SUBMISSION TO DEPARTMENT OF JUSTICE

Review of the Complaints Handling and Dispute Resolution Provisions of the *Anti-Discrimination Act 1998*

Recommendation Paper - Response

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Executive Summary

The Australian Christian Lobby (ACL) wishes to restate its concern with proposed changes to the *Anti-Discrimination Act 1998* (the Act). The central concern lies with a proposal to amend section 17 of the Act. This proposal has its beginnings in Question 61 of the discussion paper for the review of the Act, which asked:

> Should section 17 of the Act be amended to provided that a person must not engage in any conduct that offends, humiliates, intimidates, insults or ridicules another person on the basis of any attribute referred to in section 16?

In its original submission to the review inquiry, ACL argued strongly against the inclusion of all section 16 attributes in section 17 of the Act, basing its objections around five central arguments:

1. The Act already includes provisions against 'inciting hatred';
2. Freedom of Religion and Freedom of Speech would be further prohibited;
3. Robust political debate would be inhibited;
4. There is a fundamental difference between inherent attributes and those of personal choice; and,
5. Tolerance in a multicultural society would be further undermined.

As evidenced by the recommendation paper, the review committee have examined ACL's opposition to Question 61. Whilst ACL is grateful to the committee for considering its concerns, ACL is nonetheless extremely disappointed with the draft recommendation emanating from Question 61 of the discussion paper, Recommendation 50, which reads: "That section 17 be amended to apply to all the attributes in section 16."[1]

ACL appreciates that the committee must carefully weigh up the evidence presented before it when making a recommendation. However, ACL would humbly posit that the review committee have erred in their affirmative response to Question 61. This

[1] Review of the Complaints Handling and Dispute Resolution Provisions of the *Anti-Discrimination Act 1998* – Recommendation Paper, http://www.justice.tas.gov.au/__data/assets/pdf_file/0015/110571/ADC_Final_Recommendation_Paper_14_May_2008.pdf, p. 39

submission will reiterate ACL's opposition to amending section 17 of the Act, arguing that the committee has downplayed the likely ramifications of such an alteration.

ACL wishes also to state its support for the Catholic Archdiocese of Hobart's proposal to amend the law to allow educational institutions conducted in accordance with religious beliefs to positively discriminate in favour of students who are of the particular belief that the school promotes when students apply for enrolment.

ACL's opposition to the proposed section 17 amendment

ACL has consistently maintained the position that amending section 17 in the form proposed in Question 61 is fraught with legal danger and ethical complexity. As the Act presently stands, section 17 states:

> A person must not engage in any conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of an attributed referred to in section 16(e), (f), (fa), (g), (h), (i) or (j) . . .

These attributes include:

(e) gender;
(f) marital status;
(fa) relationship status;
(g) pregnancy;
(h) breastfeeding;
(i) parental status; and
(j) family responsibilities;

Recommendation 50 proposes that the following additional attributes will also be included in Section 17:

(a) race;
(b) age;
(c) sexual orientation;
(d) lawful sexual activity;

(k) disability;
(l) industrial activity;
(m) political belief or affiliation;
(n) political activity;
(o) religious belief or affiliation;
(p) religious activity;
(q) irrelevant criminal record;
(r) irrelevant medical record; and
(s) association with a person who has, or is believed to have, any of these attributes.

As stated in the earlier submission, ACL is most strongly opposed to those section 16 attributes at subsections (c), (d), (m), (n), (o) and (p) falling within the scope of section 17. ACL is concerned that such a legislative move will inhibit the rights of individuals to legitimately discuss matters relating to sexual orientation, religious belief, affiliation or activity, and political belief, affiliation or activity.

ACL is strongly opposed to Recommendation 50. In this submission ACL stands by its originally stated concerns with amending section 17 and evaluates the weak arguments presented as the basis for Recommendation 50.

The Act already includes provisions against 'inciting hatred'

Section 19 of the Act already provides that:

A person, by a public act, must not incite hatred towards, serious contempt for, or severe ridicule of, a person or a group of persons on the ground of –

(a) the race of the person or any member of the group; or
(b) any disability of the person or any member of the group; or
(c) the sexual orientation or lawful sexual activity of the person or any member of the group; or
(d) the religious belief or affiliation or religious activity of the person or any member of the group.

