

COMMUNITY LEGAL CENTRES TASMANIA

12 September 2016

Office of Strategic Legislation and Policy
Department of Justice
GPO Box 825
Hobart TAS 7001
Attn: Catherine Vickers

Dear Catherine,

Re: Anti-Discrimination Amendment Bill 2016

Community Legal Centres Tasmania (CLC Tas) welcomes the opportunity to provide comment on the *Anti-Discrimination Amendment Bill 2016*.

CLC Tas is the peak body representing the interests of eight community legal centres (CLCs) located throughout Tasmania. We are a member-based, independent, not-for-profit and incorporated organisation that advocates for law reform on a range of public interest matters aimed at improving access to justice, reducing discrimination and protecting and promoting human rights.

We strongly oppose the proposed amendments. However, given the Government's short consultation period, our focus is limited to the amendment to section 55 of the *Anti-Discrimination Act 1997 (Tas)* ('the Act').

In short, we strongly believe that amending section 55 of the Act is both unnecessary and dangerous. Our submission outlines the current law, highlighting three defences available to respondents, including the reasonable person defence, the public purpose defence and the implied freedom of political communication. We then go on to outline why the Bill is dangerous, arguing that the proposed amendments will provide a platform for persons with a religious purpose to discriminate and/or incite hatred against minority groups including women, the disabled and the LGBTI community.

A brief summary of the Anti-Discrimination Act 1997 (Tas) and the defences available

Section 17(1) of the Act prohibits conduct which "offends, humiliates, intimidates, insults or ridicules another person on the basis of [a range of attributes including] sexual orientation". In order to be unlawful, the court must then be satisfied "that a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed". Applying the 'reasonable person' test to the conduct requires there to be objective consideration, answered by reference to what a reasonable person would

have anticipated in all of the circumstances.¹ A reasonable person's perspective is to be assessed in the role of a hypothetical observer.² Applying the first of the three defences available, respondents are able to argue that the conduct the subject of the complaint is not of a degree that would offend, humiliate, intimidate, insult or ridicule the reasonable person.

Section 19 of the Act then goes on to provide that a person must not "incite hatred towards, serious contempt for, or severe ridicule of, a person or a group of persons on the grounds of... the sexual orientation or lawful sexual activity of the person or any member of that group".

If complaints are made under section 17(1) or 19 of the Act, a 'public purpose' defence is provided in section 55 which relevantly provides:

55. Public purpose

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

...

(c) a public act done in good faith for –

(i) academic, artistic, scientific or research purposes; or

(ii) any purpose in the public interest.

In weighing up the competing interests contained in the defence, Tribunal Member Otlowski in the recent Tasmanian decision of *Williams v Threewisemonkeys and Durston* repeated observations made in a number of other cases about the balancing act required:³

s55... reflects the compromise between the boundaries of inappropriate and unacceptable areas of public conduct and freedom of expression as a fundamental tenet of the common law.

The tension between these boundaries has given rise to a large body of case law from which it is clear that conduct will be held to be in the public interest where:

- It is reasonable, by bearing a rational relationship to the activity;⁴
- It is not disproportionate to what is necessary to carry it out;⁵
- There is good faith – i.e. a belief that the act is necessary or desirable;⁶
and
- It relates to a public act.⁷

¹ *Kraus v Menzie* [2012] FCA 3 at [22].

² *Leslie v Graham* [2002] FCA 32 at [70].

³ [2015] TASADT 4. References acknowledged in quote have been removed. Also see *Wood v Gerke and Samjack Pty Ltd* [2007] TASADT 03 and *Brinkley v Davies Bros Ltd* [2008] TASADT 07.

⁴ *Sunol v Collier (No 2)* [2012] NSWCA 44 at [41].

⁵ *Sunol v Collier (No 2)* [2012] NSWCA 44 at [41].

⁶ *Bropho v Human Rights & Equal Opportunity Commission* (2004) 135 FCR 105 at [197].

One of the more contestable elements of the above test is whether the conduct amounts to an action 'in good faith'. In *Bropho v Human Rights and Equal Opportunity Commission*,⁸ the Federal Court of Australia held that good faith will be established "if it is shown that the defendant engaged in the conduct with the subjectively honest belief that it was necessary or desirable to achieve the genuine religious purpose".⁹ However, the question of whether a person's genuine religious belief makes it necessary for them to discriminate must be determined objectively, as Neave JA observed in the Supreme Court of Victoria Court of Appeal decision of *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd*:¹⁰

If necessity were determined subjectively, genuinely held religious beliefs would always trump the right of individuals to be free from discrimination on prohibited grounds.

A recent example of the application of these principles was Tribunal Member Otlowski's decision in *Williams v Threewisemonkeys and Durston*¹¹ in which a gay man filed a complaint in relation to a pamphlet entitled 'Homosexuality Stats' that was published and distributed to more than 3000 households in Hobart in 2013. The pamphlet stated that 'homosexuality should not be tolerated' and that 'Scripture rejects homosexuality as utterly abominable' and set out alleged statistics on lifespan expectations and causes of death for gay men and lesbians compared to heterosexual men and women. The statistics stated that that homosexual men without AIDs will live to 42, and lesbian women will live to 43, in comparison to their heterosexual counterparts who live into their 70s.

