



# Equal Opportunity Tasmania

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## Inquiry into Discrimination and Bullying in Tasmanian Schools

Submission by the Anti-Discrimination Commissioner (Tas)

July 2024

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## Introduction

Thank you for the opportunity to make a submission as part of the **Inquiry into Discrimination and Bullying in Tasmanian Schools** (Inquiry).

As Anti-Discrimination Commissioner, I am responsible for administering the *Anti-Discrimination Act 1998* (Tas) (Anti-Discrimination Act). The Act prohibits both direct<sup>1</sup> and indirect<sup>2</sup> discrimination, offensive, humiliating, intimidating, insulting or ridiculing conduct<sup>3</sup>, sexual harassment<sup>4</sup>, incitement to hatred, serious contempt or severe ridicule<sup>5</sup>, publishing, displaying, or causing or permitting the display of any sign, notice or advertising matter that promotes, expresses or depicts discrimination or prohibited conduct<sup>6</sup>; as well as other types of conduct.

This submission touches on the following topics, which can be expanded upon by a verbal submission, should I be invited to provide one. The topics have been addressed in response to the terms of reference:

- **Examples of discrimination and prohibited conduct**
- **Preventing and remedying discrimination and prohibited conduct**
- **Obligations and duties of Tasmanian schools and meeting such obligations**
- **Legislative reform**
- **Impacts of discrimination and prohibited conduct**

My office has received a number of complaints and enquiries relating to discrimination and prohibited conduct in Tasmanian schools. All case examples have been de-identified to allow for the publishing of the submission, if required.

Thank you for the invitation to comment.

  
**Sarah Bolt**  
**Anti-Discrimination Commissioner**

29 July 2024

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<sup>1</sup> As defined in section 14 of the *Anti-Discrimination Act 1998* (Tas).

<sup>2</sup> As defined in section 15 of the *Anti-Discrimination Act 1998* (Tas).

<sup>3</sup> As defined in section 17(1) of the *Anti-Discrimination Act 1998* (Tas).

<sup>4</sup> As defined in section 17(2) of the *Anti-Discrimination Act 1998* (Tas).

<sup>5</sup> As defined in section 19 of the *Anti-Discrimination Act 1998* (Tas).

<sup>6</sup> As defined in section 20 of the *Anti-Discrimination Act 1998* (Tas).

## Examples of discrimination and prohibited conduct

The following case examples are topical and demonstrate that conduct made unlawful under the Anti-Discrimination Act is forming the subject of complaints. I have also received enquiries and reports about discrimination and prohibited conduct occurring in schools.

### Disability discrimination

More complaints are consistently made about disability discrimination than all other attributes. Most commonly in education complaints, complaints are made by parents on behalf of their child who has a disability, where allegations are that the child has been marginalised, denied reasonable adjustments, punished or excluded from school because of disability (or behaviours related to disability).

There have been a number of complaints where allegations are made that children have Individual Education Plans (IEP) or medical plans in place which are not being followed.

Arguments made by educational institutions generally relate to not having the appropriate resourcing to properly support the child, that the child's behaviours are not able to be managed and other reasons (such as the conduct of the parent).

#### Child with disability excluded from school

A complaint was lodged by parents of a child with disability. Due to behavioural issues, the child was excluded from their school. The Complainants alleged the school did not adequately consult with them regarding their child's behaviour, including whether the child should undertake an assessment for autism.

The Respondent said the child had demonstrated behaviour which the school deemed a risk to students and staff.

The parties attended a conciliation conference conducted by a conciliator from my office. The parties were not legally represented, however the Complainants brought an advocate for children with disability as they thought they would be helpful when discussing the complaint matters.

The complaint was resolved at the conciliation conference, with the Respondent agreeing to:

- a reimbursement of school funds;
- a letter of acknowledgement;
- provision of its newly reviewed policies to the Complainants;
- a targeted professional development exercise to be undertaken by involved staff; and
- discrimination training for the entire staff of the school.

While this is a positive example of resolution by conciliation, at the time the file was closed with my office, the child had not returned to that school.



### **Complaint withdrawn at Tribunal**

A complaint was lodged from a mother of a student on the student's behalf. It was alleged that the school had complained about the student attending therapy sessions, with teachers talking loudly about the student, such that it was overheard by other students.

It was alleged that the student was denied permission to go to the toilet when she was menstruating; and was made to wait before she could change clothes. The school also accused the student of dressing provocatively. It was alleged that when the student's mother complained about how her daughter had been treated, her daughter's enrolment was terminated.

The school denied it had breached the Act.

The complaint was not able to be resolved by conciliation. The complaint was referred to the Anti-Discrimination Tribunal (now the Tasmanian Civil and Administrative Tribunal), where the Complainant withdrew the complaint.

It is noted that while the Anti-Discrimination Act is essential for access to justice, it is responsive in nature. It is relatively common that complaints are withdrawn at the Tribunal, where the risk of costs arises.