ACL has previously stated its opposition to subsections (c) and (d), in particular. The Victorian experience with 'religious vilification' legislation clearly shows the

unworkability of legislative provisions similar to that in subsection 19(d) of the *Tasmanian Anti-Discrimination Act 1998*. The *Catch the Fire Ministries* case demonstrates that such legislation is unable to meet its desired objectives.

The major purpose of the Victorian *Racial and Religious Tolerance Act 2001*, as stated at subsection 1(a), is:

> to promote racial and religious tolerance by prohibiting certain conduct involving the vilification of persons on the ground of race or religious belief or activity.[2]

Far from promoting religious tolerance, or even protecting adherents of minority religions from persecution, this Act has served to exacerbate divisions between religious communities. Instead of encouraging open dialogue between religions, religious vilification laws are a mechanism to stifle debate and legitimise secrecy.

This Act has limited freedom of speech, which is an apparently fundamental element of an open, democratic, pluralistic society such as Australia. This legislation is a state-sanctioned avenue for disgruntled individuals to prevent the airing of dissenting views in public. It has already led to vexatious legal claims, clogging up judicial bodies and wasting the time, money and effort of ordinary Australians.

Given that section 19 of the Tasmanian Act already contains a provision similar to the failed Victorian legislation, it seems highly anomalous for the review committee to desire Tasmania to tread even further than Victoria down the path towards control of religious debate.

To prevent a person from engaging "in any conduct which offends, humiliates, intimidates, insults or ridicules another person" on the basis of their "religious belief or affiliation or religious activity" is akin to absolute government control of religious conduct and expression. This runs completely contrary to Australia's obligations under international treaties to protect and promote freedom of religion.

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2 http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubLawToday.nsf/a12f6f60fbd56800ca256de500201e54/33085D72B93EB338CA2573E2000BA4EB/$FILE/01-47a005.pdf p.2

ACL, therefore, remains deeply concerned by the committee's ill-considered desire to prevent people offending, humiliating, intimidating, insulting or ridiculing another person on the basis of their religious belief or affiliation or religious activity. It opens the door to the possibility of an even greater number of vexatious claims against people sharing their beliefs in the free marketplace of values.

Freedom of Religion and Freedom of Speech would be further prohibited

As stated previously, Australia, and by deference under the constitution, all states, have a responsibility to uphold the principles contained within ratified international treaties relating to freedom of religion. For example, Article 18.1 of the International Covenant on Civil and Political Rights states:

> Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.[3]

If someone is to adopt a religion or belief of his or her choosing, as they are free to do under this international covenant, it is likely this decision will be based on the balance of information they accumulate prior to making that decision. Without freely available and accessible information about a range of religions from a variety of sources, whether positive, negative or indifferent, that decision is severely hampered.

What the review committee is proposing, as the Victorian experience shows, will limit the availability and accessibility of this important type of information by stifling debate, and preventing the public sharing and broadcasting of information that presents a religion or belief system in a negative light.

Recommendation 50, however, goes beyond the scope of the Victorian legislation in proposing to make it an offence to engage in conduct that offends another person on the basis of their religious belief or affiliation or religious activity. Given the ease with

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[3] http://www.unhchr.ch/html/menu3/b/a_ccpr.htm

which people are offended in today's environment of tolerance and 'political correctness', such a proposal verges on the realms of absurdity.

(One only needs to look at the recent patently farcical report of Logan City Council in Brisbane instructing a former soldier to remove an Australian flag from his property because it 'offended' a neighbour to see how easily contemporary Australians are taken to offence.[4])

It is clear that very minor issues offend people. There is an even greater possibility that somebody will take offence at the behaviour or conduct of another person if it relates to his or her religious beliefs. A great number of Australians take their private religious beliefs very seriously. It determines their relationships, worldview, and conduct. The possibility that somebody would be offended on the basis of something so central to his or her daily life and identity is enormous.

