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Tasmanian Government's Submission

As Attorney-General and Minister for Justice, I provide this information on behalf of the Tasmanian Government. I note that the Consultation Paper was released on 27 January 2023, and submissions were due by the end of February 2023. In this context, the Government's response is brief and seeks to outline the relevant Tasmanian provisions and emphasise the importance of appropriate balance in this area.

General comments on the Inquiry and Consultation Paper

The Terms of Reference for the ALRC Inquiry note the Federal Government's commitment to ensure that an educational institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed:

1. must not discriminate against a student on the basis of sexual orientation, gender identity, marital or relationship status, or pregnancy;
2. must not discriminate against a member of staff on the basis of sex, sexual orientation, gender identity, marital or relationship status, or pregnancy; and
3. can continue to build a community of faith by giving preference, in good faith, to persons of the same religion as the educational institution in the selection of staff.

As noted in the Consultation Paper, there are areas of consistency between some of the paper's Propositions and Tasmanian law. Two areas of notable difference are as follows:

1. Propositions A and B include principles that religious educational institutions should be permitted to train religious ministers and select staff in relation to such training, and regulation of participation in religious observances, unfettered by the Commonwealth *Sex Discrimination Act*. However, the principles add that discrimination should not be allowed against other staff on grounds of sex, sexual orientation, gender identity, marital or relationship status, or pregnancy. I note that:
 - a. Tasmanian law provides no exceptions to sex discrimination laws in this area;
 - b. Tasmanian law does reflect the position that it is permissible to discriminate on the ground of religious belief or affiliation or religious activity in this area, which is sufficient to enable the building of strong communities of faith, without permitting discrimination on other grounds such as sex; and

- c. Tasmanian law also protects 'lawful sexual activity' as an attribute.
2. In relation to employment within a religious educational institution (Propositions C and D):
- a. Tasmanian law addresses the principles in Proposition C more broadly, by reference to employment generally. That is, discrimination is permitted in employment on the grounds of religion if it is a genuine requirement for the role;
 - b. In relation to educational institutions specifically, Tasmanian law permits discrimination on this ground: "if the discrimination is in order to enable, or better enable, the educational institution to be conducted in accordance with those tenets, beliefs, teachings, principles or practices". This latter provision is relevant to the principle in Proposition D which provides: "Religious educational institutions should be able to impose reasonable and proportionate codes of staff conduct and behaviour relating to respect for the institution's ethos, subject to ordinary principles of employment law and prohibitions of discrimination on other grounds."

The *Sex Discrimination Act* includes, in section 10(3), that the Act is not intended to exclude or limit the operation of a law of a state or territory that is capable of operating concurrently with the Act. I note that the paper describes the interaction between Commonwealth and state laws in this way:

Commonwealth, state, and territory laws concerning anti-discrimination may often overlap. The laws are drafted so that a complainant may choose whether to bring a complaint under Commonwealth law, or under the relevant state or territory law. In general this means that, where both apply, duty holders must apply with the most restrictive law. For example, if an educational institution is in Queensland, and certain conduct is prohibited under Queensland law but not Commonwealth law, the educational institution must comply with the Queensland law.

Further, the paper notes that where states and territories have narrower exceptions than are proposed, the effect of Propositions (such as A, for example) would be minimal or have no effect in practice.

Tasmania has previously expressed, and maintains the position, that amendments to Commonwealth anti-discrimination legislation should be drafted such that they do not conflict with the operations of the *Tasmanian Anti-Discrimination Act 1998*. It would be highly undesirable if a conflict was created requiring people in these vulnerable cohorts to address complaints at the Commonwealth level, rather than the more accessible mechanisms in the Tasmanian law including the Anti-Discrimination Commissioner and Tasmanian Civil and Administrative Tribunal complaint resolution mechanisms. Our view is that access to justice is an important consideration for this Inquiry.

An approach to these issues which located reforms in the *Fair Work Act 2009* framework, rather than in anti-discrimination legislation, may reduce the potential for unintended conflict between laws in this important area.