### **Complaint from an employee with disability**

The Anti-Discrimination Commissioner received a complaint from a person who had been employed as a Teacher Assistant at a religious school. The Complainant had disability, and had provided the school with a letter from her doctor that stated she was not able to lead group reading, but could do all other duties of her job.

After providing the school with the letter, the school immediately stood her down from employment until it could get 'new information'.

The school's senior HR officer told the Complainant she would also need to get clearance from a doctor that she was 'emotionally stable enough to come back to work'.

My office investigated the complaint, and attempted to resolve it by conciliation. This was not successful.

During the course of the investigation, the school terminated the Complainant's employment on the basis it had 'assessed that you are not able to safely perform the inherent requirements of your role'.

I amended the complaint to include the termination of employment, on the basis it appeared to be directly discriminatory on the basis of disability, offensive conduct on the basis of disability, and victimisation as a result of the Complainant making the complaint.

The matter was referred to the Tasmanian Civil and Administrative Tribunal for hearing. The Tribunal informed my office the matter resolved prior to it being determined by the Tribunal.



## Religious educational institutions

Religious educational institutions need particular attention. In the context of education complaints, my office has received a high number of complaints relating to religious educational institutions.

Concerns are ongoing as to the ability of religious educational institutions to uphold the Anti-Discrimination Act for staff and students, particularly in response to letters and public statements by Archbishop Julian Porteous.

I take this opportunity to draw your attention to media coverage<sup>7</sup> of a religious instruction course purportedly planned to be undertaken in certain religious educational institutions across Tasmania. While it is my understanding this did not go ahead (at least in the form reported in the article), the messaging to staff, students and the wider communication must not go ignored.

It was reported that Catholic Education Tasmania planned to introduce a course to year 11 and 12 students with media stating:

'The course outline says it would teach the "complementarity" of male and female genders and would require teachers to be "unambiguous in the clarity of their articulation of Catholic teaching" on marriage and sexuality.'

Media coverage also set out that the outline referred to the responsibilities of teachers in engaging with the course content, in that:

'Teachers will lead students to discover how the human person, as male and female in its complementarity, is created in the image of God who, as 'communion of persons', is Trinity. This doctrinal foundation will assist students to appreciate the magnificence of the opportunity that Matrimony affords them not only for their personal happiness and the establishment of their own family, but in no less a task than to build a Civilisation of love.'

You may like to contact Catholic Education Tasmania to find out further information about this purported course, and Equality Tasmania who released a statement asserting that the course 'actively discriminates'<sup>8</sup> against LGBTIQ+ students and that a complaint under the Anti-Discrimination Act would be lodged if the course were to proceed.

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<sup>7</sup> Loretta Lohberger, 'Catholic Education to review religious instruction course planned for Tasmanian college students', ABC News, 28 June 2023 < <https://www.abc.net.au/news/2023-06-28/tas-catholic-religious-education-review/102524776>> accessed 4 July 2024.

<sup>8</sup> Ibid.

More recently, Tasmanian students at Catholic schools in Hobart received a letter from the Archbishop. The letter is detailed on the website<sup>9</sup> of the Archdiocese of Hobart, which states:

“Archbishop Julian Porteous has written a Pastoral Letter to the faithful of Tasmania expressing concern over threats to religious freedom posed by “certain ideological positions” imposed “by means of legislation”.

He also expressed concern over “an existential threat” to Catholic schools posed by the federal government’s proposed changes to legislation.

‘We Are Salt to the Earth’, dated 2 May, outlines the Catholic vision of the human person as “created by an act of God” and “personally loved by God”.

“From the outset because we believe that God has revealed the truth about the human person, we attest to the fact that truth is objective and verifiable,” the Archbishop wrote.

“We do not accept the postmodern view that truth is subjective, that reality is a merely political construction and morality meaningless.”

The sexual complementarity of male and female was a gift from God, Archbishop Julian said, hence the Church’s teaching on sexual morality and the indissolubility of marriage.

“These well-known Catholic teachings are now the subject of rejection by many within our society, and we are experiencing efforts to curtail our freedom to live by and teach these essential truths about the nature of human life.”

The letter refers to the many ways ideology is currently being foisted on Australian society, including through the liberalisation of abortion laws, the introduction of euthanasia laws, the redefinition of marriage in 2017, and a ‘woke’ movement pushing for ‘transgender rights’ and ‘Conversion Therapy’ laws.”

Such messaging is impactful for students and staff who attend the schools where such letters are circulated. The impacts on mental health, safety at school, inclusion and school culture are immeasurable. It is not contentious to say that if a student does not feel welcome in their school community because of their identity, there will be a level of disengagement from their education. This directly contradicts a child’s right to education.

The Anti-Discrimination Act sets out exceptions in relation to staff and students at religious educational institutions.

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<sup>9</sup> Catherine Sheehan, “We are Salt to the Earth’ Pastoral Letter on religious freedom’, *Archdiocese of Hobart*, 14 May 2024 <<https://hobart.catholic.org.au/2024/05/14/we-are-salt-to-the-earth-pastoral-letter-on-religious-freedom/>> accessed 4 July 2024.



