Office of the
Anti-Discrimination Commissioner

1300 305 062 (in Tasmania) or (03) 6165 7515
office@antidiscrimination.tas.gov.au
Level 1, 54 Victoria St, Hobart TAS
GPO Box 197, Hobart TAS 7001

Anita Dow MP
Committee Chair
Government Administration Committee A
Inquiry into Discrimination and Bullying in Tasmanian Schools
Parliament House
HOBART TAS 7000

By email: assemblygaa@parliament.tas.gov.au

Dear Ms Dow

Inquiry into Discrimination and Bullying in Tasmanian Schools

Thank you for your letter, as Chair of the Committee, dated 27 February 2025.

The Committee seeks clarification as to how the *Anti-Discrimination Act 1998* (Tas) (**Tasmanian Act**) and the *Sex Discrimination Act 1984* (Cth) (**Federal Act**) intersect. The Committee also seeks comments in relation to whether or not Catholic Education Tasmania (CET) is correct in its view that the preclusion of staff in its schools due to sexual orientation, gender or relationship status is not constituted as discrimination.

I note that these are not the only attributes on the basis of which a person may experience discrimination, and there are various other protected attributes which are relevant to the above queries.

For completeness, the Tasmanian Act makes it unlawful to discriminate[1], offend etc[2]. incite[3], or publish discriminatory materials[4], on the basis[5] of the following relevant attributes:

- sexual orientation
- lawful sexual activity

[1] *Anti-Discrimination Act 1998* (Tas) s 14 – 15.

[2] *Anti-Discrimination Act 1998* (Tas) s 17(1).

[3] *Anti-Discrimination Act 1998* (Tas) s 19.

[4] *Anti-Discrimination Act 1998* (Tas) s 20.

[5] *Anti-Discrimination Act 1998* (Tas) s 16.

- gender
- gender identity
- sex characteristics
- marital status
- relationship status
- pregnancy
- breastfeeding
- parental status
- family responsibilities.

Terminology regarding exceptions and exemptions

At the outset, an understanding of the different terminology used across jurisdictions is necessary. Under the Tasmanian Act, exceptions provide a defence to a complaint, while exemptions are granted by the Anti-Discrimination Commissioner (**Commissioner**) for a limited period of up to three years[6].

Under the Federal Act, there are two different types of exemptions. These are temporary exemptions[7], which, like in Tasmania, are granted for a limited period of time, and permanent exemptions, which operate like exceptions in Tasmania, as defences to complaints[8].

The Tasmanian Act contains limited exceptions[9] on the basis of some of the above attributes, none of which are relevant[10] to the information sought. For religious educational institutions, the Tasmanian Act sets out exceptions permitting discrimination only on the basis of religious belief, affiliation or activity.

This differs to the Federal Act, where some exemptions permit discrimination on the basis of a number of the attributes above, namely the other person's sex, sexual orientation, gender identity, marital or relationship status or pregnancy[11].

Below, I go into detail about the application of the permanent exemption in section 38 of the Federal Act, which is relevant to the Committee's queries.

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[6] *Anti-Discrimination Act 1998* (Tas) div 11.

[7] *Sex Discrimination Act 1984* (Cth) s 44.

[8] Australian Human Rights Commission, Information Sheet: Religious exemptions under the SDA, 2017 <https://humanrights.gov.au/sites/default/files/document/publication/AHRC_2017_Religious_Exemptions_SDA_Info.pdf>.

[9] *Anti-Discrimination Act 1998* (Tas) part 5.

[10] For example, the *Anti-Discrimination Act 1998* (Tas) section 27(1) provides exceptions on the ground of gender in a religious institution, and in shared accommodation, etc. which may also be relied upon, however are not the focus of this letter.

[11] *Sex Discrimination Act 1984* (Cth) s 38.

Proving an exception or permanent exemption

Under the Tasmanian Act, if a religious organisational institution seeks to rely on an exception as a defence to a complaint, it is up to the institution to prove that exception on the balance of probabilities[12].

The scope of the Commissioner's power in deciding whether an exception applies under the Tasmanian Act is very narrow, with the Anti-Discrimination Tribunal (as it then was) setting out[13]:

> 26. This comment is helpful and the principle has application and may be modified to apply to the nature of review proceedings under the Tasmanian Act. Accordingly, the test in the Tasmanian context is whether the Tribunal considers that the exception so completely answers the claim that the claim is obviously hopeless or is untenable noting that at Inquiry the respondent will have the onus of satisfying the Tribunal that the exception applies.
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> 27. It is to be noted that the Tribunal proceeds on the basis that respondents bear the onus of proof with respect to exceptions in s55 of the Act: see *Toben v Jones* (2003) FCAFC 137 per Carr J at para 41.
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> 28. The reasons given by the Commissioner suggest that, at least on some occasions during her reasons, she did not adopt the test set out above of whether the complaint is obviously hopeless or is untenable noting that at Inquiry the respondent will bear the onus in relation to the application of the exception. The reasons she gave suggest she has drawn conclusions, formed views and made findings about the issues of "good faith" and "public interest". Furthermore, the reference to the likelihood that the exception would be made out suggests that it is for the Commissioner to be satisfied of the application of the exception and not the Tribunal. If it is "likely" that the exception would be established by the Respondent then the complaint may still have merit. However, I also note in various respects the Commissioner has adopted the correct approach. She seems to have considered the circumstances of the complaint to ascertain whether they suggest that the Liberal Party acted in other than good faith. That is a legitimate enquiry. I turn now to consider whether the Commissioner's conclusion that the complaint was 'lacking in substance' was correct applying the test outlined above.
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> 29. It is apparent that there will be cases where the application of an exception under the Act is so clear that the complaint is hopeless. The question that arises is whether this case falls into that category.

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[12] *Anti-Discrimination Act 1998* (Tas) s 101.

[13] *Delaney v Liberal Party of Australia (Tas)* [2008] TASADT 2.

In relation to jurisdictions where there is no provision as to the burden of proof, Rees, Rice and Allen[14] noted that:

> "The legislation in New South Wales, Queensland, Tasmania, Victoria and Western Australia expressly provides that a person who seeks to rely on any of the exceptions as a defence to a complaint of unlawful discrimination bears the burden of proving that the exception has been made out. In the other jurisdictions the same position can be implied from the structure of the legislation as a whole."

To that end, while not explicitly set out, it appears that under the Federal Act, the burden of proof would require CET to establish, on the balance of probabilities, that the exemption in section 38 applies in the unique factual circumstances of each individual complaint.

For completeness, exceptions and permanent exemptions do not impose a bar against complaints, meaning it is still open for individuals who consider they have been discriminated against to lodge a complaint under the Tasmanian or Federal Act. The question of the application of section 38 is a matter to be explored during any subsequent investigation.

Further, as the Committee will observe from the above list, there are some attributes to which no exception or exemption under either state or federal law applies. This is explored further below.

Exceptions under the Tasmanian Act

The relevant exceptions under the Tasmanian Act that permit discrimination *on the basis of religious belief or affiliation or religious activity*, are set out below. The comments in respect of those exceptions were submitted to the Australian Law Reform Commission during its Inquiry into Religious Educational Institutions and Anti-Discrimination Laws[15] and contained in our submission to this Committee. I have provided them below, to directly draw your attention to the information.

Employment based on religion

Section 51 of the *Anti-Discrimination Act 1998* (Tas) (the Act), it provides:

> **51. Employment based on religion**
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> (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

[14] Rees, N., Rice, S., & Allen, D. (2018). Australian Anti-Discrimination and Equal Opportunity Law. (3rd ed.) Federation Press at 3.9.10.

[15] Australian Law Reform Commission (4 November 2022) Religious Educational Institutions and Anti-Discrimination Laws, <www.alrc.gov.au/inquiry/anti-discrimination-laws/>.

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.

My office has received a number of enquiries about the operation of this provision. From those enquiries it appears the provision is interpreted broadly, extending beyond the scope of roles which interact directly with students, 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. This is due to organisations and recruiters not being required to provide specific reasoning to unsuccessful applicants for a position, instead generally opting for broad and generic notification letters.

Notwithstanding such difficulties, legislative protections for LGBTIQA+ teachers, divorced teachers, teachers cohabiting with partners etc. are contained within the Tasmanian Act.

The question arises as to whether the Federal Act operates to remove such protections against discrimination on the grounds of sex, sexual orientation, gender identity, marital or relationship status or pregnancy (as per section 38 which is set out below).

As contained in your letter of 27 February 2025, at the hearing of the Committee inquiry on 14 February 2025, Archbishop Porteus and Dr Gaskin from CET indicated that CET is permitted to preclude employment in some circumstances, as the Federal Act overrides the Tasmanian Act.

Below, I provide some matters that may challenge CET's position:

1. The Federal Act explicitly addresses the concurrent operation in section 10, which is supported by expert bodies including the Australian Human Rights Commission, which administers the provisions of the Act.
2. Section 38 acts as a defence to a complaint and is narrow in scope, meaning the application of the exemption is limited.
3. There are additional protections under the Tasmanian Act, which are not covered by the exemption in section 38 of the Federal Act.

