in relation to the complaint made by Ms Martine Delaney.

Summary of complaint

On 28 September 2015, Ms Martine Delaney made a complaint under the *Anti-Discrimination Act 1998* (Tas) to the Commissioner about certain statements in a booklet, *Don't Mess with Marriage*, authorised by the Australian Catholic Bishops Conference and circulated in Tasmania with a letter from the Most Rev Julian Porteous, Archbishop of Hobart. In her complaint, Ms Delaney alleged these specific statements were in breach of the Act on the basis they offended, humiliated and insulted same-sex attracted people and the children of same-sex partners.

In particular, Ms Delaney asserted:

1. Use of the term 'friendships' to describe same-sex relationships as distinct to the relationship between a man and a woman are offensive, humiliating and insulting to same-sex attracted people because it implies that their relationships are devoid and incapable of the depth of love, intimacy, commitment and personal fulfilment found in a conjugal union.

2. That a statement in the booklet to the union of a man and woman in marriage ‘makes them whole’ implies same-sex attracted people can never be whole people, especially when viewed in light of the booklet’s main message: that they should not be able to marry.
3. Use of the phrase ‘messing with kids’ is deeply offensive to same-sex couples raising children because it is commonly used to discuss and imply the sexual abuse of children.
4. The booklet states marriage is a ‘fundamental good, a foundation of human existence’, associated with ‘social stability’. It also says allowing same-sex couples to marry will ‘destabilise marriage’ and ‘undermine the common good’. It was Ms Delaney’s view that the clear meaning is that same-sex attracted people and their relationships, and their aspiration to be treated equally, are inimical to all that is good, and are threatening to not just Catholic doctrine, but to the very fabric and future of humanity.

Basis on which the complaint was accepted

Ms Delaney’s complaint was accepted on the basis that the allegations disclosed a possible breach of section 17(1) of the *Anti-Discrimination Act 1998* (Tas). Section 17(1) of the Act makes it unlawful to engage in conduct that is offensive, humiliating, intimidating, insulting, or ridiculing on the basis of attributes, including sexual orientation.

Summary of the respondents’ view

The respondents to the complaint provided a joint response to Ms Delaney’s complaint on 17 November 2015. The response:

1. denied any offensive, humiliating, intimidating, insulting or ridiculing conduct on the basis of sexual orientation in connection with education and training against the complainant or the class of same-sex attracted people;
2. indicated that the distribution of the document, *Don’t Mess With Marriage*, was done in good faith and in the public interest;

Conciliation processes

A process of conciliation was undertaken in relation to the complaint as provided under the Act. Two conciliation meetings were held: on 16 December 2015, and on 18 March 2016. Discussions were conducted in good faith and in a way that was open and respectful of the views of all parties. Proposals for possible resolution were considered by the parties both at the conciliation meetings and out of session (during periods of adjournment for that purpose).

Outcome

Agreement had not been reached on whether and in what terms amendments could be made to the booklet. On 5 May 2016, Ms Delaney withdrew her complaint.

No finding was made in relation to the complaint: it was neither upheld nor dismissed. No finding was made in relation to whether or not the defence available under section 55 of the Act applied

in the circumstances. These findings are a matter for the Tasmanian Anti-Discrimination Tribunal, which did not consider this complaint due to its withdrawal.

Strengthening protections for religious freedom

During the parliamentary debate over amendment to the Marriage Act, advocates for the greater protection of religious freedom in Australia referenced the need to incorporate Article 18 of the ICCPR into national law.

This view echoes many submissions made to relevant committees including most recently to the Joint Standing Committee on Foreign Affairs, Defence and Trade's Inquiry into the Legal Foundations for Religious Freedoms in Australia.²⁷

Any recommendations to separately legislate the provisions of Article 18 should take into account all of the rights and responsibilities contained within the ICCPR, not simply those contained in Article 18.

Human rights are interdependent and indivisible and a piecemeal approach threatens the effective implementation of the full suite of rights available to all individuals.

Whilst I am supportive of greater protections on the basis of religion or belief under federal anti-discrimination law, I consider that this matter would more properly be considered as part of the introduction of broader protections for human rights through the enactment comprehensive national human rights legislation.

Australia is the only western democracy without a national Human Rights Act or Bill of Rights. Enactment of comprehensive human rights legislation would act to ensure that all of Australia's obligations under international law, including those protecting the rights of individuals to hold and manifest religious views and beliefs, are protected.

This approach would be consistent with the most recent recommendations of the United Nations Human Rights Committee which has called for the adoption of 'comprehensive federal legislation giving full legal effect to all Covenant provisions across all state and territory jurisdictions' to address the gaps in the application of Covenant rights.²⁸

It was also the option preferred in submissions and public hearings undertaken as part of the Joint Standing Committee on Foreign Affairs, Defence and Trade's Inquiry into the Legal Foundations for Religious Freedoms in Australia.²⁹

²⁷ Joint Standing Committee on Foreign Affairs, Defence and Trade, *Interim Report: Legal Foundations for Religious Freedoms in Australia* (November 2017, Canberra)

²⁸ Human Rights Committee, *Concluding Observations on the sixth periodic report of Australia*, UN Doc CCPR/C/AUS/CO/6 (9 November 2017) 2 [5 & 6]

²⁹ Joint Standing Committee on Foreign Affairs, Defence and Trade, *Interim Report: Legal Foundations for Religious Freedoms in Australia* (November 2017, Canberra) p69.