I make the following observations, noting that even with 'narrow' exceptions applicable to religious schools I have received enquiries and complaints about these issues:

### **Employment based on religion**

Under section 51 of the Anti-Discrimination Act it is set out:

#### **51. Employment based on religion**

(1) A person may discriminate against another person on the ground of religious belief or affiliation or religious activity in relation to employment if the participation of the person in the teaching, observance or practice of a particular religion is a genuine occupational qualification or requirement in relation to the employment.

(2) A person may discriminate against another person on the ground of religious belief or affiliation or religious activity in relation to employment in an educational institution that is or is to be conducted in accordance with the tenets, beliefs, teachings, principles or practices of a particular religion 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.

I have received a number of enquiries about the operation of this provision. It is apparent that this provision is interpreted broadly, extending beyond the scope of roles which interact directly with students. It appears to be commonly considered applicable to every role within a religious educational institution.

As an example, my office received an enquiry regarding an advertisement for a 'Grounds and Maintenance Officer' at a religious school in Tasmania. The advertisement noted the applicant was to be 'humbly following [Religious figure]' and will have a 'vibrant [Religion] faith and servant heart'. The application process asked the questions:

'What does it mean to be a [member of Religion]?'

'What are your thoughts on evolution?'

'What church do you attend and describe your level of involvement?'

The phrasing of the exceptions under section 51 limits their applicability to certain circumstances. These are circumstances where it is a 'genuine occupational qualification or requirement' or 'if the discrimination is in order to enable, or better enable, the educational institution to be conducted in accordance with those tenants, beliefs, teachings, principles or practices'.

Whether the particular role referenced above fits within the exceptions is untested. It is arguable, however, that the role of a groundskeeper would not be covered by the exceptions, due to the nature of the work conducted by a person holding such a position.

In this instance, the advertisement in itself acted as a deterrent to the individual who would have applied but for such requirements set out in the advertisement.

I also note that discrimination in recruitment is extremely difficult to establish. It is common practice that organisations and recruiters do not provide specific reasoning to unsuccessful applicants for a position, instead generally opting for broad and generic notification letters.

Further, discrimination on the ground of religious belief or affiliation, or religious activity, in relation to employment is only covered as it relates to religious grounds, not any other attribute.

Anecdotally, there appears to be confusion in the interpretation of the provision, as it has been taken to mean that, because of a person/educational institution's religious belief or affiliation, or religious activity, they are able to discriminate against others because of *their own* beliefs. The most poignant examples of this are discrimination on the basis of sexual orientation and gender identity.

It is also important to recognise that the perception of an individual's adherence to whatever particular religion the religious educational institution follows is dependent on the views taken by the individuals who hold power within that institution. This means that it is the personal belief system and interpretation of religion by the institutional leaders which sets the standard internally.

My above comments are demonstrated through the following case summary:

#### **Complaint from an employee at a religious school who had divorced and had started a new relationship**

The Anti-Discrimination Commissioner received a complaint from a current employee of a religious school. The employee had applied for a more senior position, that of the role of Deputy Principal. The employee was found to be the best applicant for the role, and was offered the role.

The employee had previously been married, but had divorced. The employee stated that after his divorce he developed a committed, ongoing relationship with a new partner, and together they had a child.

A senior church leader informed the school that he was unable to support the offer of employment being made to the employee, because of the employee's 'relationship arrangement'. The offer of employment for the Deputy Principal role was rescinded.

The school stated that it would only employ staff in senior leadership positions if they had 'a regular relationship'.

The complaint proceeded to an early conciliation conference. After the conciliation conference conducted by a conciliator from my office was held, the complaint resolved directly between the parties.

#### **Admission of a person as student based on religion**

Under section 51A of the Act, it is set out:

##### **51A. Admission of person as student based on religion**



(1) A person may discriminate against another person on the ground of religious belief or affiliation or religious activity in relation to admission of that other person as a student to an educational institution that is or is to be conducted in accordance with the tenets, beliefs, teachings, principles or practices of a particular religion.

(2) Subsection (1) does not apply to a person who is enrolled as a student at the educational institution referred to in that subsection.

(3) Subsection (1) does not permit discrimination on any grounds referred to in section 16 other than those specified in that subsection.

(4) A person may, on a ground specified in subsection (1), discriminate against another person in relation to the admission of the other person as a student to an educational institution, if the educational institution's policy for the admission of students demonstrates that the criteria for admission relates to the religious belief or affiliation, or religious activity, of the other person, the other person's parents or the other person's grandparents.

As above, the phrasing 'a person may discriminate against another person on the ground of religious belief or affiliation or religious activity' is capable of misinterpretation. It is possible that the provision is understood to mean that a person/religious educational institution holding a particular religious view may discriminate against others on the grounds of *their own* religious belief or affiliation or activity.

Subsection (3) specifically states discrimination is not permitted on any ground other than those specified in subsection (1), namely religious belief or affiliation and religious activity.

It may be for this reason that my office has not received specific reports of this particular issue applying to LGBTIQ+ students. However, it is important that clarity around laws is a priority. It is clear that students in other jurisdictions have experienced discrimination on the basis of their sexual orientation and/or gender identity.