In her decision Tribunal Member Otlowski found that, despite the public purpose defence and the Australian Constitution's right to freedom of religion,¹² the publishing and distributing of the pamphlet was prohibited conduct that amounted to a breach of sections 17(1) and 19 of the Act. This was because the statistics 'clearly could not be substantiated' and incited hatred because the pamphlet's intention is 'to warn people away from homosexuality which... is rejected by the Scriptures as "utterly abominable"'.¹³

The decision in *Williams v Threewisemonkeys and Durston* and similar cases decided by Tasmania's Anti-Discrimination Tribunal provide no cause for concern that

⁷ Section 3 of the *Anti-Discrimination Act 1998* (Tas) defines 'public act'. Equal Opportunity Tasmania materials describe a public act as including 'actions other people can hear or see, and include displaying or sending out information to other people, whether by distributing leaflets, posting billboards, commenting on radio or television, or posting comments online': Equal Opportunity Tasmania, 'Inciting Others – Stirring up hatred or ridicule is not okay – know where the line is.

⁸ (2004) 135 FCR 105.

⁹ *Bropho v Human Rights & Equal Opportunity Commission* (2004) 135 FCR 105 at [197].

¹⁰ *Christian Youth Camps Ltd & Ors v Cobaw Community Health Services Ltd v Ors* [2014] VSCA 75 at para. [425] per Neave JA. Also see the remarks in *Bull v Hall* [2014] 1 All ER 919 at [278] per Lady Hull; *Christian Education South Africa v Minister of Education* (1999) 2 SA 83 at [35] per Sachs JA and *Ontario Human Rights Commission v Brockie* [2002] 222 DLR (4th) 174 at [42].

¹¹ [2015] TASADT 4.

¹² Section 116 of the *Commonwealth of Australia Constitution Act 1900*.

¹³ *Williams v Threewisemonkeys and Durston* [2015] TASADT 4 at paras. [28] and [35].

persons with a religious purpose armed with the facts rather than unsubstantiated assertions will not be able to speak freely during the proposed plebiscite.

As well as the defences available under the Act, there is also the implied constitutional freedom of political communication, which has been recognised as including the expression of an opinion relating to the debate on human sexuality. Importantly, defences often relied on in an anti-discrimination setting including 'in good faith' and 'in the public interest' should recognise the freedom, as Allsop P observed in the New South Court of Appeal decision of *Sunol v Collier (No 2)*:¹⁴

The recognition of the implied Constitutional freedom does mean, however, that the words "reasonably", "in good faith" and "other purposes in the public interest" should take into account the important Constitutional freedom to discuss matters of wide public interest that may be related to political and governmental matters.

One of those subject matters for discussion in our society, potentially affecting the workings of the Commonwealth Parliament, is human sexuality and the rights of people in Australia connected therewith. Topics such as marriage, adoption and superannuation readily come to mind. Some of the debate that surrounds these issues contains expressed or unexpressed assumptions or predicates about the rightness or wrongness of certain sexual orientations. That these assumptions or predicates may have been settled for many, if not most, in our community some years ago, cannot deny the existence of social and political debate about these issues.

We reiterate that there are a number of defences already available under both the *Anti-Discrimination Act 1997 (Tas)* and the *Commonwealth of Australia Constitution Act 1900* that persons with a religious purpose would be able to rely on during the proposed plebiscite on marriage equality. While the existing exemptions do place some restrictions on the type of commentary that can be expressed, such restrictions are designed to achieve balance and are not so restrictive as to prevent free and fair commentary, and open public debate.

Amendments tip the balance too far in favour of discrimination

As well as the case law demonstrating no case for reform, we are also concerned at the broadening of section 55 of the Act to include a 'religious purpose'. In our opinion the current exemptions which apply to academic, artistic, scientific or research purposes, as well as any purpose in the public interest strikes the right balance. We do not believe that the 'conveying, teaching or proselytizing [of] a religious belief' should provide an exemption to discriminatory conduct and/or inciting hatred. Alarming, the passing of this amendment will provide a platform for religious organisations to discriminate and/or incite hatred against minority groups including women, the disabled and the LGBTI community.

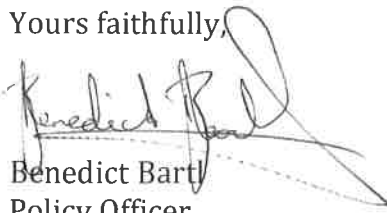
In summary, we cannot support the proposed amendments to section 55 of the Act. The Government has repeatedly stated that the amendments are an attempt

¹⁴ [2012] NSWCA 44 at [64]-[65] per Allsop P.

to 'strike the right balance'¹⁵ but have failed to provide any evidence of weakness in the current legislative provisions. No case law. No egregious outcomes. No obvious reason for concern. Further, in our view, the haste with which these reforms are being introduced is premature, particularly given the uncertainty around whether a plebiscite on marriage equality will even take place. However, of most concern is that the proposed amendment will weaken the protections provided to minority groups and allow persons with a religious purpose to engage in conduct that offends, humiliates, intimidates or ridicules another person and/or incite hatred against another person.

If you have any queries or we can be of any further assistance, please do not hesitate to contact us.

Yours faithfully,



Benedict Bartl
Policy Officer

Community Legal Centres Tasmania

¹⁵ For example, see Will Hodgman's comments that the proposed amendments "will provide for genuine protection of freedom of religion during public debate by striking a fairer balance between the right to free speech and the need to protect people from unlawful conduct": *Hansard*, House of Assembly, Wednesday 17 August 2016. Also see Attorney-General Vanessa Goodwin's comments that "the proposed changes seek to strike the right balance between providing protection from discrimination and unlawful conduct, while still allowing for genuine public debate and discussion on important issues": Media Release, *Anti-Discrimination Act changes released for consultation*, 25 August 2016.