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## Australian Lawyers for Human Rights

### Submissions: Anti-Discrimination Bill 2016 (Tas)

#### Introduction

Australian Lawyers for Human Rights (ALHR) is pleased to provide this submission in relation to the proposed amendments to the *Anti-Discrimination Act 1998* (“the Act”) as set out in the *Anti-Discrimination Amendment Bill 2016* (“2016”) and tabled in Parliament on 20 September 2016.

The Bill if passed will substantially diminish the protections offered by the Act to people in minority groups. It will not “achieve an appropriate balance between providing protection from discrimination and unlawful conduct whilst allowing for genuine public debate and discussion on important issues.”<sup>1</sup> The Bill will not protect vulnerable Australians from discriminatory behaviour.

When considering how the amendments will take practical effect, the group most immediately at risk is the LGBTQI community, given the ongoing public and political discussion with respect to same-sex marriage and a potential plebiscite on this topic.

However, the Bill goes further than this, as it removes the long-established protections of the Act for other minorities and vulnerable people. ALHR is also concerned about the impact of these changes not only on LGBTQI individuals, but also on people who may be discriminated against on the basis of race, gender, age, lawful sexual activity, disability, marital status, relationship status, pregnancy, breastfeeding, parental status, and family responsibilities.

ALHR submits that there is no need for the Bill. Some community groups, such as the Australian Christian Lobby, have argued that the current Act prevents or restricts free speech<sup>2</sup> and prevents genuine and meaningful debate on important issues such as same sex marriage<sup>3</sup>. ALHR submits that these arguments are not persuasive, and that international law places a clear obligation on the State to limit discriminatory behaviour.

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<sup>1</sup> Department of Justice call for Community Consultation, 26 August 2016, <http://www.justice.tas.gov.au/community-consultation>, accessed 22 September 2016

<sup>2</sup> Australian Christian Lobby, Mark Brown “Why Free Speech Must be Allowed Outside Church Walls” 21 September 2016, [http://www.acl.org.au/why\\_free\\_speech\\_must\\_be\\_allowed\\_outside\\_church\\_walls](http://www.acl.org.au/why_free_speech_must_be_allowed_outside_church_walls), accessed 22 September 2016

<sup>3</sup> Ibid

## Recommendation

**ALHR submits that no change should be made to the *Anti-Discrimination Act 1998* (“the Act”) and urges you to reject the *Anti-Discrimination Amendment Bill 2016* (“2016) in its entirety.**

### 1. The Operation of the Act

ALHR endorses the submissions of the Law Society of Tasmania with respect to the current operation of the Act.<sup>4</sup>

In particular:

- There have been no decisions of the Anti-Discrimination Tribunal that raise issues that might require consideration of these amendments.
- The complaint that we understand gave rise to these amendments was made by Martene Delaney against the Archbishop of Hobart and the Australian Bishops Conference, and was ultimately withdrawn.
- The Act allows for a person to put their own views based on religious beliefs without being in breach of the Act.
- The existing test under section 17(1) is an objective one and already requires the full context of the conduct to be considered. It is only in circumstances where a reasonable person having regard to all the circumstances would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed that a breach of the Act would occur.
- The amendments are far-reaching and will enable a person or group to make comments that incite hatred, serious contempt or serious ridicule against a person or a group of people on the basis of sexual orientation, race, gender, marriage, disability, and more, without legal redress.
- The proposed amendments restate an existing objective test in the Act. That is, the Commissioner has powers to reject a complaint where the complaint does not relate to prohibited conduct.

### 2. International Law

The Act gives domestic effect to Australia’s international obligations and ought to be supported in its current form.

Australia is a party to the International Covenant on Civil and Political Rights (ICCPR). Article 9 protects freedom of expression. Article 19(3) contemplates limits to freedom of expression in the following terms:

“The exercise of the right [to freedom of expression] carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

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<sup>4</sup> Law Society of Tasmania *Anti-Discrimination Amendment Bill 2016*, letter to Department of Justice and Legislative Councillors, 15 September 2016

- (a) For the respect of the rights or reputations of others;
- (b) For the protection of national security or public order (*ordre public*), or of public health or morals.”

Human dignity has been described as the “foundational concept” of international human rights law<sup>5</sup>.