It is essential to consider the different interpretation of religions and the effect this has on decision making by and within religious educational institutions. It is unreasonable and unsafe for LGBTIQ+ students and teachers, divorced teachers, teachers cohabiting with partners etc. to bear the burden of being acceptable to some types of religious educational institutions and not others, depending on the views upheld by that institution.

I provided the above information<sup>10</sup> in relation to these provisions to the Australian Law Reform Commission as part of its review into existing exceptions in the *Sex Discrimination Act 1984* (Cth) and the *Fair Work Act 2009* (Cth) that apply to religious educational institutions.

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<sup>10</sup> Australian Law Reform Commission, 'Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws', 21 March 2024, <<https://www.alrc.gov.au/wp-content/uploads/2024/03/ALRC-ADL-Final-Report-142.pdf>> accessed 4 July 2024.

## Preventing and remedying discrimination and prohibited conduct

### Training and education

My office regularly undertakes the delivery of community education sessions with schools, colleges and TasTAFE. Schools are an important part of the education programs which are delivered by my office, pursuant to my functions in section 6(b) and (e) of the Anti-Discrimination Act:

...

(d) to disseminate information about discrimination and prohibited conduct and the effects of discrimination and prohibited conduct;

(e) to undertake research and educational programs to promote attitudes, acts and practices against discrimination and prohibited conduct;

...

These sessions are tailored for particular groups and are age appropriate. If a school has raised that they are seeing a rise in racist comments, sexual harassment or other conduct within the scope of the Anti-Discrimination Act, the session will specifically deal with these topics in order to assist schools to build a safe and respectful culture.

Discussions in the course of the most recent sessions are highlighting the following issues:

- racist language at school
- female students being targeted
- students feeling that teachers are too busy to talk to them
- teachers feeling powerless to address unsafe conduct by students

Access to information about discrimination and sexual harassment, in particular, is critically important for young people who are entering the workforce for the first time. Young people need to be empowered to realise their rights and identify conduct which breaches those rights. Safety at school and at work is directly correlated with awareness of discrimination, prohibited conduct and bullying as this is linked to being able to use the appropriate language to describe such conduct.

Despite recognition of the importance of access to information, resourcing constraints on my office mean that the level of need is unable to be met, with my staff having to be selective about how much time can be dedicated to anti-discrimination programs in schools.



## Complaints against the Department

Another mechanism by which discrimination and prohibited conduct is prevented (at least from continuing) and remedied, is via complaints under the Anti-Discrimination Act.

However, there are significant barriers posed by the Department for Education, Children and Young People which impede the progression of complaints. I have recently written to the Secretary of the Department and requested a review of the Department's approach to complaints<sup>11</sup>.

I received a reply from the Secretary dated 5 July 2024,<sup>12</sup> noting an independent review of current processes would be undertaken.

The issues as summarised for the Secretary are as follows:

- The length of time it takes for the Department to respond to a complaint.
- Whether indemnity for individual respondents is sought which is contrary to the Tasmanian Government's Policy and Guidelines for the Grant of Indemnities and Legal Assistance to Public Officers of the State of Tasmania.
- Whether the person attending conciliation conferences on behalf of the Department has the appropriate delegated authority to resolve the complaint.
- Whether the Department's approach to responding to complaints follows trauma-informed principles.

It is my view that the conduct of the Department is not consistent with the Model Litigant Guidelines.<sup>13</sup>

In relation to the Tasmanian Government's Policy and Guidelines for the Grant of Indemnities and Legal Assistance to Public Officers of the State of Tasmania, issues with the Department's seeking of indemnity in complaints made by public officers *against* public officers<sup>14</sup> has been addressed by me in various ways over the years, to no avail.

I wrote to Ms Katherine Morgan-Wicks, then Chair of the Indemnity and Legal Assistance Panel in 2018.<sup>15</sup> I received a reply to the effect that the Panel would not change its processes.<sup>16</sup>

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<sup>11</sup> See Annexure A.

<sup>12</sup> See Annexure B.

<sup>13</sup> Solicitor General Tasmania, *Model Litigant Guidelines*, Tasmanian Government, 14 May 2019, <[https://www.crownlaw.tas.gov.au/\\_data/assets/pdf\\_file/0012/469875/Model-Litigant-Guidelines.pdf](https://www.crownlaw.tas.gov.au/_data/assets/pdf_file/0012/469875/Model-Litigant-Guidelines.pdf)>.

<sup>14</sup> Ibid at clause 3.11(c).

<sup>15</sup> See Annexure C.

The issue remains. In 2021 I lodged a complaint to the Tasmanian Ombudsman<sup>17</sup>. As far as I am aware, that matter is still with the Ombudsman.

In early 2024, I, along with my team of Investigation and Conciliation Officers, met with Mr Mark Rapley, the State Litigator, to brief him on the issue.

