



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

**Final Report**  
(Recommended Position Paper)

**September 2009**

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## **INTRODUCTION:**

### **Background of the Review**

In 2002, as part of the State Government's program of law and justice reforms, the Attorney-General appointed the State Service Commissioner to undertake a review of administrative review processes in Tasmania. The *Report of the Review of Administrative Processes* released in 2003 made suggestions for changes to the *Anti-Discrimination Act 1998*.

In 2004, some changes were made to the *Anti-Discrimination Act* to address the State Service Commissioner's recommendations. In 2005, the Anti-Discrimination Commissioner streamlined a number of administrative processes relating to the investigation, management and determination of complaints.

A number of possible changes to the legislation had been identified to enhance the efficient and effective resolution of complaints. In 2006 the then Attorney-General announced a review of the complaints handling and dispute resolution provisions of the *Anti-Discrimination Act 1998* (the Act).

### **Terms of Reference of this Review**

The purpose of the Review was to:

1. examine the complaints handling and dispute resolution provisions of the *Anti-Discrimination Act 1998*; and
2. make recommendations for legislative change to support fair, flexible and efficient investigation, conciliation and inquiry processes.

### **The review process**

A Discussion Paper was released in 2006 and over 40 submissions were received from a variety of interested people and organisations. These comments were analysed and recommendations for change were incorporated in the Recommendations Paper which was released in 2008. A list of the persons and organisations that made Submissions in response to the Discussion Paper can be found at the end of the Recommendations Paper.

The Recommendations Paper commented on the issues raised in the previous paper, incorporated a new issue regarding enrolments in denominational schools and made recommendations for a number of legislative changes.

In terms of the next steps after consideration of any comments those amendments to the *Anti-Discrimination Act 1998* which the Government proposes to adopt will be submitted to Cabinet for approval. Following Cabinet approval an Amendment Bill will be drafted and circulated to relevant stakeholders for comment. Once the amendment Bill is finalised it will be tabled in Parliament at the earliest opportunity.

## **Summary of suggested positions:**

This Summary includes all of the changes which are proposed to the Act in previous papers and does not include those matters where issues were raised but no changes are proposed to the Act.

### **Position 1:**

Amend the Act to provide that the Commissioner must approve a person who makes a complaint on behalf of another.

### **Position 2:**

Amend the Act to provide a process for the appointment of a litigation guardian for children and persons who do not have the capacity to complain due to a disability.

### **Position 3:**

Amend the Act to provide that the Commissioner and/or the Tribunal dealing with a matter must approve settlement outcomes in matters involving children or persons who do not have the capacity to approve due to a disability.

### **Position 4:**

Amend the Act to provide that matters investigated by the Commissioner on his/her own motion be treated as complaints that may, after investigation, be referred to the Tribunal for determination.

### **Position 5:**

Amend the Act to provide that the Commissioner may amend a complaint to name a respondent.

### **Position 6:**

Amend the Act to allow for the amendment of a complaint; taking into account the decision of *Commissioner of Police v Reid* when developing the amendment.

### **Position 7:**

Amend the Act to allow respondents to have a copy of the complaint as well as being provided with a summary of the complaint.

### **Position 8:**

- a) Amend Section 68 to allow the Commissioner to continue to investigate complaints that have been withdrawn (voluntarily or involuntarily) if it is in the public interest to do so; and
- b) Amend the Act to allow complainants to reinstitute complaints that have been withdrawn involuntarily if it is in the public interest to do so.

### **Position 9:**

- a) Amend the Act to provide that a complaint lapses where the complainant has failed to make contact with the Commissioner within 12 months of the last contact.
- b) Amend the Act to include this category in the list of lapsed matters which cannot be reopened in Section 73.

### **Position 10:**

Note that the issue regarding disclosure of details of the investigatory process under FOI has also been explored in the recent review of the FOI Act and is deferred to the outcome of that review.

**Position 11:**

Amend the *Personal Information Protection Act 2004* to provide that the Office of the Anti-Discrimination Commissioner has a similar status to a law enforcement agency for the purposes of that Act.