Therefore, the committee's Recommendation 50 in effect suggests that the private domain of religion is beyond the bounds of publicly acceptable debate. It stops religious groups expressing their ideas, or critiquing the beliefs of another religion through fear of offending another religious group, and the possibility of litigation under the Act.

Such provisions have disturbing implications for other groups. Robust recent debates have been sparked by the publication of books written by ardent new atheists. The Committee's recommendations may serve to silence those who wish to state that all religion is evil, dangerous and foolish. Similarly, a great deal of comedy relies on the mockery of religious belief.

It is therefore not surprising that when similar laws were proposed in the UK, they were opposed by an unexpected alliance of the National Secular Society, satirists and comedians such as Rowan Atkinson (Mr Bean), writers, and religious groups. Each group wished to retain the right to promote its religious view (whether Christianity or atheism) as the correct one, and to critique and even make fun of the religious beliefs of others. Strong belief systems can handle such robust discussion or mockery.

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[4] Ex-soldier told to remove 'offensive' Aussie flag, Hannah Davies, October 08, 2008, http://www.news.com.au/couriermail/story/0,23739,24467397-952,00.html

As Article 18.1 of the International Covenant on Civil and Political Rights suggests, all religious groups must be free to manifest, through worship, observance, practice and teaching. Truth claims are central to the teaching of all religions. Believers hold these claims up for examination against the truth claims of other religious and non-religious worldviews. Religious organisations should be free to openly discuss and compare such claims regardless of how offensive they might appear to other people.

As it stated in its original submission, ACL is apprehensive of any legislation that limits the ability of religions to proclaim their beliefs. Although that is clearly not the intent of the Act or of the legislative amendment proposed in Recommendation 50, the Victorian experience shows that there are undesirable and uncontrollable consequences. That such consequences are foreseeable should be enough impetus to reject Recommendation 50.

ACL also strongly contends that freedom of speech is an element of Australia's democratic society that must be protected. It is a principle enshrined in Article 19.2 of the International Covenant on Civil and Political Rights states:

> Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.[5]

ACL acknowledges that freedom of speech is not an absolute right. In a contemporary society it is beholden upon citizens to respect the reputation and integrity of fellow citizens. People are subsequently protected from the slanderous comments of others through defamation and libel legislation. Such legislation, however, does not impinge upon legitimate social debate, as defendants have a range of recourses in law to counter-argue any action brought against them.

The right to free speech allows people to send and receive information and ideas of "all kinds". This includes information about religious beliefs. Recommendation 50, however, seeks to soften the tone of discussion about religious beliefs and sexual orientation to the polite and inoffensive. Given the controversial nature of such topics,

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[5] http://www.unhchr.ch/html/menu3/b/a_ccpr.htm

the proposed amendment to section 17 seriously limits these important religious, theological, social and ethical debates by imposing fear of litigation.

In a democratic society that upholds freedom of speech, people have the right to hold and express a range of moral views regarding sexuality, including homosexuality. Implementing Recommendation 50 in law will seriously jeopardise the ability of those with religious convictions to openly broadcast or argue their opposition to particular types of sexuality, even if their concerns are genuinely held.

Robust political debate would be inhibited

Were the Act to be amended according to Recommendation 50, it will be an offence to “engage in any conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of” political belief or affiliation, or political activity.

It is nigh on impossible to conceive how such a nonsensical legislative provision will work in practice. The rigours of Australia’s open democratic political structure, underpinned by an adversarial judicial system and Westminster parliamentary framework, require constant debate and disagreement in order to work effectively. Offence, insult and ridicule are the inevitable consequences.

People are offended, insulted and ridiculed in relation to political affiliation and activity on a daily basis, whether that is within parliament between politicians, in the broader community, or through the media. To prevent people from offending others on the basis of their political persuasions is to undermine the foundation of Australia’s democratic system in which every idea is open to debate and every participant is free to criticise ideology.

We would strongly argue that, like religious belief and sexual orientation, political activity and affiliation is a matter of choice for the individual concerned. This means that a wide variety of information, whether positive or negative, should be freely available to allow people to make that choice. Limiting the availability of public debate to that, which is, to other people, inoffensive politically, not only limits the ability of people to make a fully informed choice, but also perhaps removes all information required to make that choice.