General comments on the Tasmanian legislation

International Covenant on Civil and Political Rights

Article 18 of the International Covenant on Civil and Political Rights (ICCPR) deals with the right to freedom of thought, conscience and religion. Articles 18(3) and 18(4) state:

...

- 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.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Tasmania's laws align with international and national commitments

Tasmanian legislation prohibits discrimination against staff, prospective students and current students of educational institutions on the basis of sexual orientation, gender identity, marital or relationship status, or pregnancy. Discrimination on the basis of any other protected attributes, including breastfeeding, political activity and parental status is also prohibited.

In relation to building a community of faith and allowing parents and guardians to ensure the religious and moral education of their children in conformity with their own convictions, Tasmania's laws support this in two ways, notably sections 51 & 51A of the *Anti-Discrimination Act 1998* (Tas):

- Section 51 provides narrow grounds for discrimination against a person on the basis of religious belief or affiliation or religious activity in relation to employment generally (only where it is a "genuine occupational qualification or requirement"), and with a religious educational institution (where the grounds for discrimination is slightly broader);
- Section 51A provides narrow grounds for discrimination against a person on the basis of religious belief or affiliation or religious activity in relation to admission as a student in an educational institution.

The ability to preference employing staff of the same religion as the educational institution clearly supports both Australia's international obligations and the Commonwealth Government's commitments.

Tasmanian law also permits religious educational institutions to preference the admission of students who share the religion which the relevant institution promotes. The ICCPR acknowledges the importance to parents of faith to be able to preference an institution which will educate their children in conformity with their own convictions. By allowing educational institutions to preference staff members and admission of students who share those common convictions, freedom to educate one's children into one's own community of faith is meaningfully preserved.

Importantly, as was noted, discrimination related to any protected attribute, other than religion, is prohibited. The ability to make a complaint to the Anti-Discrimination Commissioner is also preserved, should a person form the view that they have been refused employment, or refused admission as a student, on the basis of any protected attribute other than religious belief or affiliation or religious activity. It is important that this ability to participate in State-based conflict resolution is preserved, particularly as these laws relate to vulnerable cohorts of our community.

The ability for educational institutions to preference admitting students who share the religious beliefs of the institution was added to the Tasmanian *Anti-Discrimination Act* on 24 June 2015. The second reading speech and related documents note that the amendment does not apply to enrolled students, only those seeking to be admitted as students. The documents further note that the amendment was made to support Australia's commitment to the ICCPR. We believe that the legislation is fit for this purpose.

Tasmania's current laws align with other jurisdictions

A review of other jurisdictions within Australia has revealed that Victoria, the Australian Capital Territory, Queensland and the Northern Territory all have legislated exemptions to anti-discrimination laws which allow certain educational institutions to preference the admission of students who share the religious belief advanced by the institution. South Australia permits discrimination against a student or potential

student if the person's manner of appearance or dress are symbolic of a religion different to the religion which the educational authority promotes.

New South Wales does not specifically prohibit discrimination on the grounds of religious belief, affiliation or activity, therefore no exemption or exception is required. Only Western Australia appears to currently prohibit educational institutions from discriminating against prospective students on the basis of religious conviction.

Tasmania's current laws strike a balance between freedom and protection

The Tasmanian Government firmly believes that every member of our community should be protected from discrimination and other unlawful conduct, whilst also being able to enjoy full freedom of religious belief and expression. We believe that Tasmania's current legislative framework strikes an appropriate balance between protecting community members from discrimination and allowing them to enjoy fundamental rights and freedoms.

As highlighted above, the Tasmanian Government supports the Commonwealth Government's objectives, while noting the important principle that law reform in the Commonwealth jurisdiction must be designed so as not to affect the balance Tasmania has carefully struck in this complex area, nor should it dispose of or adversely impact on the effective complaints mechanisms available in Tasmania.

Yours sincerely



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