**Position 12:**

Amend the Act to provide a regulation making power for procedural matters such as referrals to the Tribunal from the Commissioner; reviews and inquiries.

**Position 13:**

Amend the Act to give the Tribunal discretion to publish de-identified decisions on review matters.

**Position 14:**

Amend the Act to include a power to direct the parties to early conciliation before or during the investigation of a complaint.

**Position 15:**

Amend the Act to allow for subsequent investigation following early conciliation.

**Position 16:**

Amend the Act to provide the Commissioner with unilateral power to extend the time for an investigation.

**Position 17:**

Amend the Act to allow for extensions of time not exceeding an additional 6 months to investigate or conciliate matters (thus giving the Commissioner up to 12 months to investigate and conciliate a complaint).

**Position 18:**

Amend Section 79(3) so that the referral report (to the Tribunal) includes reference to conciliation of a complaint (but not the details of what was discussed), a description of the complaint, a reference to amendments to the complaint and any material evidence to substantiate the complaint or to support the respondent's position.

**Position 19:**

Amend the Act to give the Tribunal discretion to publish decisions on procedural and other matters.

**Position 20:**

Amend Section 80(4) to include the words 'without reasonable excuse'.

**Position 21:**

Amend the Act to ensure that the Tribunal must be satisfied that the majority of members consent to a class action.

**Position 22:**

Amend the Act to ensure that a child's name or information revealing the identity of a child shall not be published unless permitted by the Tribunal.

**Position 23:**

Amend Section 85 to explicitly provide that the Tribunal may give or withdraw permission for a party to be represented or accompanied at anytime during the progress of a matter.

**Position 24:**

Amend the Act to allow for the establishment of a fund under the control of the Public Trustee for the distribution of any settlement monies.

**Position 25:**

Amend the Act to provide that agreements reached at Tribunal facilitated conciliation through the *Alternative Dispute Resolution Act 2001* be enforceable as if they were orders of the Tribunal.

**Position 26:**

Amend the Act to provide that only the Tribunal has power to make interim orders.

**Position 27:**

Amend the Act to allow a complainant to voluntarily withdraw a complaint from inquiry or an application for review and to provide that if it is withdrawn there can be no further complaint or application in relation to the same matter.

**Position 28:**

Amend Section 99A to give the Tribunal discretion to order a party's representative to pay all or part of the costs of proceedings.

**Position 29:**

Amend the Schedule to the *Judicial Review Act 2000* to include the *Anti Discrimination Act 1998* in the list of Acts exempt from the *Judicial Review Act 2000*.

**Position 30:**

Amend Section 17 so that it applies to all the attributes in section 16.

**Position 31:**

Amend Section 101 to include the words 'in good faith'.

**Position 32:**

Amend the Act to extend immunity from suit to authorised officers and conciliators.

**Position 33:**

- a) Amend the definition of 'club' to include 'or' after the words 'from the funds of the association'; and
- b) Amend the definition of 'competitive sporting activity' to include the word 'and' before the word 'umpiring'.

**Position 34:**

Amend the definition of sexual orientation to exclude transsexuality.

**Position 35:**

Amend the Act to define the term 'intersex' and include it as a separate attribute.

**Position 36:**

- a) Amend the Act to define the term 'child' as a person under the age of 18 years and
- b) to allow for the Commissioner to accept a complaint from a child if the Commissioner is satisfied the child has capacity to be the complainant.

**Position 37:**

Amend the Act to allow for the appointment of a Registrar and other staff to assist the Tribunal.

**Position 38:**

Amend the Act to allow discrimination on the basis of religious belief, religious affiliation or religious activity in educational institutions conducted in accordance with the doctrines, tenets, beliefs, teachings, principles or practices of a particular religion in so far as the policies of that educational institution provide for preferential admission to those students who also adhere to the particular religion.

The exemption should not extend beyond the point of admission.

## **EXPLORATION OF RECOMMENDED POSITIONS:**

In the previous Paper there were a number of recommendations for change to processes and practices in the handling of complaints and dispute resolution process. In addition it sought views of interested parties on the issue of whether there should be statutory exemptions for educational institutions that operate schools based on religious convictions.