The ICCPR proclaims that the rights in the Covenant derive from the “inherent dignity of the human person”.<sup>6</sup> The *Universal Declaration of Human Rights* proclaims that all human beings are born free and equal in dignity and rights.<sup>7</sup> The Oxford Dictionary defines ‘dignity’ as “the state or quality of being worthy of honour or respect”. Human rights law recognises that everyone is inherently worthy of respect because they are human. A person has a fundamental right not to be “unjustly debased”.<sup>8</sup>

Section 17 of the Act protects a person from discrimination by virtue of a number of attributes<sup>9</sup>, many of which are qualities which are immutable and inherent to them as human beings. ALHR submits that the current provisions properly protect a person’s human dignity while still allowing public discourse on issues of importance, whereas the Bill provides inadequate protection and would leave individuals and minority groups open to unnecessary and unjust vilification, and amount to a breach of the State’s obligations pursuant to international law.

### 3. General effect of proposed changes

Section 17(1) of the Act prohibits a person from engaging in conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of an attribute referred to in section 16 of the Act “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.”<sup>10</sup>

To ‘humiliate’ is to injure a person’s dignity and self-worth.<sup>11</sup> UNESCO has described humiliation as an offence against human dignity.<sup>12</sup>

Section 19(1) of the Act prohibits the inciting of hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of race, disability sexual orientation or lawful sexual activity or religious belief or affiliation of that person. This provision in effect prevents hate speech.

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<sup>5</sup> Jack Donnelly, *Human Dignity and Human Rights*, June 2009, 3: [http://www.udhr60.ch/report/donnelly-HumanDignity\\_0609.pdf](http://www.udhr60.ch/report/donnelly-HumanDignity_0609.pdf)

<sup>6</sup> See Preamble to ICCPR and Preamble to the *International Covenant on Economic, Social and Cultural Rights*

<sup>7</sup> Preamble to *Universal Declaration of Human Rights*

<sup>8</sup> William A Parent, “Constitutional Values and Human Dignity”, *The Constitution of Rights: Human Dignity and American Values*, M. J. Meyer and W.A. Parent (Eds) Cornell University Press, Ithaca 1992,64

<sup>9</sup> race, age, sexual orientation, lawful sexual activity, gender identity, intersex, marital status, relationship status, pregnancy, breast feeding, parental status, and family responsibilities. See s17 Anti-Discrimination Act 1998 (Tas).

<sup>10</sup> Anti-Discrimination Act 1998 (Tas), s 17

<sup>11</sup> The *Oxford English Dictionary* defines “humiliate” as: “make (someone) feel ashamed and foolish by injuring their dignity and self-respect, especially publicly.”

<sup>12</sup> See preamble to UNESCO *Declaration on Race and Racial Prejudice*

Although the Bill would leave in place the prohibition on hate speech and conduct which humiliates, the proposed amendment to section 55(c)(i) would provide an exemption for those who would carry out such conduct on the grounds of religious purposes.

“Religious purposes” is defined by the Bill as “include[ing], but not limited to, conveying, teaching or proselytising a religious belief.”<sup>13</sup> The ALHR submits that this definition is open ended and capable of a very broad interpretation. It can be contrasted with the definition of “religious purpose” in New South Wales where the meaning is limited to religious discussion or instruction.

The Bill also proposes amendments to section 55(1)(c) of the Act by including the qualifying word “reasonably” so that an exemption would apply to “a public act done **reasonably** and in good faith...”<sup>14</sup>

The effect of the proposed changes is therefore to condone conduct that incites hatred against a person or a group of people, or to allow humiliating, offensive, intimidating, insulting or ridiculing behaviour where it is established that the person engaging in such behaviour did so reasonably, in good faith, and for religious purposes.

It is accepted and understood that a feature of a multi-cultural and multi-denominational society there will be a vast range of ideas, opinions and beliefs in relation to any given issue. The concern of the ALHR, however, is that some views have the potential to cause widespread hatred, humiliation, offence and intimidation which outweighs any benefits to be gained by the unrestricted sharing of those views.

The crux of any anti-discrimination law is to recognise that the rights of all persons to be free of humiliation, offence and intimidation is worthy of greater protection than the rights of individuals or organisations that would seek to persecute others on the basis of a certain genetic, social, cultural or physical trait.

The amendments will prevent many such individuals from having an effective remedy against violation of their right to reputation and human dignity, contrary to Article 2(3) of the ICCPR.

