



Office of the Anti-Discrimination Commissioner

Celebrating Difference, Embracing Equality

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24 September 2008

Mr Len Armsby
Director
Legislation Development & Review
GPO Box 825
HOBART TAS 7001

Dear Mr Armsby,

Re: Review of the Complaints Handling and Dispute Resolution Provisions of the Anti-Discrimination Act 1998 – proposed exception for religious educational institutions

Thankyou for the opportunity for the Office of the Anti-Discrimination Commissioner (OADC) to comment on Recommendation 59 of the Review of the Complaints Handling and Dispute Resolution provisions of the *Anti-Discrimination Act 1998* (the Review). That is, that further consultation be undertaken on the question of whether the *Anti-Discrimination Act 1998* (the Act) should be amended to allow for educational institutions conducted in accordance with religious beliefs to discriminate against students who are not of the particular belief that the school promotes when students apply for enrolment.

The Review notes that the Catholic Archdiocese of Hobart proposed amendment of the Act to include the following exception:

It is not unlawful to discriminate on the ground of religious conviction in relation to the refusal to accept a person's application for enrolment as a student at an educational institution that is conducted solely or mainly for students of a particular religion.

At the outset, the OADC is concerned that the Catholic Archdiocese of Hobart made this proposal in the context of an administrative review of the Act and that it has been considered as part of the review. The proposal is clearly of a non-administrative character; it proposes a significant amendment to the substantive provisions of the Act.

The OADC is also concerned that the closing date for submissions is 10 October 2008 and that submissions have not been widely called for from the public. The proposal represents a significant encroachment on the application of the Act and we believe that extensive consultation should be undertaken.

The OADC does not support the proposed amendment to the Act.

By way of background, discrimination on the basis of religious belief or affiliation and religious activity in the area of education is unlawful under the Act. There are currently no exceptions relating to students' religious belief or affiliation.

Exceptions under the Act operate as a defence to complaints of discrimination. If a respondent demonstrates on the balance of probabilities that an exception is applicable, it is not unlawful discrimination. There are already many exceptions under Part 5 of the Act and the OADC is of the view that the existing exceptions provide adequate protection to respondents.

The OADC does not support the proposed amendment for the following reasons.

The proposed exception is inherently discriminatory, as it allows educational institutions to refuse to enrol students who do not adhere to the religious beliefs of the school. It is discriminatory on the basis of an applicant's religious belief or affiliation in the area of education and infringes on notions of equality.

Private schools are recipients of substantial public funding¹ and provide public services relating to education. The proposed exception entertains only that private schools and not public schools will be able to refuse applications on the basis of religious belief.

The OADC notes that Archbishop Doyle is reported in the media as saying that he is seeking to ensure that at least 75 percent of students at the proposed Catholic school in Kingston are Catholic² and that he intends to roll out the 75 percent baptised Catholic policy across the State after introducing it at the proposed school in Kingston.³

The 75 percent quota allows for the possibility that students who are not Catholic may be enrolled. However, this is still discriminatory because it enables Catholic students to be enrolled in preference to students not of that faith.

It is the OADC's view that this is contrary to the Tasmania Together 2006 Goals and Benchmarks, in particular Goal 5 – Vibrant, inclusive and growing communities where people feel valued and connected. Standard 6 of Goal 5 is to foster an inclusive society that acknowledges and respects our multicultural heritage, values diversity and treats everyone with compassion and respect.⁴

¹ In Tasmania, it has been estimated that the Tasmanian government pays a minimum of \$954 and a maximum of \$1307 per private primary school student and a minimum of \$1284 and a maximum of \$2405 per private secondary school student, Wilkinson, D., Denniss, R., and Macintosh, A., The Australia Institute, *The Accountability of Private Schools to Public Values*, Discussion Paper Number 71, August 2004, at 16.

² 'Tas Catholic Church pushes for changes to anti-discrimination laws', ABC Online, 29/04/2007.