This Paper revisits some of the matters which were included in the Recommendations Paper but most of the recommendations which point to change have been brought forward as suggested positions, with little or no amendment, as there was no substantive feedback in most submissions, which tended to focus mainly on the issues of vilification on the grounds of religion and exemptions for enrolments at denominational schools.

Of the 115 submissions received about the Recommendations Paper, some 107 were limited to these one or two issues, specifically Recommendations 50 or 59 or both. These two recommendations represent the two main policy aspects of the review and are represented in this paper as Position 30 (Bullying) and Position 38 (Exemption for educational institutions).

Where the Recommendation Paper indicated the retention of the status quo and the feedback also supported the retention of existing provisions details of the issue have not been brought forward into this paper, but the topics which were previously examined are listed for completeness.

*Note: In the following sections the issues listed are those highlighted in the Recommendations Paper released in 2008.*

## **COMPLAINTS**

### **Who may complain?**

Following examination of the issues no changes are brought forward here.

### **Acting on behalf of another**

The earlier submissions demonstrated general support for a process of approving the persons who may make a complaint on behalf of another. One submission did not agree with the Commissioner undertaking this role, but there was not any substantive justification for this position.

Authorising or approving a person to make a complaint on behalf of another is not so different from the existing powers the Commissioner exercises in accepting complaints made by representative organisations or individuals on behalf of a class of complainants. Therefore it is considered appropriate to extend this power to allow the Commissioner to approve persons who make complaints on behalf of another and if necessary have a formal representative appointed.

#### **Position 1:**

Amend the Act to provide that the Commissioner must approve a person who makes a complaint on behalf of another.

**Position 2:**

Amend the Act to provide a process for the appointment of a litigation guardian for children and persons who do not have the capacity to complain due to a disability.

The Tribunal also raised the need to have some independent appraisal of outcomes reached in the settlement of a complaint. It is therefore recommended that the Commissioner and the Tribunal be given power to approve settlement outcomes to ensure the interests of vulnerable parties are protected.

**Position 3:**

Amend the Act to provide that the Commissioner and/or the Tribunal must approve settlement outcomes in matters involving children or persons who do not have the capacity to approve due to a disability.

### **Investigation of Complaint by Commissioner**

Section 6 of the Act provides that the Commissioner has a role in promoting the recognition and approval of acceptable attitudes, acts and practices relating to discrimination and prohibited conduct. Sometimes people may not come forward and complain about discrimination because of entrenched bias, disinterest or an inability to fund or take carriage of a matter.

In light of section 6 it is appropriate that the Commissioner should not only be able to investigate matters on his/her own motion, but these matters should be treated as complaints so that the full set of processes, sanction and remedies under the Act are available to address discriminatory behaviour.

**Position 4:**

Amend the Act to provide that matters investigated by the Commissioner on his/her own motion be treated as complaints that may after investigation be referred to the Tribunal for determination.

### **Acting on behalf of a person**

Following examination of the issues no changes are brought forward here.

### **Form of complaint**

Following examination of the issues no changes are brought forward here.

### **Time limit on complaints**

Following examination of the issues no changes are brought forward here.

### **Rejection of complaints**

Following examination of the issues no changes are brought forward here.

## Part accept/reject complaints

Following examination of the issues no changes are brought forward here.

## Naming of respondents

It is accepted that in some circumstances rather than reject a complaint because it does not name a specific respondent it may be necessary for the Commissioner to name as a respondent a person whom the complainant may not have able to fully identify but whose name is able to be determined by the Commissioner. This is supported by the decisions of *Secretary of the Department of Justice and Industrial Relations v Anti-Discrimination Commissioner* (2003) TASSC 27, *Steel v Cowley and DHHS* [2005] TASADT 3 and *Commissioner of Police v Reid* (2000) TASSC 181. These decisions are authority for the Commissioner to clarify the name of a respondent.

The Tribunal was not opposed to an amendment that would allow the Commissioner to name a respondent.