#### 4. Specific concerns in relation to LGBTQI Community

ALHR understands that the changes to the Act were instigated following a complaint by Martene Delaney to the Anti-Discrimination Tribunal after the publication and circulation of a pamphlet by the Catholic Church which espoused certain views on homosexuality and same-sex marriage (which, in the opinion of ALHR, contained homophobic content).

The topic of same-sex marriage has been a frequent topic of public debate which has only been amplified since the 2016 Federal Election, in which the Liberal Party pledged to hold a plebiscite to determine whether the Commonwealth Government should legislate to allow same-sex marriage. That debate is now twofold in that there is disagreement as to whether a plebiscite should proceed, in addition to the overarching discussion with respect to same-sex marriage.

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<sup>13</sup> Anti-Discrimination Amendment Bill 2016, section 4

<sup>14</sup> Ibid

Many public commentators, academics, politicians, legal professionals and other individuals have voiced opinions as the serious risks posed to LGBTQI individuals in the event that a plebiscite is to be held. Without intending to generalise, the ALHR views the crux of those concerns to be that the campaign against same-sex marriage is likely to cause humiliation, harassment, vilification, offence and intimidation to LGBTQI individuals, through the publication of information or beliefs which stigmatise, ridicule, belittle or persecute homosexuality and same-sex relationships.

ALHR's submission is that the current restrictions contained in the Act are sufficient to allow individuals and organisations to engage in genuine and meaningful public debate on any given topic and particularly in relation to same-sex marriage. This is evident in that the public debate in relation to same-sex marriage is already a fierce one. Religious organisations are able to make their opinions and beliefs known, and are able to circulate and publish these beliefs to the broader public beyond their own religious communities.<sup>15</sup>

The current Act does not contain any exemption for discriminatory conduct on the grounds of religious purposes and yet this does not appear to inhibit religious organisations from making their views known. ALHR suggests that the current legal framework ensures that individuals who, or groups which, hold views which may be controversial, unpopular or subjectively offensive (whether based in religion or not) publish these views with due regard for the language used, method of publication, and potential effects on other individuals or groups. To allow the Bill to pass would, in the submission of ALHR, remove this protection and create a floodgate issue and enable the publication of opinions which, although rooted in religious belief, have no factual or evidentiary basis, in circumstances where the person or group honestly believes those untrue or unsubstantiated claims to be true.

## 5. Free speech

The Bill has been promoted on the basis of the supposed desirability of allowing free speech. The Premier has been quoted as saying "We want the greatest quality and standard of free speech in Australia"<sup>16</sup>.

This is not a proposition shared by international law. As earlier stated, the right to freedom of expression carries with it the duty to respect the rights and reputations of others. It is not possible to have real freedom without equality and human dignity. Free speech is not supreme. It is not a superior right to any other human right.

Australia's Race Discrimination Commissioner put it well when saying:

...the marketplace of ideas can be distorted; it is not an arena of perfect competition, as economists might put it. We cannot realistically expect that the speech of the strong can be countered by the speech of the weak.<sup>17</sup>

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<sup>15</sup> For example see <http://www.acl.org.au/> where the Australian Christian Lobby regularly publishes articles and media releases which make its beliefs and political position clear.

<sup>16</sup> See 'Greens, Labor attack Government over proposed Anti-Discrimination Act changes', *The Mercury*, 21 September 2016.

<sup>17</sup> Tim Soutphommasane "Two freedoms: Freedom of expression and freedom from racial vilification" *Alice Tay Lecture in Law and Human Rights 2014* Australian National University, 3 March 2014.

ALHR submits that the Bill does not achieve this balance. It denies the weak from effective redress against speech that incites hatred and violence against them. It places the onus on the victim, the person who has been the subject of offensive and humiliating commentary, to establish that the comments have no factual basis and are not for a good faith purpose before a complaint can be accepted. It does not give effect to the social compact, enshrined in international law, that places a duty on all people to freely express their opinion while respecting the rights and reputations of others. This is not an unfair or onerous duty. It is one that all minority and majority groups ask of each other and a principle of international law that ought be respected.

## 6. About ALHR

ALHR, established in 1993, has extensive experience and expertise in the principles and practice of international law and human rights law in Australia. ALHR is a network of over 3,000 Australian lawyers, barristers, judicial officers and law students active in practising and promoting awareness of international human rights. ALHR has active National, State and Territory committees through which it conducts training, information dissemination, submissions and networking related to human rights both within, an external to, the legal profession.

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