Exemptions under the Federal Act

As explained above, the Federal Act contains a permanent exemption in section 38, which permits discrimination on the grounds of sex, sexual orientation, gender identity, marital or religious status, or pregnancy, as follows:

> **38 Educational institutions established for religious purposes**
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> (1) Nothing in paragraph 14(1)(a) or (b) or 14(2)(c) renders it unlawful for a person to discriminate against another person on the ground of the other person's sex, sexual orientation, gender identity, marital or relationship status or pregnancy in connection with employment as a member of the staff of an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.
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> (2) Nothing in paragraph 16(b) renders it unlawful for a person to discriminate against another person on the ground of the other person's sex, sexual orientation, gender identity, marital or relationship status or pregnancy in connection with a position as a contract worker that involves the doing of work in an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

> (3) Nothing in section 21 renders it unlawful for a person to discriminate against another person on the ground of the other person's sexual orientation, gender identity, marital or relationship status or pregnancy in connection with the provision of education or training by an educational institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, if the first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed.

As permanent exemptions operate as defences to complaint, the mere assertion that the exemption exists is not necessarily binding, as its' application would depend on the factual circumstances of the matter. For example, a religious educational institution may have a complaint made against it by a divorced teacher who has been denied employment and has been subject to statements as to their lifestyle choices.

While that institution can argue the applicability of section 38 in relation to refusing that individual an offer of employment, arguably, any offensive remarks made in the course of the recruitment process, would not be protected by the limited scope of the exemption.

It follows that section 38 does not provide broad protections enabling a religious educational institution to engage in other unlawful conduct, for example, offensive, humiliating, intimidating, insulting or ridiculing conduct or sexual harassment[16] under the Tasmanian Act, going to point 2 above.

The Federal Act also provides some other exemptions, such as section 37(1)(d) which creates a broader exemption for religious bodies, being:

> **37 Religious bodies**
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> (1) Nothing in Division 1 or 2 affects:
>
> ...
>
> (d) any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.

While this exemption is a broad one, the Australian Law Reform Commission (**ALRC**) takes the view that it would have limited application for religious educational institutions, stating[17]:

> 4.178 The ALRC expects that the exception in s 37(1)(c) of the *Sex Discrimination Act* would have limited application to the activities of religious educational institutions outside of the running of religious services. The ALRC

[16] *Anti-Discrimination Act 1998* (Tas) s17.

[17] See note 15 at 4.178.

> has not heard of any instances of religious educational institutions excluding students or staff from participation in religious services on the basis of attributes protected under the Act. The conduct of religious observances and practices, whether performed within a religious institution or within a religious educational institution, is recognised under international law as requiring a greater degree of institutional autonomy without unjustified interference from the state. If religious educational institutions were to be excluded from the scope of s 37(1)(c), the law may unduly restrict religious activities that are at the core of the identity of these institutions. Further, anti-discrimination laws in Australian states and territories contain equivalent exceptions.

Federal diversity jurisdiction and concurrent operation

Section 10 of the Federal Act addresses the concurrent operation by explicitly setting out that:

> (3) This 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 this Act.

Rees, Rice and Allen[18] made specific reference to section 38 of the Federal Act and its operation with State or Territory law, stating:

> For example, s 38 of the SDA [Federal Act] permits an educational institution established for religious purposes to discriminate against job applicants and employees on the grounds of sex, marital status, pregnancy and sexual orientation (among other attributes) in the areas of employment if it does so 'in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed. But under the Queensland and Tasmanian anti-discrimination law, conduct of this nature is unlawful because the exceptions granted to educational institutions established for religious purposes are not as broad as those in the SDA, not extending to discrimination against job applicants and employee. This would be tested if, for example, a respondent to a complaint were to challenge the validity of a State or Territory law that exposed them to liability for conduct that would not be unlawful under the Commonwealth law. Again, were a court to find that a s 109 consistency exists, it is likely that the offending provision would be severable rather than finding that the entire Act is invalid.
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> In both the above instances of s 109 in operation, the State or Territory law is vulnerable either because it allows discriminatory conduct that the Commonwealth law does not, or because it prohibits the discriminatory conduct that the Commonwealth law allows.

As a matter of process, section 131 of the *Tasmanian Civil and Administrative Tribunal Act 2020* (Tas) provides for the transfer of matters involving federal jurisdiction to the Magistrates Court. Practically, this means that if a complaint referred to the Tribunal

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[18] See note 14 at 2.14.24 – 2.14.25.

involved arguments as to the application of section 38 of the Federal Act, that matter would be referred to the Magistrates Court.

I take this opportunity to refer the Committee to the ALRC's recommendation, in its' report: Maximising the Realisation of Human Rights: Religious Educational Institutions and Anti-Discrimination Laws[19], that section 38 be repealed[20], pursuant to the Terms of Reference. That report goes on to explain the protections available to staff, which the Committee can refer to, if this assists.