Position 5:

Amend the Act to provide that the Commissioner may amend a complaint to name a respondent.

## Amending the complaint

One of the aims of the Act is to make the complaints resolution process as user friendly as possible. It is therefore not necessary or desirable for a complainant to identify breaches of the Act with the same particularity that would be required for civil proceedings.

There seems to be general agreement that the Commissioner should be able to amend a complaint and that where there are matters that fall outside the original complaint they should be the subject of a fresh complaint. The Tribunal also agreed that the Commissioner should be able to amend a complaint.

The Tribunal also referred to the decision of *Commissioner of Police v Reid* which is authority for allowing a complaint to encompass matters that occurred after the lodgement of a complaint which may come to light during an investigation. The Tribunal suggested that it may be useful for the principles set out in *Commissioner of Police v Reid* to be reflected in the Act. The Tribunal also noted that the decision did allow for a complaint to be extended to unrelated conduct and commented that there is a need for some certainty about the ambit of the complaint.

Position 6:

a) Amend the Act to allow for the amendment of a complaint; and  
b) that the decision of *Commissioner of Police v Reid* be taken into account when developing the amendment.

## **Notification of rejection of a complaint**

Following examination of the issues no changes are brought forward here.

## **Vexatious litigants**

Following examination of the issues no changes are brought forward here.

## **Review of rejected complaints**

There were no questions raised in the Discussion Paper about the current provisions. However the current provisions may be amended slightly to allow for reviews of amended complaints as mentioned above.

## **Agreements not to complain**

Following examination of the issues no changes are brought forward here.

## **Notification of acceptance of complaints**

Once a decision is made to accept a complaint, investigation of the complaint will commence. This will involve an assessment of the merits of the complaint. Section 67 provides that both parties are to be notified of the acceptance of a complaint for investigation but the respondent does not have statutory right to a copy of the actual complaint. The respondent only receives a summary of the complaint unless the complainant consents to the respondent being provided with a full copy of the complaint.

Section 67 has been criticised as being unfair because without the actual complaint the respondent is at a disadvantage in responding to the allegations. The actual complaint is the foundation of the investigation and dispute resolution process. It forms the basis of the summary of the complaint but it may also contain evidentiary material and information that the Commissioner has relied upon in accepting the complaint for investigation. In commenting on this section the Discussion Paper reflected on the 'hearing rule', which requires a decision-maker to give a person whose interests will be adversely affected by the decision, an opportunity to be heard.

Many of the earlier submissions supported the right of the respondent to have an actual copy of the complaint.

### **Position 7:**

Amend the Act to allow respondents to have a copy of the complaint as well as a summary of the complaint.

## Withdrawal of complaints

Section 68 allows a complainant to withdraw a complaint. The Discussion Paper noted some of the reasons that a complainant may wish to withdraw a complaint. There are no particular problems with having the power to withdraw a complaint but the Discussion Paper suggested that the wording of section 68(5) may need further refinement.

If a complaint is withdrawn it follows that, in the ordinary meaning of those words, the complaint no longer exists, but section 68(5) continues to refer to a withdrawn complaint as a complaint, which allows the complaint to be investigated and resolved under the provisions of the Act. There was seen to be some anomaly in the allowing a complaint to be withdrawn by the complainant but permitting the Commissioner to continue to investigate it (section 68(5)(a)(i)).

The majority of the earlier submissions did not expressly oppose the suggestion of clarification. One submission did not want the section changed but on the whole it would seem that the section could benefit from some refinement.

The intention of this section would appear to be to provide the Commissioner power to:

- a) allow the complainant to withdraw the complaint so that the complaint lapses; or
- b) refuse to allow the withdrawal of a complaint if the Commissioner is satisfied that the complaint was not withdrawn voluntarily and therefore the complaint will continue to be investigated; or
- c) where the complaint has been withdrawn voluntarily but it is in the public interest to continue the investigation allow the complainant to discontinue prosecution of the complaint and permit the Commissioner to take carriage of the matter; or
- d) where the complaint has been withdrawn involuntarily but it is in the public interest for the Commissioner to continue the investigation, allow the complainant to reinstate the complaint or permit the Commissioner take carriage of the matter.