³ Phillippa Duncan, 'Catholic bias to new school plan', *The Mercury*, 31 May 2007.

⁴ Tasmania Together Goals and Benchmarks 2006. Available at: http://www.tasmaniattogether.tas.gov.au/reports_and_papers/documents/site_documents/2007_05_07_61112_-Benchmarks_in_detail1.pdf.

It is also the OADC's view that the proposal is contrary to the National Goals for Schooling,⁵ in particular Goal 3:

3. Schooling should be socially just, so that:

3.1 students' outcomes from schooling are free from the effects of negative forms of discrimination based on sex, language, culture and ethnicity, religion or disability; and of differences arising from students' socio-economic background or geographic location.

It is also contrary to the recently released Draft National Declaration on Educational Goals for Young Australians,⁶ which states:

Promoting equity: a foundation for achieving our goals

To achieve these goals we must:

Provide all students with equality of opportunity to access and participate in high-quality schooling that is free from discrimination based on gender, language, sexual orientation, pregnancy, culture, ethnicity, religion or disability, and differences arising from students' socioeconomic background or geographic location.

In the Australia Institute's Discussion Paper *The Accountability of Private Schools to Public Values*,⁷ it was noted that the desire to promote a more tolerant and inclusive society has been enshrined in legislation and is an objective of the National Goals for schooling, but because of exceptions in some States that permit private schools to engage in discriminatory practices that are not permitted in public schools, it is often left to the management of each school as to whether it will engage in discriminatory behaviour.⁸

The Australia Institute's Discussion Paper noted "*While many private schools cultivate a religiously and ethnically diverse student body others do not, with some private schools designed to provide an education to particular religious or ethnic sub-groups of the population. This is often justified on the grounds of religious or cultural freedom or because children from predominantly non-Christian faiths may be inadvertently discriminated against in public schools. However, the creation of schools that are almost exclusively comprised of students and teachers from a single religious or ethnic group leads to a concern that these schools will be unable to promote a real understanding of difference, based on actual engagement with others, and that as a consequence society will be more divided*".⁹

⁵ Adelaide Declaration on National Goals for Schooling in the Twenty-First Century, 1999. Available at:

http://www.dest.gov.au/sectors/school_education/policy_initiatives_reviews/national_goals_for_schooling_in_the_twenty_first_century.htm#Goals.

⁶ MCEETYA, National Declaration on Educational Goals for Young Australians, 8 September 2008. The draft has been released for consultation with stakeholders and the community. Available at: <http://www.curriculum.edu.au/mceetya/natgoals,24767.html>.

⁷ Wilkinson, D., Denniss, R., and Macintosh, A., *The Australia Institute, The Accountability of Private Schools to Public Values*, Discussion Paper Number 71, August 2004.

⁸ *Ibid.* At 27.

⁹ *Ibid.* At 48.

Further, the Australia Institute's Discussion Paper referred to a Newspoll survey that asked respondents whether they believe it is good for children of different religions and ethnic backgrounds to mix at school. Ninety-six percent of respondents agreed with the statement.¹⁰ It was concluded that, "*The preference of some private schools to establish ethnically and religiously homogenous school environments has almost no support in the Australian community*".¹¹

If the proposed exception is enacted, a religious school will be able to refuse enrolment to any student that does not adhere to the religious beliefs held by the particular school. Whether or not students are accepted from other religions will be entirely up to the discretion of the particular school. This does not support or encourage diversity and inclusiveness. It is the OADC's position that it is necessary to support and encourage diversity and inter-faith relations to ensure an inclusive, not divisive, society.

Other potential ramifications of the exception are that applicants may be excluded for other discriminatory reasons. For example, although an applicant identifies with a particular religion, if he or she is gay, pregnant and unmarried, or has divorced parents or parents in a same-sex relationship, the school may argue that these circumstances are contrary to the tenets of its religion and may be refused enrolment. Again, it will be up to a particular school to determine how to assess whether an applicant adheres to the tenets of a particular religion.