As ACL stated in its previous submission, that the review committee would suggest such a bizarre amendment to the legislation suggests it has not carefully considered the likely consequences of the proposed amendment to section 17 of the Act. We can only begin to imagine the type and extent of frivolous claims to be brought by individuals offended at other people's political beliefs.

There is a fundamental difference between inherent attributes and those of personal choice

ACL maintains that there is a fundamental difference between inherent attributes and those of a personal choice. A person should not be discriminated against on the basis of an attribute that is beyond his or her control. For example, people are unable to control their race or disability. Subsequently, section 19 of the Act provides sufficient coverage to protect people against discrimination on these bases.

However, religious belief and activity, in a pluralistic society such as Australia, is purely a matter of personal choice. Individuals should be able to engage in discussion about these beliefs. As people place high value on their religious beliefs, such discussion is likely at times to be emotive and confronting. Offence is inevitable. It is also highly subjective, as a person making comment cannot be expected to know the likely response of each hearer: Some may find it funny, some may find it thought-provoking, others may find it offensive.

ACL has argued that subsection 19(c) is more than sufficient to cover conduct that incites hatred towards a person or a group of persons on the ground of sexual orientation or lawful sexual activity. The inclusion of these two attributes in section 17 imposes an unnecessarily heavy burden on people not to engage in conduct that offends others in relation to these matters.

ACL notes that the committee have not taken into consideration our recommendation flowing from our discussion of inherent versus chosen attributes: that the inherent attributes in section 16 should be the ones covered by section 17. It is not right to engage in conduct that offends another person on the basis of an attribute over which they have no control, but to prevent people offending others on the basis of

attributes of their own choosing is to limit discussion of the justifications and decision-making process behind that choice.

Tolerance in a multicultural society would be further undermined

Experience shows that rather than promoting tolerance and unity amongst members of society, limiting discussion and criticism of religious beliefs leads to division and intolerance. Such prohibitions undermine Australia's multicultural society and have the opposite effect from that intended. They are drawn upon in frivolous circumstances to stifle legitimate public debate of key social issues.

People require a full range of information, whether positive or negative, to assist them to make informed decisions about their political beliefs, religious affiliations and sexual orientation. Rather than improving levels of tolerance, deliberately stemming the flow of information regarding such choices will lead inevitably to an intolerant society in which individuals fail to engage constructively with people with different values and attributes.

Recommendation 50 misdirected

ACL would argue that the reasoning documented in the recommendation paper to reach the affirmative conclusion to Question 61 is flawed. Some attention must be paid to these errors. Responding to our concerns about the proposed amendment to section 17 because of *Catch the Fire Ministries* case, the paper states:

> In response to their [ACL's] submissions it is important to stress that the Act deals with inappropriate behaviour aimed at individuals or groups, not private beliefs. It is about addressing certain types of conduct.

The tone of this statement suggests that ACL is concerned the proposed amendment will prevent individuals from holding any particular private religious belief. This was never our stated concern. We do believe, however, that the proposed amendment

will stifle discussion of sexual orientation and religious belief, in particular, which is a generally accepted manifestation of one's religious belief.

ACL is concerned by the very real possibility of those charged with administering the legislation will broadly interpret "types of conduct", or "engage in any conduct", as the Act states, to include all manner of public statements and debates. This effectively stifles any public presentation or broadcast of religious material that another person may find offensive.

The recommendation paper notes that the Act is not directed at private beliefs, but effectively confines religious belief to the private domain. Yet, religious belief has public implications as it informs people's opinions and conduct in all areas of life. When public discussion is closed down, the consequence is that people will make decisions about their religious beliefs without the balance of freely available information from a variety of sources.

Stifling the public sharing of religious ideas does impinge on the private religious domains of individuals because, for many religious people, there is no neat line between the private and the public: religious belief is relevant to both. Religious groups are not alone in this. Feminists have been similarly critical of the public/private dichotomy, claiming that the personal is political.

There is a very real possibility that the legislative proposal will prevent religious organisations from freely expressing their beliefs. This includes proselytising, a very important element of some religious traditions. Such a limit would be viewed as an illegitimate government interference of religious freedom.