Notwithstanding academic commentary and the recommendation to repeal section 38 of the Federal Act, the ALRC's position[21] is that:

> … Commonwealth, state, and territory laws that prohibit discrimination may overlap, and may differ in scope. Commonwealth anti-discrimination laws indicate that they are intended to operate concurrently with state and territory anti-discrimination laws, and a person may seek remedies under the law most favourable to them. In the context of this Inquiry, the practical effect of this is that, if a state or territory law provides greater protection from discrimination than the Commonwealth Sex Discrimination Act (for example, because it has a more restrictive exception for religious educational institutions or covers additional attributes), religious educational institutions in that state or territory must comply with the more restrictive state or territory law.

The ALRC goes on to explain that the 'practical effect' on religious educational institutions of repealing s 38 of the Sex Discrimination Act 'would be minimal because state and territory anti-discrimination laws operate concurrently with the Federal Act. Anti-discrimination laws in most states and territories already prohibit discrimination against staff and students of religious educational institutions.'[22]

While it is outside the scope of the Committee's query for me to comment on the recommendation to repeal section 38 of the Federal Act, the surrounding commentary goes some way to support the interpretation that the protections under the Tasmanian Act apply due to the concurrent operation of the provisions. This may present a barrier to the argument relied upon by CET that discriminatory actions are protected under the Federal Act, supporting point 1.

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[19] See note 15 at 4.4.

[20] This recommendation was made pursuant to the Terms of Reference under which that report was commissioned – see note 15.

[21] See note 15 at 12.84.

[22] Ibid.

To illustrate this further, in its publication 'A quick guide to Australian discrimination laws'[23] the Australian Human Rights Commission states:

> Commonwealth laws and the state/territory laws generally overlap and prohibit the same type of discrimination. As both state/territory laws and Commonwealth laws apply, you must comply with both. Unfortunately, the laws apply in slightly different ways and there are some gaps in the protection that is offered between different states and territories and at a Commonwealth level. To work out your obligations you will need to check the Commonwealth legislation and the state or territory legislation in each state in which you operate. You will also need to check the exemptions and exceptions in both the Commonwealth and state/territory legislation as an exemption or exception under one Act will not mean you are exempt under the other.

As to point 2, if section 38 of the Federal Act does apply, its application is narrow in scope, not permitting other conduct (such as comments and/or actions) which may be discriminatory, and confirming that discriminatory action taken is only permissible insofar as the 'first-mentioned person so discriminates in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or creed'.

Further limitations in the scope of section 38

The Committee should also note that the exemption in section 38 of the Federal Act, if it is proved, only permits discrimination on the grounds of a person's sex, sexual orientation, gender identity, marital or relationship status or pregnancy, going to point 3.

I observe that the following attributes protected under the Tasmanian Act are not covered by the Federal exemption:

- lawful sexual activity[24]
- sex variations[25] (referred to as intersex status[26] in the Federal Act)
- parental status[27]
- family responsibilities[28]
- association with a person who has, or is believed to have, any of these attributes[29]

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[23] Australian Human Rights Commission 'A quick guide to Australian discrimination laws' (2014) <https://humanrights.gov.au/sites/default/files/GPGB_quick_guide_to_discrimination_laws_0.pdf>.

[24] *Anti-Discrimination Act 1998* (Tas) s 16(d).

[25] *Anti-Discrimination Act 1998* (Tas) s 3 and 16(eb).

[26] *Sex Discrimination Act 1984* (Cth) s 4.

[27] *Anti-Discrimination Act 1998* (Tas) s 16(i).

[28] *Anti-Discrimination Act 1998* (Tas) s 16(j).

[29] *Anti-Discrimination Act 1998* (Tas) s 16(s).

This means that individuals can make a complaint under the Tasmanian Act on these grounds. The question as to the application of section 38 of the Federal Act is again, dependent on the facts, noting that the above attributes may intersect with some of the attributes exempted from discrimination that Act. In those circumstances, there would be a questions as to the true and genuine reason[30] for the conduct.

As the Committee will conclude itself, the above does not provide certainty in relation to the application of the Tasmanian Act and the Federal Act and the intersection of both, however, I hope the above information provides some clarity as it relates to the Committee's question of whether CET are able to preclude employment of senior employees on the basis of certain protected attributes, and confirm that, without determination by a court of law, or legislative reform, the question remains open.

While I recognise the Committee's enquiry relates to employees, the exemption under section 38(3) of the Federal Act applies to students. If you require information on the legislative framework as it relates to students, please get in contact.

I confirm I am content for this information to be published. Please advise whether the Committee is comfortable for me to provide this information to third parties, or if it is preferred that this enquiry remains confidential for now.

If you have any questions or would like to discuss further, please contact me on (03) 6161 7515 or at commissioner@antidiscrimination.tas.gov.au.

Yours sincerely

[redacted]

Pia Saturno

ACTING ANTI-DISCRIMINATION COMMISSIONER

17 March 2025

[30] *Cain v The Australian Red Cross Society* [2009] TASADT 03.