



**Equal Opportunity
Tasmania**

Equal Opportunity Tasmania

Phone: 1300 305 062 (in Tasmania) or (03) 6165 7515

E-mail: office@equalopportunity.tas.gov.au

Office: Level 1, 54 Victoria St, Hobart TAS 7000

Post: GPO Box 197, Hobart TAS 7001

www.equalopportunity.tas.gov.au

Dr Brendan Gogarty
Acting Director – Tasmania Law Reform Institute
Faculty of Law
Private Bag 89
Hobart, TAS, 7001

By email: law.reform@utas.edu.au

Dear Dr Gogarty

Issues Paper 31 'Sexual Orientation and Gender Identity (SOGI) Conversion Practices'

Thank you for meeting with me recently to discuss possible reforms addressing sexual orientation and gender identity (SOGI) conversion practices in Tasmania. Please find my views outlined below.

I reiterate my view that SOGI practices undermine the principles of the *Anti-Discrimination Act 1998* (Tas) (the Act). As such, I support the development of law reform which furthers the objectives of the Act.

Existing law

The Act in its current form arguably enables a person to make a complaint if they are subject to SOGI conversion practices.

Section 14 of the Act sets out that direct discrimination is unlawful.

14. Direct discrimination

(1) Discrimination to which this Act applies is direct or indirect discrimination on the grounds of any prescribed attribute.

(2) Direct discrimination takes place if a person treats another person on the basis of any prescribed attribute, imputed prescribed attribute or a characteristic imputed to that attribute less favourably than a person without that attribute or characteristic.

(3) For direct discrimination to take place, it is not necessary –

**Celebrating Difference
Embracing Equality**

- (a) that the prescribed attribute be the sole or dominant ground for the unfavourable treatment; or
- (b) that the person who discriminates regards the treatment as unfavourable; or
- (c) that the person who discriminates has any particular motive in discriminating.

Sexual orientation, gender identity, as well as lawful sexual activity, are protected attributes¹ under the Act. If a person is treated less favourably on the basis of these attributes they can make a complaint of unlawful discrimination.

I note section 14(3)(b), that a person who discriminates does not need to regard the treatment as unfavourable. I consider this would be applicable to most situations where SOGI conversion practices take place.

Additionally, Issues Paper 31 'Sexual Orientation and Gender Identity (SOGI) Conversion Practices' (the Issues Paper) correctly identifies that a person can also make a complaint of prohibited conduct outlined in section 17(1) of the Act, and potentially section 20.

However, it is arguable that although a person may have grounds to make a complaint, in reality, this is unlikely. A significant barrier for individuals is the identification of the treatment they are subject to during SOGI conversion practices as being 'less favourable', let alone unlawful.

The same can arguably be said for prohibited conduct under section 17(1), where a person must subjectively feel offended, humiliated, intimidated, insulted or ridiculed in order to allege a breach of this provision.

SOGI conversion practices are generally presented to individuals as helpful, supportive and coming from a place of compassion, and the conduct is not framed as being harmful or detrimental to an individual's health. Additionally, as I understand it, such practices are generally recommended by people an individual trusts, further impacting their ability to identify the conduct as harmful.

At the time SOGI conversion practices are experienced they may not be interpreted as being injurious to a person. Evidence shows that the negative effects of such practices can emerge some years after experiencing them.

A person undergoing SOGI conversion practices would therefore experience certain barriers to seeking justice under the Act before even lodging a complaint, the first being identification of the conduct as potentially unlawful, and the second being

¹ *Anti-Discrimination Act 1998* (Tas) s16(c), s16(d) and s16(ea).

lodging the complaint within the time constraints set out under the Act (discussed further below).

I note the Issues Paper identifies the possibility of a hybrid approach to law reform. Any adoption of such approach will need to consider the likelihood of complaints actually being lodged in this jurisdiction. As it stands, despite that grounds to lodge a complaint already exist, my office has no record of a complaint being made where a person was subject to SOGI conversion practices.

While it is important people have the option to lodge a complaint if they wish to do so, a solely complaints-based system and reactive approach will not go far enough to protect the rights of people who may be subject to SOGI conversion practices and prevent them from harm.

Limitations of time

The Act places limitations on the Commissioner's ability to accept a complaint for investigation within a certain time period.

63. Time limit on complaints

- (1) A complaint is to be made within 12 months after the alleged discrimination or prohibited conduct took place.
- (2) The Commissioner may accept a complaint made after the 12-month time limitation has expired if satisfied that it is reasonable to do so.

