

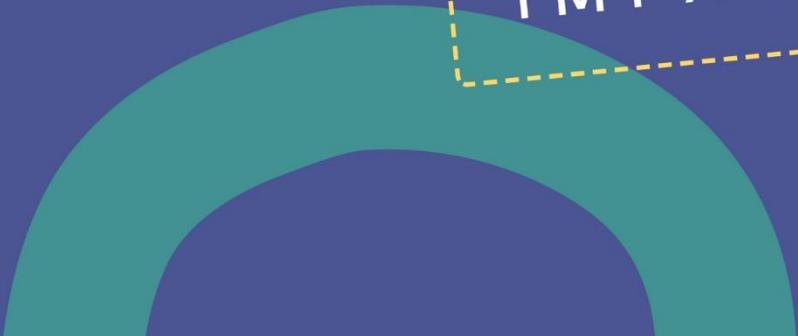


# Women's Health Tasmania

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Submission in response to The  
*Religious Discrimination Bill*

21<sup>ST</sup> DECEMBER 2021



EQUITY  
CHOICE  
IMPACT

## About Women's Health Tasmania

Women's Health Tasmania welcomes the opportunity to provide this submission on the *Religious Discrimination Bill 2021 (Cth)*.

Women's Health Tasmania (WHT) is a health promotion charity and part of a national network of women's health centres. It is guided by the World Health Organisation's definition of health – "Health is a state of complete physical, mental and social well-being, not merely the absence of disease or infirmity"<sup>1</sup>. WHT provides health and health promotion services, and policy advice on best practice gender-responsive service delivery.

WHT's vision is for Tasmanian women to be informed, supported and active decision-makers in their own health and well-being. As a result, WHT has also been a key advocate on issues such as a woman's right to make informed choices about their health. Our leadership has been evident in a wide range of health policy areas, in social justice and gender equity. WHT consistently responds to Commonwealth and State consultation processes on a range of legislation and policies impacting on women's health.

Our knowledge and expertise are based on 33 years' experience working with, and for, the women of this state.

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## 1. Introduction

Women's Health Tasmania supports making discrimination on the ground of religious belief or activity unlawful in all Australian jurisdictions as it is in our state under the *Anti Discrimination Act (Tas)*. While people are protected from this form of discrimination in Tasmania, we understand that they are not in New South Wales and South Australia and we support the development of national legislation to ensure this right is held by all Australian residents.

However, we have grave concerns about provisions in the *Religious Discrimination Bill* which endow some people with the positive right to behave in harmful ways.

WHT wrote submissions in response to the first two exposure drafts of the Bill. We appreciate that the Government has responded to some of the community concerns raised in relation to the first two exposure drafts of the Bill. However, serious concerns that were raised in our previous submissions remain. They are:

- The over-ride of all other anti-discrimination acts and unfettered right to statements of belief
- The over-ride of section 17 (1) of the Tasmanian Anti-Discrimination Act, by allowing statements of belief to be communicated which offend, humiliate, intimidate, insult or ridicule others.

## 2. Recommendations

- That this Bill be withdrawn and be replaced with legislation that provides protection to people with religious faith from direct and indirect discrimination on the basis of religious belief and activity, including having no religious belief, in line with Australia's existing anti-discrimination framework.
- Given the impact of the proposed Bill on Tasmanian legislation, and Tasmanian people we urge the Committee to provide the opportunity to a Tasmanian panel to speak to their concerns about the Bill.

## 3. Concerns about the Bill

This Bill goes far beyond ensuring the substantive right to religious freedom as it is outlined in international law. In this body of law the right to manifest a religion or belief covers the following types of conduct: the right to worship or assemble; to establish and maintain appropriate charitable institutions; to make, acquire and use the materials related to the rites or customs of one's religion; to write and publish about ones' religion; to solicit donations; to develop a leadership; to observe holidays and ceremonies.<sup>2</sup>

This Bill will create a legislative right to act or speak in workplaces and in public places in ways that cause distress and harm to other people, and which over-ride the fundamental rights and freedoms of others. This is contrary to international law.

The International Covenant on Civil and Political Rights, to which Australia is a signatory, recognises that 'that the right to manifest religious or other beliefs may be subject to limitations that are prescribed by law and necessary to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others.'<sup>3</sup> International humanitarian law belief freedoms ensure both freedom of, and freedom from, 'religion or belief'.

The Government has stated that the Religious Discrimination Bill has emerged from a long period of consultation, including the Inquiry into Religious Freedom and its subsequent report. However, a reading of the Report on the Inquiry into Religious Freedom raises questions about where key parts of the Bill have emerged from as that Review did not identify a need for the bulk of the provisions included in the Bill.