Tasmania, due to its comparatively low population, does not have the same diversity of schools as on the mainland. In some regions, a Catholic school may be the only non-public school in the area, unlike Victoria and New South Wales where there are other religious schools, such as Jewish and Muslim schools. It is the OADC's view that restricting enrolment to students who adhere to the same beliefs as the school is likely to have greater impact on minority groups in regional areas.

The OADC also notes Archbishop Doyle's statement in *The Mercury* that the 75 percent policy would ensure a "*very strong Catholic ethos and vision*" in schools.¹² It is not necessary to restrict enrolments to students of the religious beliefs of the school to ensure a strong religious ethos and vision. Mixed-faith enrolments do not prevent the school from teaching and practising the tenets of the faith. In this regard, the OADC notes the decision of the England and Wales High Court in *The Governing Body of the London Oratory School, Richard John Adams, Harvy Kaye Goodliffe and Peter Charles John Lindsay v The Schools Adjudicator*.¹³ In considering an argument under Article 2 of Protocol 1 to the European Convention for the Protection of Human Rights,¹⁴ Jackson J stated as follows:

If the admissions process of the Oratory School is impaired, then this may lead to the admission of pupils with a lesser commitment to the Catholic faith. Over time this

¹⁰ Ibid. At 48.

¹¹ Ibid. At 49.

¹² Supra footnote 3.

¹³ [2004] EWHC 3014 (Admin).

¹⁴ That the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

*will have some effect on the overall make up of pupils at the School. Nevertheless, the Oratory School will still remain a Catholic school. Religious worship and other Catholic activities will be an important part of school life ...*¹⁵

The OADC also notes that a significant section of the non-Catholic community is enrolling children in Catholic schools. I note that on Archbishop Doyle's own account, about 40 percent of students in Tasmania Catholic schools are not Catholic.¹⁶ If Catholic schools are permitted to reject these enrolments, it brings into question whether the current number of Catholic schools will be viable. The OADC notes that the State Government has predicted a drop of 10,000 students in ten years due to demographic changes.¹⁷

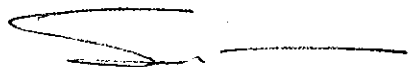
The OADC recognises that people have a human right to hold religious beliefs. However, people with religious beliefs are and should remain subject to Australian laws, including the Act. Unlawful conduct is not excused because the person holds a particular religious belief. For example, if an employer dismisses an employee who is unmarried and has a child because it is against the tenets of the employer's religion, this is unlawful discrimination and adherence to a particular religious belief cannot be pleaded in defence. Nor do other areas of the law confer more favourable treatment on the grounds of religious belief. A recent example is that of a parent who was charged and pleaded guilty to the manslaughter of her son after she omitted to obtain medical treatment for him on religious grounds.¹⁸

It is the OADC's submission that religious schools, which receive public funding and provide a public service, should not be treated more favourably than non-religious schools by enacting an exception to the Act to allow applications for enrolments to be rejected on the basis of the applicant's religious beliefs. This is especially so when the preferential treatment will result in the less favourable treatment of people on the ground of their religious belief, and potentially on the grounds of sexual orientation, pregnancy, marital status and relationship status.

In the event that a decision is made recommending the amendment of the Act to include such an exception, which the OADC strongly opposes, we would like the opportunity to make a further submission regarding the wording of any exception.

Please contact Ms Catherine Edwards, Complaints Manager, if you have any queries.

Yours sincerely,



Sarah Bolt
Anti-Discrimination Commissioner

¹⁵ At [54].

¹⁶ Supra footnote 3.

¹⁷ David Killick, 'Inner-city school shutdown', *The Mercury*, 18 April 2008. Available at: <http://www.news.com.au/mercury/story/0,22884,23559073-921,00.html>.

¹⁸ Caroline Berdon, 'Religious mother let 'emaciated' son die', *The Mercury*, 15 September 2008. Available at: <http://www.news.com.au/mercury/story/0,22884,24347160-922,00.html>.