As set out in the Issues Paper, evidence shows that SOGI conversion practices have long term negative effects, including guilt, shame, severe anxiety and depression, internalised homophobia and PTSD.² These effects all create barriers for a person lodging a complaint within 12 months. Identification of the conduct as being grounds for a complaint under the Act may take years.

The Commissioner's discretion to extend time can only be exercised where certain criteria is met. I consider that due to the barriers of identification outlined above, it may be more common for a complaint about SOGI conversion practices to be lodged out of time and for the Commissioner to be required to consider whether to exercise their discretion under section 63(2). This should not be the routine approach to complaints of this nature and should be considered in any proposed approach.

I also note that while a complainant may be experiencing the effects of the conduct on an ongoing basis, decisions in this jurisdiction have drawn a distinction between 'conduct' and the 'consequences of conduct'. In *Mazukov Ivan v University of Tasmania* [2005] TASADT 5, the Anti-Discrimination Tribunal held at [43]:

² Tasmania Law Reform Institute, *Sexual Orientation and Gender Identity Conversion Practices* (Issues Paper No 31, November 2020), 2.2.9.

Conduct or treatment will often have continuing consequences or an impact which continues to be felt by a complainant beyond the time when the conduct has occurred but that does not mean that the conduct is not concluded and the Act applies.

In *R v S* [2005] TASADT 1 at [31]-[33] the Anti-Discrimination Tribunal of Tasmania set out the relevant factors that I must consider when exercising my discretion to extend time available for lodging a complaint, with reference to relevant cases:

- The entire period, from the date of the alleged events to the date of lodging the complaint is to be explained, not just the period extending from the expiration of the 12-month date (*Ramadan v Legal Holdings* [2001] NSWCA 41) and there must be a satisfactory explanation for the delay (*Buderim Ginger Limited v Booth* [2002] QCA 177).
- Whether the delay was attributable to the acts or omissions of the complainant or his or her legal representatives, the respondent, or both (*Buderim Ginger Limited v Booth* [2002] QCA 177).
- The length of the delay (*Buderim Ginger Limited v Booth* [2002] QCA 177).
- Whether it would cause prejudice to the respondent (*Buderim Ginger Limited v Booth* [2002] QCA 177). Having to defend a matter long after the circumstances which gave rise to it have passed can be oppressive to a defendant (*R v S* [2005] TASADT 1).
- Once prejudice to the respondent is established, the limitation period should only be overridden in exceptional circumstances (*R v S* [2005] TASADT 1).
- The complainant bears the onus to make out a case for extension of time (*Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541).
- The merits of the complaint should not be used as a basis for an out of time decision (*McAulliffe v Puplick and Anor* (1996) EOC 92-800; *Buderim Ginger Limited v Booth* [2002] QCA 177).

Establishing a satisfactory explanation for the delay would present numerous difficulties. The complainant would need to explain why they didn't complain from the time of conduct, which may require them to disclose incredibly personal information before a complaint is accepted for investigation.

As a matter of natural justice, this information would be sent to the respondent(s) to make submissions on any prejudice they may experience if the Commissioner were to exercise her discretion to extend time.

In the event the complaint is not accepted for investigation, the information has been provided with no way for the complainant to achieve a remedy after the respondents have reviewed it and possibly acted upon the same.

I note that the Issues Paper identified that people while people have experienced SOGI conversion practices may have found them harmful, this does not necessarily

mean they wish to disconnect from their religious community.³ I am of the view that the current approach to extending time for a complaint under the Act may well risk a complainant's connection to their community.

It is also important to note that in *R v S* [2005] TASADT 1 at [52], the Anti-Discrimination Tribunal took the view that the time limitation in the Act has a specific purpose and should only be extended where it is reasonable to do so. A limitation period is the general rule; an extension provision is the exception to the rule (*Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541).

The Supreme Court of Tasmania took a similar view in *Bullard v Anti-Discrimination Tribunal* [2020] TASSC 15 at [25]:

25. Section 63 of the Act prescribes a limitation period which governs the acceptance of a complaint. A limitation period is arbitrary and fixed by parliament on policy grounds. In *Brisbane South Regional Health Authority v Taylor* [1996] HCA 25; (1996) 186 CLR 541, at 553 McHugh J explained this: "In enacting limitation periods, legislatures have regard to all these rationales. A limitation period should not be seen therefore as an arbitrary cut off point unrelated to the demands of justice or the general welfare of society. It represents the legislature's judgment that the welfare of society is best served by causes of action being litigated within the limitation period, notwithstanding that the enactment of that period may often result in a good cause of action being defeated."