Clearly the Government is responding to pressure from somewhere. A reading of the published submissions to the Review reveals that those respondents advocating for religious ‘freedom’ had four main concerns – all of which have been responded to in some way in the various iterations of this Bill. They provide an insight into where people may seek to use the provisions to exercise ‘religious freedom’. They are:

- The existence of abortion clinic safe access zone laws in Tasmania, the ACT, the Northern Territory, Victoria and NSW
- The moves across jurisdictions to ban conversion therapy
- The existence of vaccination programs

The fourth main concern expressed by respondents is the legislative requirement in some states that doctors refer women seeking terminations to another practitioner if they have a conscientious objection to abortion. While the Government has removed the unworkable conscientious objection provisions which were found in the first two exposures drafts, the Religious Discrimination Bill in its current form will give licence to health practitioners to make statements of belief to patients, and it will stop qualifying and authorising bodies from regulating for gold-standard patient centred care, potentially creating a barrier to safe, dignified, consistent abortion care for women in Australia.

#### 4. Section 7 - Religious bodies

The Bill provides that ‘religious bodies’ – including religious schools, religious charities and welfare organisations, and organisations organised around faiths that deliver commercial services – have human rights and have the right to discriminate on the basis of religious belief.

This is problematic for two reasons. Firstly, it gives entities human rights, rights commonly understood to be inherent to being a human being. Entities will have the right to over-ride the human rights of the organisations they have formed to serve – their parishioners, students, patients and clients.

Secondly, as the Australian Human Rights Commission has pointed out: “this is a wide exemption that undercuts protections against religious discrimination, particularly in the areas of employment and the provision of goods and services”. The Bill gives these entities the right to give preference to persons that share their religion. This preference could be in the receipt of services in some instances, meaning that parts of the population could potentially be denied or alienated from essential services. The Bill makes no reference, for example, to the Emergency Relief distribution system ‘the safety net under the safety net’ (of the income support system). The Emergency Relief system is a complex one, heavily subsidised by the Commonwealth and predominantly delivered by faith-based agencies. Its resources are limited and in high demand. Services could use religious belief as a reason to exclude clients who are not members of their religion or give it as the reason they are excluding a client, when the real reason is an otherwise unlawfully discriminatory one.

In addition, entities, including religious hospitals, aged care facilities, disability service providers and accommodation providers will also be able to take religion into account in staffing decisions. This has widespread implications for the delivery of health and welfare services, particularly in the large disability and aged services sector – much of which is provided by faith-based agencies.

This has widespread employment implications. In Tasmania, for example, around 18,000 workers are employed in the not-for-profit sector, many in faith-based agencies. It also has implications for clients who are not members of the religion providing the service but who will be dealing not with staff who have been selected for their religious belief.

## 5. Section 12 (1) – ‘statements of belief’

Section 12 of the Religious Discrimination Bill does away with existing anti-discrimination protections, including on the grounds of face, religion, sex, marital status, disability, sexual orientation, gender identity and intersex status. Section 12(2) states that the legality of statements of belief does not apply to a statement of belief that is malicious, threatens, intimidates, harasses, or vilifies a person or group.

This blanket protection of statements of belief is contrary to international law, as described in section 2 of this submission. The Bill gives a positive right to make statements or engage in communications in accordance with one’s religious belief even when these statements would currently be unlawful under current Anti-Discrimination legislation. By over-riding the nation’s body of anti-discrimination law to give some people the right to manifest their beliefs, the Religious Discrimination Bill removes the human rights of others to protection from discrimination.

The outcome of this will be that people who are vulnerable to discrimination will no longer have protection from statements or acts which fall just short of the bar of ‘malicious, harassing, threatening, intimidating, or vilifying’. The legislation says that “A moderately expressed religious view that does not incite hatred or violence would not constitute vilification.”

This would encompass a great deal of distressing behaviour and statements and it will leave those who make complaints about such behaviour, or who seek to limit it in their workplaces to protect staff vulnerable to charges of discrimination.

Further, a statement is protected if it is made in ‘good faith’ and in accordance with the speaker’s subjective understanding of their own beliefs/faith. As it is beyond the capacity of employers to objectively determine whether the statements are made ‘in good faith’, it will be left to expensive Federal court processes to determine the religious sincerity of statements/behaviour about which there have been complaints.

Spokespeople for the Bill have said the Religious Discrimination Bill only allows discrimination on the ground of religion, not sexual orientation, gender identity or relationship status etc. Unfortunately, the licence this bill will give to discrimination as has been inadvertently signalled by the Attorney-General.

*“In a statement, Attorney-General Michaela Cash’s office stressed that any decision to “preference” heterosexual applicants over gay applicants would need to be done under the guise of religious views, not purely sexual orientation.”<sup>4</sup>*

## 6. Section 12 (1)(b) The Tasmanian Anti-Discrimination Act

The *Religious Discrimination Bill* specifically over-rides subsection 17 (1) of the Anti-Discrimination Act 1998 of Tasmania.

