Civil Liberties Australia
PO Box 181, New Town TAS 7008

Ms Catherine Vickers
Director
Office of Strategic Legislation and Policy
Department of Justice
by email – xxxxxx@justice.tas.gov.au

12 September 2016

Dear Ms Vickers

RE: draft Anti-Discrimination Amendment Bill 2016

Thank you for your letter of 25 August inviting comment on the draft.

Civil Liberties Australia (CLA) believes the amendments are not needed and are likely to be counter-productive.

Unnecessary, because the current Anti-Discrimination Act 1998 already achieves an acceptable balance between freedom of speech and protecting vulnerable people from harm.

However, even if they were needed, the proposed amendments are counter-productive: instead of providing certainty to religious groups as intended, the amendments change the Commissioner's duty to one of a more quasi-judicial nature leading to greater complexity and cost, and longer proceedings through the Commission. Indeed, some of the words proposed to be inserted will call for judicial interpretation, adding further costs and delay.

Amendments to section 55

CLA supports the premise that laws should remain as they are unless there's a clear case made out for the need for change. The potential for unintended consequences is always high when laws are changed; this is a dangerous area in which to risk creating more uncertainty without clearly showing why a need for change outweighs the potential for unintended consequences.

We do not believe the case for change has been made out; we do not believe that it is clear precisely what the supposed problem is with how the current Act is operating.

For example, on 17 August 2016 the Attorney General said in a press release that "the Government's view is that our current laws, in particular the Anti-Discrimination Act, do not have the right balance in allowing responsible free speech" and that the amendment to section 55 would "provide for genuine protection of freedom of religion during public debate". On the other hand, in your letter the amendment is said to "make it clear that the exception in section 55 applies if the public act was done for religious purposes".

This leaves us uncertain as to whether the amendment aims to strike a new balance between freedom of speech and protecting others from harm or – instead – whether it is to simply clarify the existing balance.

Further, we believe unintended consequences could include that the amendments create greater uncertainty around the scope of the relevant section.

There are examples from both Victoria and New South Wales (attached) where costly and lengthy court proceedings have been required to determine the meaning of the words 'religious tenets, beliefs, teachings, principles or practices' used in the laws of those states.

The draft proposed changes for Tasmania insert new words into the Act that are not currently present, including 'religious purpose': it is likely there will be lengthy court cases testing the meaning of these words.

CLA does not support the proposed changes to section 55 of the Act.

Amendments to sections 64

Currently there are eight grounds in the Act upon which the Anti-Discrimination Commissioner can dismiss a complaint under section 17 or 19. This proposed amendment adds two further grounds for dismissal.

The existing eight grounds state that the Commissioner 'may' dismiss the complaint if the ground is made out: the two additional grounds proposed to be added state that the Commissioner 'must' dismiss the complaint if the grounds are made out.

The first new ground to be inserted, in paragraphs 1A(a) and 1B(a), is essentially that all the elements required by either section 17 or 19 as the case may be are not made out. This mirrors the existing ground – "the complaint does not relate to discrimination or prohibited conduct". We cannot see that the proposed amendment adds anything new to the array of powers currently held by the Commissioner (aside from making the dismissal of the complaint mandatory, rather than discretionary which we believe should be retained).

The second new ground of dismissal to be added is that the exception in section 55 has been made out. We understand that determining whether the section 55 exception has been made out will turn on questions of both fact and law. Asking the Commissioner to make rulings on questions of law would move the role to a quasi-judicial role which would increase the cost and complexity of bringing matters to the Commissioner, for all parties, both applicants and respondents. We fear this is counter productive and probably an unintended consequence. It will undoubtedly create greater confusion in the community about what the law is in this highly contentious area.

As for the use of the word "must' rather than "may", CLA believes the Commissioner should retain the discretion to accept the complaint and to investigate if there is uncertainty over whether the ground is made out. Should the ground be made out there are further points in the process at which the complaint can be dismissed.

CLA does not support the proposed changes to section 64

Amendments to sections 71 and 99

Use of the word 'ought' in these two proposed amendments appears to indicate that the decision maker must dismiss the complaint if they believe an incorrect decision was made earlier under section 64.

However, if new information has arisen during the investigation that shows the grounds for dismissal have been made out, this new information would not have been available at the time of the first decision and use of the word 'ought' is problematic. That is, how could have the decision been made to dismiss if the relevant information was not yet available?

It appears better wording can be achieved in this section if the new information unearthed during the investigation is to be relied upon.

CLA does not support the proposed changes to sections 71 and 99.

Thank you for this opportunity to provide comment on the proposed changes.

Yours sincerely

Richard Griggs
Tasmanian Director

ATTACHMENT

Example 1 – NSW

The legal issue: the hearings throughout this matter involved argument about the application of a defence in the NSW *Anti-Discrimination Act 1977* relating to the meaning of religious belief, tenets and doctrine

Number of court or tribunal hearings: 6 hearings over 8 years

The background: The initial incident in the following court proceedings occurred in mid- 2002. The complainants are a gay couple who were already foster parents. They applied to a foster agency run by Wesley Mission to be foster parents through that agency and were refused. The applicants made a complaint about it to the Anti-Discrimination Board. The complaint was not resolved and was referred to the NSW Anti Discrimination Tribunal.

The cases:

- *OV and OW v QZ* [2006] NSW ADT, 27 September 2006 (unpublished)
- *OV and anor v QZ and anor (No 2)* [2008] NSWADT 115 (1 April 2008)
- *Members of the Board of the Wesley Mission Council v OW and OV* [2009] NSWADTAP 5 (27 January 2009)
- *Members of the Board of the Wesley Mission Council v OV and OW (No 2)* [2009] NSWADTAP 27 (1 October 2009)
- *OV v OW v Members of the Board of the Wesley Mission Council* [2010] NSWCA 155 (6 July 2010)
- *OW v OV v Members of the Board of the Wesley Mission Council* [2010] NSWADT 293 (10 December 2010)

Example 2 – Victoria

The legal issue - this involved multiple attempts from the courts to balance the right to freedom of religion and expression with the right to freedom from discrimination.

Number of court or tribunal hearings: 6 hearings over 7 years

The background - In June 2007, the Phillip Island Adventure Resort refused to hire its facilities to a suicide prevention program targeting young people who are same-sex attracted. The refusal was because of the sexual orientation of the participants in the program. The Resort is operated by Christian Youth Camps Limited, established by the Christian Brethren.

The cases:

- Cobaw Community Health Services v Christian Youth Camps Ltd & Anor (Anti- Discrimination [2010] VCAT 1613 (8 October 2010)
- Christian Youth Camps Limited & Anor v Cobaw Community Health Services Limited and Anor [2011] VSCA 284 (21 September 2011)
- Christian Youth Camps Limited v Cobaw Community Health Services Limited & Ors [2014] VSCA (16 April 2014)
- Christian Youth Camps Limited v Cobaw Community Health Services Limited & Ors (No 2) [2014] VSCA 112 (6 June 2014)
- Christian Youth Camps Limited v Cobaw Community Health Services Limited & Ors (No 3) [2014] VSCA 113 (6 June 2014)
- Christian Youth Camps Limited v Cobaw Community Health Services Limited & Ors (Special Leave application to the High Court of Australia, 12 December 2014, leave refused with costs)