Based off these views and the knowledge that most complaints about SOGI conversion practices are likely to be made years after the conduct is experienced, I strongly suggest that any approach to law reform will need to consider the existing time limitations set out under the Act and adopt an approach that does not require people to routinely seek the Commissioner exercise discretion to extend time.

I also draw your attention to a further barrier for complainants, where in *Bullard v Anti-Discrimination Tribunal* [2020] TASSC 15 at [15]-[40], the Supreme Court held that a decision not to accept a complaint made out of time under section 63 of the Act does not engage section 64 of the Act. Section 64 of the Act lists the grounds for rejection of a complaint. Non-acceptance under section 63 is not a rejection and the decision is not reviewable by the Anti-Discrimination Tribunal; however, it can be reviewed by way of judicial review to the Supreme Court of Tasmania.

This interpretation means that complainants who would have historically been able to seek a review in the Anti-Discrimination Tribunal are no longer able to do so. They must either be able to afford to seek judicial review in the Supreme Court or meet the conditions for fees to be waived.

³ Ibid 2.2.19.

As such, any person who sought to complain about SOGI conversion practices where the Commissioner decided not to exercise discretion, would meet another barrier in their attempt to lodge a complaint.

Consent to SOGI conversion practices

Jurisdictions have approached the ability to give consent to conversion practices differently.

Consent to harm can only been given in limited circumstances, such as where there is the opportunity for the person to achieve some gain. Some sports involve controlled violence, such as boxing, and risk is mitigated through anticipation of harm and rules surrounding how the sport is conducted, including movements, timing, equipment, etc.

In circumstances where the effects are largely harmful and the extent to which a person may be negatively affected by SOGI conversion practices is unknown, It is difficult to see how informed consent can be given.

As set out in the Issues Paper, evidence shows that SOGI conversion practices do not fulfil their aims and are generally harmful and ineffective.⁴ It is also identified that some existing criminal laws and tort/civil liability may apply.

I am concerned that being able to provide consent to submit to SOGI conversion practices would then undermine any possible legal avenue where a person seeks a remedy after experiencing harm. It would be legally problematic if a person could consent to a service which another person may make a complaint under the Act about. It is inconsistent to label the service discriminatory in some circumstances, but not others.

Insofar as people can purportedly consent to SOGI conversion practices existing discriminatory attitudes regarding LGBTIQ+ people will continue to be upheld making social change and equality far more difficult to achieve.

Freedom of religion and freedom of expression

I am supportive of a principles-based approach which seeks to achieve a balancing of rights and interests.

The Act protects religious belief, activity and affiliation.⁵ It crucial that any changes to the law are not so broad that they seek to unreasonably restrict people from engaging in religious expression and activities.

⁴ Ibid 2.2.5.

⁵ *Anti-Discrimination Act 1998* (Tas) s16(o) and s16(p).

However it is important to differentiate between the conduct of expressing one's beliefs (whether through actions or words) and the conduct of imposing such beliefs on another with the purpose of changing their gender identity or sexual orientation.

Freedom of religion or expression should not be protected insofar as that freedom causes harm to others. It is well established that many freedoms are not absolute, and should not be interpreted as such.

This principle is enshrined in the International Covenant on Civil and Political Rights⁶ which states:

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.

...

3. 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 Issues Paper highlights that evidence-based studies, which are peer-reviewed and conducted in line with ethical standards for research, demonstrate that SOGI conversions practices are overwhelmingly harmful.⁷

The concept of freedoms do not extend insofar as to permit individuals to cause other individuals harm in furtherance of their own belief system. This conduct cannot be characterised as the exercise of freedom of religion or freedom of expression because it goes further, impacting on the freedoms of others not to be subject to harm from another. As set out, limitations are justified when they are imposed in order to protect the health and fundamental rights and freedoms of others.

Concluding comments

Law reform has the capacity to influence societal change, the promotion of acceptable attitudes and the rejection of harmful conduct.

The creation of laws in Tasmania which make SOGI conversion practices unlawful would send the message that the practices are not in line with current community expectations and values, sexual orientation and gender identity are protected and

⁶ *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (ICCPR).

⁷ Tasmania Law Reform Institute, above n 2.2.8 – 2.2.13.

people who identify as LGBTIQ+ are not to be subject to ineffective, detrimental and injurious conduct with the aim of achieving an impossible change.

If you have any questions, please contact me on (03) 6165 7515 or EOT.Commissioner@equalopportunity.tas.gov.au.

Yours sincerely

A handwritten signature in dark ink, appearing to be 'Sarah Bolt', with a stylized, flowing script.

Sarah Bolt
ANTI-DISCRIMINATION COMMISSIONER

2 FEBRUARY 2021