A recent matter impacted was summarised in my 2022 – 2023 annual report<sup>18</sup>, with that summary setting out:

### **Difficulty in complaint process where Tasmanian Government does not follow its guidelines**

The Anti-Discrimination Commissioner received a complaint from a state service employee, who alleged he had disclosed to his manager that he is Aboriginal. The man alleged that following this, his manager engaged in bullying conduct toward him. The man made a complaint against his manager and the State (as his employer). The man was not seeking a financial outcome, but rather was seeking some kind of resolution that would enable him to attend work and be treated respectfully.

The State Government has a scheme in which it allows state service employees to be given legal assistance, legal representation and legal indemnity where they are subject to legal proceedings or investigations because of incidents that arise in relation to their work. The relevant Guidelines state, however, that indemnity should not be granted in relation to complaints by one state service employee against another (Policy and Guidelines for the Grant of Indemnities and Legal Assistance to Public Officers of the State of Tasmania).

It is a frequent experience in complaints under the Anti-Discrimination Act involving one state service employee against another that indemnity is granted, contrary to the Guidelines.

In the experience of Equal Opportunity Tasmania, this exacerbates power imbalances, and creates unfairness. One state service employee has the benefit of the resources and expertise of the State, whereas the other employee, who has made the complaint, does not.

In this case example, the manager was granted indemnity. Representatives for the manager sought adjournments and caused delay. For example, despite asking for the response to the complaint to be provided within 21 days, the response was not provided until 82 days after the Anti-Discrimination Commissioner asked for the response. The Complainant ended up withdrawing the complaint.

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<sup>16</sup> See Annexure D.

<sup>17</sup> See Annexure E.

<sup>18</sup> Equal Opportunity Tasmania, *Annual Report 2022 – 2023*, p 18:  
<[https://equalopportunity.tas.gov.au/data/assets/pdf\\_file/0003/731532/0783-EOT-Annual-Report-2022-23-V04-FA-web-accessible.pdf](https://equalopportunity.tas.gov.au/data/assets/pdf_file/0003/731532/0783-EOT-Annual-Report-2022-23-V04-FA-web-accessible.pdf)>.



It is noted this case example was reported in the media<sup>19</sup>, however no changes to the process for seeking indemnity by the Department have been made.

My office is currently dealing with the below matter which has been significantly impacted by the conduct of the Department:

### **Complaint by employee and Department's delay**

The Anti-Discrimination Commissioner received a complaint from a state service employee with disability. The Complainant had requested adjustments to the workplace for her disability, which were allegedly not implemented until 4 months after commencing their employment. The employee also stated incorrect terminology was used in reference to the disabled toilet, having to wait for co-workers to finish using the disabled toilet due to it being preferred for its space and changes being made to her role which could not be undertaken due to disability.

The Department commenced applications for indemnity and legal assistance for the individual respondents to the complaint, with the Crown appointed as legal representative for the Department.

Attempts were made by a conciliator from my office to schedule a conciliation between the parties, which were unsuccessful. The Department requested adjournments to the conciliation dates because of the indemnity process. Furthermore, the Department did not engage substantively with my office, instead contacting the Complainant's legal representative directly. At the time, it was aware the Complainant wished to discuss the complaint and possible resolution at conciliation facilitated by my office.

In order to bring parties to conciliation as soon as possible after a complaint is lodged, my office attempts to conduct a conciliation conference between 4-6 weeks after acceptance of a complaint for investigation (if appropriate). In this case, a conciliation was not conducted until 7 months after notification.

Under the Anti-Discrimination Act, the Anti-Discrimination Commissioner has a statutory requirement to automatically refer a matter to the Tasmanian Civil and Administrative Tribunal within 6 months after parties are notified of the complaint, except where an extension of time has been consented to by the Complainant.

The Complainant consented to provide further time to enable a conciliation to be held, which was required because of delays from the Department. For example, despite asking for a response to the complaint to be provided within 21 days, the response was not provided until 208 days after the Department was notified of the complaint. The response was also received 24 hours prior to conciliation and indicated it was for the purposes of conciliation only. The individual who supplied

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<sup>19</sup> Judy Augustine, 'Anti-Discrimination commissioner Sarah Bolt says state government defied its own indemnity advice' The Mercury, 4 November 2023, <<https://www.themercury.com.au/news/tasmania/antidiscrimination-commissioner-sarah-bolt-says-state-government-defied-its-own-indemnity-advice/news-story/061b959ce4ca09c23179539e5036e85e>> accessed 4 July 2024.

the response to the complaint is aware that a response forms part of an investigation and it is not satisfactory to supply it for the purposes of conciliation only.

The conciliator from my office attempted to resolve it by conciliation. This was not successful, and at the time of writing, the complaint is currently subject to investigation.

### **Costs being sought by the Department against former State Service employee**

In another instance, the Department sought and was awarded costs set out in the case summary below:

### **Teacher with disability made to pay Department of Education's costs**

My office received a complaint from a Department of Education (as it then was) teacher with disability in the form of a chronic skin condition that limited her ability to withstand sun exposure. The Complainant provided information from her doctor that exposure of over 15 minutes of direct sunlight worsens the condition. The Department of Education transferred the Complainant to another school, which was approximately 1 hour's drive away from her home. The Complainant alleged the exposure to sunlight during the drive would aggravate her skin condition and put her at risk of cancer. The Complainant chose to end her employment, rather than accept the transfer.