The view of the Commissioner is that there may be circumstances in which the Commissioner should be able to take matters further despite the complainant not wishing to continue. If section 60 is amended to allow the Commissioner to investigate complaints on his/her own motion and refer them to inquiry then it would seem logical that this section be also amended to clarify the Commissioner's role can include taking over complaints that a complainant may not wish to further pursue where it is in the public interest to do so.

### Position 8:

- a) Amend Section 68 to allow the Commissioner to continue to investigate complaints that have been withdrawn (voluntarily or involuntarily) if it is in the public interest to do so; and
- b) Amend the Act to allow complainants to reinstitute complaints that have been withdrawn involuntarily if in the public interest to do so.

## **Stale complaints**

Providing certainty to respondents about the completion of any investigation or inquiry is one of the most important considerations in addressing the issue of old complaints. Some submissions suggested including a timeframe after which the file on a complaint could be closed and this would appear logical. One submission opposed the inclusion of discretion to revive a closed complaint and this certainly would be the fairer for respondents and administratively more effective for the Commissioner.

The Recommendations paper proposed that the Commissioner be able to administratively close complaints where the complainant has failed to make contact within 12 months of the last contact from the Commissioner where further consideration of the complaint is dependent upon further information which has been requested from the complainant. There should be no power to revive a closed complaint as this does not provide any certainty to the respondent or assist the Commissioner in closing inactive files.

### **Position 9:**

- a) Amend the Act to provide that a complaint lapses where the complainant has failed to make contact with the Commissioner within 12 months of the last contact.
- b) Amend the Act to include this category in the list of lapsed matters which cannot be reopened in Section 73.

## **INVESTIGATION**

### **Investigation of complaints**

Following examination of the issues no changes are brought forward here.

### **Freedom of Information**

The issues involved in any investigation may be highly personal and disclosure prior to resolution may not only taint the process, but may defame parties and cause personal embarrassment and aggravation to persons involved. This view was reflected in submissions.

It would seem that while there is a need for public scrutiny of the operations of any statutory office or government agency, it is not appropriate that the scrutiny extends to the detail of the lives of individuals involved in dispute resolution processes. In particular persons who are not parties to a complaint should not have a general right to apply for the records of others. Under the general rules of procedural fairness the parties to an action are provided with the relevant documents and information in order to respond to allegations or applications.

This issue was subsumed into the review of the *Freedom of Information Act 1991* and is now being dealt with in that review process.

### **Position 10:**

The issue of disclosure of details of the investigatory process under FOI has also been explored in the recent review of the FOI Act and is deferred to the outcome of that review.

## ***Personal Information Protection Act 2004***

The Recommendations Paper suggested that the investigation and scrutiny of the affairs of others for the purpose of establishing legal rights is within the scope of law enforcement activities and that the *Personal Information Protection Act 2004* to provide that the Office of the Anti-Discrimination Commissioner has a similar status to a law enforcement agency for the purposes of that Act.

The basis of this was that the activities of the OADC may be constrained or affected if the obligations imposed by the *Personal Information Protection Act 2004* in terms of notification and verification of third party personal information are strictly enforced. There are many circumstances where it is not necessary or appropriate to advise another party that information about them has been obtained.

The Act already recognises that when a complaint is initially received it is not necessary to advise the putative respondent until the complaint is accepted for investigation. Potential witnesses may be contacted at appropriate stages of an investigation to verify and clarify information but this should be at the discretion or professional judgment of the Commissioner not just because of a mandatory legal requirement.

In the recent review of the *Freedom of Information Act* it was recommended that the OADC have the same status as the Tribunal for the purposes of that Act, it would appear that this same solution is appropriate as a response to this issue.

Position 11:

Amend the *Personal Information Protection Act 2004* to provide that the Office of the Anti-Discrimination Commissioner has a similar status to a law enforcement agency for the purposes of that Act.

### **Completion of investigation**

Following examination of the issues no changes are brought forward here.