The Bill says that statements of belief which are malicious, likely to harass, vilify, incite hatred or violence against another person or group of persons *will* be considered discrimination. This means discriminatory remarks which are humiliating, even intimidating, ridiculing, offensive, but are not a call to violence, cannot be the subject of a complaint.

Tasmania's Anti-Discrimination Act protects all Tasmanian residents from being subjected to behaviour which is objectively humiliating, intimidating, insulting, ridiculing or offensive. This has led to public conversations about the treatment of people with disabilities, people of different races, older people, women and LGBTIQ+ folk. In some rare instances, there have been mediated conversations managed through the Anti-Discrimination Commission's investigation process which have been reported to have been acceptable to both parties, and have been helpful in promoting the dignity and inclusion of groups at risk of marginalisation.

It is our belief that it is to this higher bar that any anti-discrimination or human rights legislation should be raised.

### **The balance between freedom of religion, freedom of speech and freedom from harm**

The Tasmanian Act provides the ability to speak about issues of faith. The Tasmanian Supreme Court has found that Section 17(1) does not infringe free speech or freedom of religion. James Durston, the author of an anti-gay flyer found by the Anti-Discrimination Tribunal to have breached section 17 and section 19 (incitement to hatred) of the Anti-Discrimination Act 1988 (Tas) appealed to the Supreme Court on the grounds that his free speech and freedom of religion were being infringed. Justice Brett found that sections 17 and 19 do not infringe these rights, and that they are valid under the Australian Constitution. He also concluded that freedom of religion and freedom of speech are not unfettered rights, and the Tasmanian Anti-Discrimination Act strikes the right balance between these rights and right of citizens to live free from hate.<sup>5</sup>

### **Section 17(1) is not open to subjective interpretation**

Section 17 (1) of Tasmanian Anti-Discrimination Act is not open to a subjective interpretation of offence, humiliation, intimidation, insult or ridicule. Section 17(1) does not simply allow someone to complain because they feel offended. Whether someone is "offended, humiliated, intimidated, insulted or ridiculed" must be something that would be anticipated by "a reasonable person". There are a growing number of court decisions establishing what a reasonable person would anticipate. These are cited in the Tasmanian Supreme Court decision on Durston (discussed above).

### **The importance of the Act in Tasmania**

The over-ride of the Tasmanian Act will affect all groups that make complaints under this section. The largest proportion of these are people with disabilities, the second largest is people from racial minorities and the third largest is women.

It has been pointed out by commentators that this is a risky way for the over-ride to be framed as

future Tasmanian Governments could introduce a new subsection reinstating the provision. The only effective way for the Australian Government to protect the over-ride would be to clearly state the legislation's real intention; statements made on the basis of religious belief which offend, humiliate, intimidate, insult or ridicule people vulnerable to discrimination are permissible under this Bill.

## 7. Section 15 – qualifying body conduct rules

The Bill contains the provision a qualifying body will be in violation of the law if it imposes a conduct rule on people seeking qualifications or authorisation that relates to standards of behaviour that is deemed by an individual to fetter their freedom of religion.

Qualifying bodies confer the professional qualifications necessary to practice essential professions such as medicine, nursing, psychology, law etc and regulatory bodies such as the Australian Health Professionals Regulation Agency (AHPRA) protect the public by monitoring of their members' conduct.

These bodies will be prevented from responding reasonably to students or members who make offensive, erroneous, insulting, distressing statements to patients or colleagues. The onus is not on the harm done to the patients or clients but on the right of the speaker to express their beliefs. This does not meet the higher bar described by the International Covenant on Civil and Political Rights.

## 8. Conclusion

Religious speech and other expressions of religious belief should not be absolutely protected at the expense of the human rights of other people. This principle is well established in international law.

In view of the serious concerns with the Bill, and the harm and social divisions it could cause, Women's Health Tasmania calls on the Government to withdraw this Bill and to introduce legislation designed purely to protect religious belief and activity (including having no religious belief or refusing to engage in religious activity) from discrimination. This could be done as a separate piece of legislation, or by adding religious belief as a protected attribute to existing anti-discrimination legislation.

## References

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<sup>1</sup> Constitution of the World Health Organisation, April 1948 <https://www.who.int/about/who-we-are/constitution>

<sup>2</sup> The Religious Freedom Review: Report of the Expert Panel, s1.46 – 1.49, <https://www.ag.gov.au/RightsAndProtections/HumanRights/Documents/religious-freedom-review-expert-panel-report-2018.pdf>

<sup>3</sup> The Religious Freedom Review: Report of the Expert Panel,, s 1.53 <https://www.ag.gov.au/RightsAndProtections/HumanRights/Documents/religious-freedom-review-expert-panel-report-2018.pdf>

<sup>4</sup> [New religious freedom laws gives schools right to reject gay teachers | news.com.au — Australia's leading news site](#)

<sup>5</sup> Durston v Anti-Discrimination Tribunal (No 2) [2018] TASSC 48 (4 October 2018) <http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/tas/TASSC//2018/48.html>