The Anti-Discrimination Tribunal (as it then was) did not consider there was discrimination, as the requirement for the Complainant to transfer 'had not been formally imposed on her', as the Department of Education Transfer Agreement meant the Department 'cannot be said to have *"insisted upon a particular requirement"*' and the Complainant had rights of review and appeal under that Agreement. The Tribunal also considered the transfer was reasonable in the circumstances.

The Department of Education was represented by the Office of the Solicitor-General and pursued costs against the teacher. The Tribunal ordered that the teacher pay the Department's costs.<sup>20</sup>

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<sup>20</sup> *Maree Summers v State of Tasmania (Department of Education) & Ors* [2020] TASADT 5.



## Obligations and duties of Tasmanian schools and meeting such obligations

In the context of the Anti-Discrimination Act, organisations have obligations under the Act, set out in section 104 which says:

### **104. Obligation of organisations**

- (1) An organisation is to ensure that –
  - (a) its members, officers, employees and agents are made aware of the discrimination and prohibited conduct to which this Act relates; and
  - (b) the terms of an order made under section 89 relating to that organisation are brought to the notice of those of its members, officers, employees and agents whose duties are such that they may engage in conduct of the kind to which the order relates; and
  - (c) no member, officer, employee or agent of the organisation engages in, repeats or continues such conduct.
- (2) An organisation is to take reasonable steps to ensure that no member, officer, employee or agent of the organisation engages in discrimination or prohibited conduct.
- (3) An organisation that does not comply with this section is liable for any contravention of this Act committed by any of its members, officers, employees and agents.

These obligations are met by ensuring training of staff, updated policies and procedures, complaint management and responsiveness to reports.

### **Scope of section 104**

In relation to organisational liability for breaches of the Anti-Discrimination Act, section 104 clearly includes staff of educational institutions, by vicarious liability applying to members, officers, employees and agents. A plain English reading of section 104 is that students are 'members' of an educational institution and a school can be liable for their conduct, however there is no case law to affirm this.

Specifically including organisational liability where students have engaged in discrimination and/or prohibited conduct (such as sexual harassment) in circumstances where a school has failed to take reasonable steps to remedy the issues after it has become aware of students engaging in the conduct, should be contemplated.

Currently, in relation to decisions of leadership by an educational institution where such conduct was alleged, I consider if that conduct could fall within section 21 of the Act, which sets out:

### **21. Prohibition of aiding contravention of this Act**

(1) A person must not knowingly –

- (a) cause another person to contravene this Act; or
- (b) induce another person to contravene this Act; or
- (c) aid another person to contravene this Act.

(2) All persons referred to in subsection (1) are jointly and severally liable for any contravention under this Act.

I note that I have previously accepted complaints for investigation on this basis. Most recently where a failure to address possible offensive, humiliating, intimidating, insulting or ridiculing conduct could have been interpreted to be aiding the offensive etc. conduct:

**Complaint against school investigated on the basis conduct was being aided by lack of action**

A complaint was made under the Anti-Discrimination Act by a parent on behalf of their child, alleging their child was being bullied at school by other children on the basis of their gender, gender identity and sexual orientation. The Complainant alleged the school was not taking the bullying seriously, and not addressing it. The bullying kept occurring, both at school and outside of school by students of the school, and was getting worse.

The Anti-Discrimination Act provides that a person or organisation must not knowingly aid another person to breach the Act.

The complaint was accepted on the basis that by allegedly failing to take any meaningful action to stop the bullying and allowing it to continue, the school was in effect aiding the bullies to breach the Act.

As the complaint was being investigated, the bullying outside of school continued. With the Complainant's consent, Equal Opportunity Tasmania passed on details of the complaint to a LGBTIQ+ Liaison Officer at Tasmania Police. The Tasmania Police Officer went to the Complainant's home, spoke with the Complainant and her child, and provided information and assistance in relation to the being safe outside of school.

Equal Opportunity Tasmania conducted a conciliation conference between the parents of the child, and the school. At the conciliation conference, the school agreed to:

- provide anti-discrimination training to its staff;
- take and deal with complaints about student behaviour occurring in public, outside of school;
- arrange for presentations to be provided to its students in relation to discrimination on the basis of sexual orientation; and for presentations in relation to bullying, harassment and discrimination; and
- review its policies relating to bullying, harassment and discrimination to ensure they adequately address bullying on the basis of gender, gender identity, and sexual



orientation; and as part of that review, seek feedback from students and parents about bullying and harassment by way of an anonymous and confidential survey.

Whether the lack of action of a school in addressing conduct made unlawful under the Anti-Discrimination Act should raise the possibility for liability under section 104 explicitly, is a matter for which I am open to discussion.

### **Targeted training programs for staff**

In order to prevent and address discrimination and prohibited conduct, schools need to be proactive and responsive and such actions need to be visible and have measurable impact for staff and students.