The recommendation paper further suggests:

> Discussing and debating issues such as religion, even comparing faiths and promoting the benefit of one faith over another, are not affected where that discussion is legitimate and conducted in good faith. What is required is the presentation of reasonable and fair views. It is not accepted that free speech would be unduly fettered or religious freedom significantly curtailed if an amendment where [sic] made in the terms proposed in question 61.

This is a highly debatable and unsubstantiated statement. As we have seen from the *Catch the Fire Ministries* case in Victoria, a presentation about the Muslim religion to a largely Christian audience was deemed to contravene religious vilification law when viewed through a similar lens. Then other judges, who viewed the ambiguous legislation differently, subsequently overturned the ruling. The possibility of judicial interpretation on any number of the points stated above is alarming.

It is left to the presiding authority to determine what is "legitimate", "reasonable", "fair" and when it is "conducted in good faith". These subjective tests leave open the very real possibility of abuse of the system, leading to vexatious claims. The highly subjective test of "conduct which offends" opens up an even greater possibility of people making frivolous claims. Such ambiguity will also leave people unsure of what the law means and of what they can or cannot safely say.

Section 17, as presently drafted, does not have sufficient tests of objectivity to protect citizens from claims made with the benefit of Recommendation 50, regardless of the assurance presented by the review committee in its recommendation paper. The test of offence is just too light. Let us examine a possible scenario of what constitutes offence for a person with a religious belief.

Richard Dawkins is a prominent atheist academic. His popular book, *The God Delusion*, has been praised worldwide for its hard-hitting refutation of religion and those who hold religious views. The title of this text is particularly loaded, and could conceivably be seen as highly offensive. The title suggests that those people who believe in a deity are deluded, an offensive and insulting proposition to those of faith. No doubt Dawkins, as "a reasonable person, having regard to all the circumstances, would have anticipated that" 'people of faith' "would be offended, humiliated, intimidated, insulted or ridiculed", by the title and the contents of the book.

Therefore, if the publication of a book were deemed to be included in the type of conduct under which subsection 17(1) refers, as it no doubt would, then Dawkins would be open to litigation under the Act if it were to be amended in accordance with Recommendation 50. It is an absurd proposition that one cannot offend another on the basis of their religious beliefs, as Dawkins openly does in his publications and presentations. The proposed amendment is open to abuse, misinterpretation and judicial manipulation.

This paper further argues:

> It seems unfair and anomalous to limit conduct that offends, humiliates, ridicules and the like to only a select limited set of attributes when such conduct could apply to all the other attributes.

This line of argument is particularly weak. Just because something “seems unfair and anomalous” are hardly grounds for making such a monumental legislative reform. One is reminded, in this case, of the argument proposed in the iconic Australian movie *The Castle* by the Kerrigan’s floundering legal counsel: “it’s the vibe”. How something “seems” or “feels” is akin to a “vibe”.

Given the ease with which section 17 could include all the attributes in section 16, there are obviously strong reasons why the original drafters of the legislation did not include all of those attributes. These people obviously felt it appropriate, contrary to the stated position of the recommendation paper, to include “only a select limited set of attributes when such conduct could apply to all the other attributes”.

The recommendation paper fails to address the reasons why the legislation, as it was historically drafted, should be amended, other than to say it “seems unfair and anomalous”. It is perhaps anomalous, but with good practical and historical reasons. The legislators no doubt felt that the Act would impinge on the rights of people to freely express their views on the range of section 16 attributes not included in section 17.

The recommendation paper fails to show why these reasons for not including all the attributes in section 17 ten years ago have changed to such an extent that their inclusion is now required. It “seems unfair” is not a solid justification for a legislative amendment that has clearly not been thought out carefully, as evidenced by the weak line of argument presented in the recommendation paper.

The paper also fails to address to whom it seems unfair that section 17 is limited to only certain section 16 attributes. Our submissions have consistently argued that people with religious convictions will be unfairly prevented from expressing their beliefs, but the recommendations paper does not even identify who is presently the target of unfair treatment at the impost of section 17 in its current form, let alone

whether their right to 'fair' treatment negates the right of people with religious convictions to express their point of view.