One way to achieve this is through a training program developed in order to address discrimination and prohibited conduct. For effective and fulsome staff training to be achieved, it is not satisfactory to require staff to simply complete a webinar which briefly explains the complex topics which fall under the Anti-Discrimination Act. Training should be tailored and specific, recognising that discrimination and prohibited conduct can manifest in different ways across different operating environments. For educational institutions, understanding behaviours amongst young people which may constitute discrimination, sexual harassment or other unlawful conduct requires a different approach to understanding such conduct in the context of staff interactions.

Further to this, teachers should be trained and supported to directly discuss discrimination and forms of prohibited conduct with students. Due to their relationship with students, teachers are often the first point of contact for a student who is experiencing unsafe behaviours. In order to more effectively support students, teachers should have the benefit of targeted training of the types of behaviours which fall within the scope of the Anti-Discrimination Act.

### **Disability-ready educational institutions**

In relation to students and staff with disability, I note that disability ready organisations have some of the following key elements:

- Proactive identification and removal of potential barriers for people with disability:
  - What changes to our infrastructure and methods of doing things need to be made?
  - What are the current barriers we are aware of?
  - What have previous complaints identified and have we responded to them?
- The development of knowledge and skills to respond appropriately and inclusively:
  - Knowing how to recognise disability
  - Producing information in a variety of relevant formats
  - Appropriate signage and access
  - Appropriate and inclusive language
- All staff made aware of procedures and an embedded organisational culture:
  - Preparedness to make adjustments to meet individual needs

- Basic knowledge about alternative communication systems or how to make adjustments to suit the needs to the person with disability (advocates, communication assistants, longer meetings)
- Staff awareness of flexible approaches and elimination of negative attitudes and stereotypes

Based on complaints and reports received by my office, it is clear that new and innovative measures to ensure inclusion of students with disability remain engaged in the schooling system are required.

Further it is clear that both public and private educational institutions are often not equipped to support staff with disability and that when those staff make complaints about disability discrimination, as is their right, that they are regularly met with hostile and combative responses.

Exploration of measures, such as the ones outlined above, that can be adopted in order to create more disability-ready educational institutions is encouraged.

### **Encouragement of reporting to the Anti-Discrimination Commissioner**

One way that schools can assist students to be empowered to raise issues is by advocating for students to report issues anonymously.

Reports of discrimination, offensive etc. conduct, sexual harassment, incitement and publishing or displaying of discriminatory content can be made anonymously to me via the form online:  
<https://www.equalopportunity.tas.gov.au/resources/forms/report-it>.

I can then take action to address the matter further or refer it to an appropriate authority, such as Tasmania Police.

Such data allows for me to understand where conduct which breaches the Act may be occurring. If I were to receive a number of reports about incidents occurring within a particular school, this would enable me to compile this data and work with that school to improve the situation. This is a proactive way of addressing issues.

I note I have previously approached a school in Hobart when I received a number of reports from students about racist conduct occurring on school grounds. After a discussion with the Principal of that school, internal measures were adopted to address the issues.

Further, bystanders, such as other students, staff and parents, should also be encouraged to make reports, anonymous or otherwise. With further resourcing, my office would be far more equipped to work closely with schools where reports are arising, to develop anti-discrimination programs and policies which may contribute to addressing and reducing discrimination and types of prohibited conduct, such as sexual harassment.



## Legislative Reform

### Model Litigant Obligations

It is my view that the Model Litigant Guidelines in Tasmania should be legislated. If the State departs from acting as a model litigant, this should be actionable. The Guidelines as they stand, are ineffectual as they are not followed.

### Tasmanian Human Rights Act

I have publicly advocated for the adoption of a Tasmanian Human Rights Act. In April 2024 the Tasmanian Law Reform Institute (TLRI) released its report 'A Charter of Human Rights for Tasmania? Update'.<sup>21</sup> In this report, the TLRI recommends that Tasmania adopt a Human Rights Act, which would include the right to education.

The TLRI noted that the ACT has a right to education under the *Human Rights Act 2004* (ACT) and that Queensland has the *Human Rights Act 2019*.<sup>22</sup> In Queensland 'every child has the right to appropriate primary and secondary education ...'.

It is my view that 'appropriate primary and secondary education' encompasses education that is free from discrimination, sexual harassment, other prohibited conduct and bullying.

### Review of the Tasmanian Anti-Discrimination Act

I have recently made various public statements calling for a review of the Tasmanian *Anti-Discrimination Act 1998* (Tas). In order to best serve the community, including people who make complaints about discrimination and prohibited conduct in educational institutions, the law in Tasmania should be reviewed and updated in order to achieve its intended aims.

While once considered a 'gold standard' piece of legislation, the Anti-Discrimination Act has now fallen behind other states and territories. Tasmanians need greater protections, and such protections are relevant to staff and students in schools in a multitude of ways.

In addition to the consideration of section 104 of the Anti-Discrimination Act as discussed above, employers should have a positive duty to prevent sexual harassment and discrimination under Tasmanian laws, and assistance animals should be specifically included in state anti-discrimination legislation.

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<sup>21</sup> Tasmanian Law Reform Institute, 'A Charter of Human Rights for Tasmania? Update.' 30 April 2024, <[https://www.utas.edu.au/data/assets/pdf\\_file/0003/1706169/TLRI\\_HR-Research-Paper.pdf](https://www.utas.edu.au/data/assets/pdf_file/0003/1706169/TLRI_HR-Research-Paper.pdf)> accessed 4 July 2024.

<sup>22</sup> Ibid at 61.

I note that Autism Assistance Dogs are increasingly being utilised to support autistic children. Without clear legislation protecting assistance animals, a child with autism who uses one at school does not have the same legislative protections as a child who uses a guide dog as defined in the *Guide Dogs and Hearing Dogs Act 1967* (Tas).

If a review of the entirety of the Anti-Discrimination Act is not supported, I would be pleased to see consideration of amendments which would address some of the issues highlighted in this submission.

I would also be pleased to see commitments on a policy level, to improve the wellbeing and safety of students, with actions such as:

- additional resourcing for the Anti-Discrimination Commissioner to undertake specific discrimination and sexual harassment programs in schools;
- learning about discrimination and prohibited conduct permanently implemented into the curriculum, starting from primary school;
- targeted training for teachers relating to discrimination and prohibited conduct;
- safe and effective official reporting mechanisms for students; and
- improved access to diversity and inclusion supports, as well as mental health supports, in schools.



## Impacts of discrimination and prohibited conduct

The impact of discrimination and prohibited conduct cannot be understated. Various reports released in Australia have indicated considerable detriment to young people who have had such experiences.

Mission Australia's Youth Survey Report 2020<sup>23</sup> set out:

'... Education about gender equality at an early age through whole-of-school programs is a critical measure, ...

Discrimination against young people who identify as lesbian, gay, bisexual, transgender, intersex, queer/questioning or asexual (LGBTIQA+) was also identified as an issue by survey respondents. The implications of this discrimination are significant. People who identify as LGBTIQA+ are six times more likely to attempt to end their life compared to their peers. Discrimination, prejudice, isolation and family rejection because of their sexuality and gender identity may increase the risk of suicide and suicidal ideation.

Schools are an important site of efforts to eradicate this discrimination and ensure young people of different gender identities are safe and included. LGBTIQA+ people should be specifically recognised and included in the development of strategies, programs and policies for young people. It is also important that services and supports including physical and mental health professionals, community services and other sports and recreation services create welcoming environments sensitive to the needs of LGBTIQA+ young people.'

By complaints and enquiries to my office, it is clear that students who experience discrimination and/or prohibited conduct in schools experience the following repercussions:

- disruption to learning due to disengagement with, or exclusion from, school
- social impacts, such as being ostracised by peers, and loss of connection from the school community
- mental health impacts, including the development of anxiety and depression
- effects to the family unit, parental distress, separation of siblings, confusion as to why one sibling has been suspended or expelled but not others
- impacts on parents who become viewed as problematic for advocating for their child, parents disclosing suicidal ideation of their children
- impacts to student learning where staff leave the workplace due to discrimination or prohibited conduct in their employment

<sup>23</sup> Tiller, E., Fildes, J., Hall, S., Hicking, V., Greenland, N., Liyanarachchi, D., and Di Nicola, K. 2020, Youth Survey Report 2020, Sydney, NSW: Mission Australia <<https://www.missionaustralia.com.au/media-centre/media-releases/young-australians-greatest-concerns-unmasked-equity-and-discrimination-covid-19-mental-health-education-and-employment>> accessed 4 July 2024.

For staff who experience discrimination and/or prohibited conduct, there are also a range of repercussions, including:

- impacts to wellbeing, psychosocial safety in the workplace
- disengagement from the profession, which for teachers flows on to impact students
- economic loss from impacts of discrimination
- development of medical conditions (anxiety, depression etc.)
- changing jobs, stagnation of career, impacts to confidence and capacity

There are also repercussions for educational institutions, such as:

- overall decrease in employee morale and impact on team dynamics
- reduced diversity and a staffing cohort which does not reflect the student population
- increased turnover of staff and inability to retain staff (which can be disruptive to learning)
- legal consequences (workers compensation and anti-discrimination matters)
- damage to reputation and public perception of the educational institution
- discrimination undermining organisational culture and values, leading to a toxic workplace



## Concluding remarks

Being cognisant of the varying impacts of discrimination and prohibited conduct outlined above, I am hopeful that the recommendations arising from this Inquiry will seek to impose proactive steps to ensure such damaging types of conduct do not occur. While responsiveness is an important element, remedies only go so far in rectifying the experience of unlawful conduct.

Where a reactive response is required (such as in relation to a complaint), there is significant room for improvement in both the public and private sphere. Best practice and model litigant methods should be utilised by a respondent in matters under the Anti-Discrimination Act. This would greatly contribute to facilitating restorative justice, achieving more positive outcomes for staff and students of educational institutions in Tasmania.