A better response would be to analyse each attribute individually to determine whether it should be included in section 17, which reflects the careful consideration given to the original drafting of the legislation. The review committee must carefully consider the likely consequences of including each attribute. A blanket response without due care, like that proposed in the recommendation paper, will inevitably lead to complexity and frustration. We would propose a more careful examination in line with the chosen versus inherent attribute proposal discussed above.

In addition to this, the recommendation paper states: "The other submissions strongly supported the application of section 17 to all the attributes listed in section 16." This is clearly a false and misleading statement. A number of submissions were made in opposition to the application of section 17 to all the attributes listed in section 16. This claim does nothing to support the conclusion reached at Recommendation 50.

The review committee, therefore, have erred in proposing Recommendation 50. The reasoning behind this suggestion is poorly directed and fails to adequately address our serious concerns with the assumptions inherent in Question 61.

Support for proposed exemptions for faith-based educational institutions

ACL is very much in favour of the Catholic Archdiocese of Hobart's proposal to amend the law to allow educational institutions conducted in accordance with religious beliefs to positively discriminate in favour of children who are of that particular belief in student enrolment processes.

ACL is mindful of the need to weigh up this proposal "against a number of public policy considerations that relate to the provision of educational services, religious freedoms and the protection of human rights."

Article 5 (1)(b) of the Convention against Discrimination in Education reads:

> It is essential to respect the liberty of parents . . . to choose for their children . . . the religious and moral education of the children in conformity with their own convictions; and no person or group of persons should be compelled to receive religious instruction inconsistent with his or their conviction.[6]

ACL is very supportive of faith-based educational institutions and contends that the state's duty to the international treaty cited above outweighs any of the government's other stated concerns. Parents have a right to send their children to schools that operate and instruct according to the values and ethos of the faith community they represent.

It is perfectly understandable and legitimate therefore, that educational institutions conducted in accordance with religious beliefs in Tasmania not only have the right to recruit teachers who uphold the values of the represented community, but have the right to enrol students of a similar faith-based background. ACL, therefore, supports the intent of the Catholic Church's proposed amendment to the legislation.

Conclusion

ACL remains deeply concerned by the review committee's determination to include all section 16 attributes in section 17 of the *Anti-Discrimination Act 1998*. As this submission attests, ACL feels that this is fraught with legal danger. It will inevitably lead to vexatious claims, and have the opposite effect to that intended.

Even if the intention of the legislation is good, it is easy for such provisions to mean something completely different in practice. Subjectivity is the major flaw with the proposed amendment to section 17. What, for example, is the test of humiliation, intimidation, insult or ridicule? It is also particularly easy for people to become offended.

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[6] http://www.unhchr.ch/html/menu3/b/d_c_educ.htm

Even though the legislation contains a test along the lines of what a ‘reasonable person’ would anticipate in the circumstances, ACL feels it does not adequately protect people from frivolous claims made against them. The test of reasonableness is still very much open to judicial interpretation.

ACL, therefore, strongly opposes amendments in accordance with Question 61 and Recommendation 50. In particular it is opposed to the inclusion of the following attributes in section 17: (c) sexual orientation, (d) lawful sexual activity, (m) political belief or affiliation, (n) political activity, (o) religious belief or affiliation, and (p) religious activity. ACL continues to urge the government to retain the status quo in relation to these attributes.

The need to include such attributes in the legislation has not changed since the *Anti-Discrimination Act 1998* was brought into law ten years ago. It is beholden upon the review committee to state otherwise. As it has not, we can assume that Recommendation 50 was the inevitable path of the committee before the review. “It seems unfair” is hardly a strong justification for proposing such an ill-considered, and potentially divisive, legislative amendment

The Victorian experience shows that anti-vilification law is fraught with subjectivity and complexity, and instils a culture of fear and intolerance. To suggest Tasmania steps beyond the scope of the failed Victorian legislation is to tread a dangerous path that will seriously curtain freedom of religion and freedom of speech.

ACL Tasmania
October 2008