### **Dismissal because discrimination not substantial or dominant reason**

Following examination of the issues no changes are brought forward here.

### **Review of rejection or dismissal**

Many of the earlier submissions agreed that there should be a specific statutory provision to ensure that complainant receives reasons for the decision from the Tribunal. However, the Tribunal did not think such an amendment was necessary and was concerned that such an amendment may lead to an over prescriptive approach.

As an alternative the Tribunal suggested introducing a regulation making power that would allow for regulations to be made about procedural matters. The Tribunal felt that from time to time it would be of value to its processes to prescribe certain process in this way – such an approach would give certainty to parties and also allow

the Tribunal to the power to enforce its procedures in certain circumstances. It may be that the issue of reasons, should it become a problem, would be able to be prescribed by Regulation, without needing to revisit the legislation.

**Position 12:**

Amend the Act to provide a regulation making power for procedural matters such as referrals to the Tribunal from the Commissioner, reviews and inquiries.

A further issue relating to the process of reviews was raised by the Tribunal in response to the Recommendations Paper. The issue relates to the publication of decisions on review. Currently, if a decision raises a point of precedent or interest for future hearings or a point of public interest the Tribunal Member must seek permission of the parties to publish a decision. This is not always practical and the Tribunal would prefer a discretion to publish decisions in these situations. Obviously, there has not been an Inquiry in these matters so the identity of parties would need to be protected.

This issue is similar to the discussion in relation to Recommendation 33 in the earlier paper.

**Position 13:**

Amend the Act to give the Tribunal discretion to publish de-identified decisions on review matters.

## **Reviews of decisions on the papers**

Following examination of the issues no changes are brought forward here.

## **Lapsed complaints**

The only substantive issue here is dealt with under the stale complaints issue earlier in this paper – see Position 9(b).

## **CONCILIATION**

### **Conciliation of complaints**

The Commissioner supports 'early conciliation', that is conciliation during the investigation phase. The philosophy behind early conciliation is that in some cases if the parties can be brought together earlier, before proceedings become protracted and positions entrenched, there is a better chance of resolving the matter.

**Position 14:**

Amend the Act to include a power to direct the parties to early conciliation before or during the investigation of a complaint.

Under the Act as it currently stands, where the conciliation is concluded but has not resolved the complaint, the complaint must be referred to the Tribunal for inquiry. This does not allow for any further investigation of matters raised during conciliation. There are circumstances in which the matter may benefit from further investigation by the Commissioner and perhaps further conciliation. Matters may come to light in

conciliation that could be further investigated and verified, then dealt with again in conciliation.

On the whole it would seem there are benefits to allowing for early dialogue because this can focus the area of dispute and an investigation. Providing parties with an opportunity for further conciliation before referral to the Tribunal for inquiry gives parties another chance to resolve matters and may result in less cost for parties.

Position 15:

Amend the Act to allow for subsequent investigation following early conciliation.

### **Representation at conciliation conference**

Following examination of the issues no changes are brought forward here.

### **Recording conciliated outcomes**

Following examination of the issues no changes are brought forward here.

### **Conciliation proceedings not admissible**

Following examination of the issues no changes are brought forward here.

## **INQUIRY**

### **Referral for inquiry**

Once a complaint has been investigated and has not been able to be resolved through conciliation by the Commissioner then it is referred to the Tribunal for inquiry. Section 78 sets out the Tribunal's inquiry powers. An inquiry is an inquisitorial and open process.

A referral to the Tribunal must occur within 6 months after receipt of the complaint by the Commissioner whether or not the investigation of the complaint has been completed. The six month investigation period may be extended with agreement from the complainant; however the respondent has no say in whether the investigation period is to be extended.

The majority of submissions on this issue expressed the view that the Commissioner should be able to extend the time limit for complaints to be investigated or conciliated and there should only be one extension. Many agreed that seeking the complainant's opinion created a perception of bias.

In terms of extensions the Tribunal made a suggestion that extensions should not be limited in number but perhaps limited by a timeframe. An extension of the investigation and conciliation period out to 12 months may be useful where another attempt to conciliate a matter following additional investigation may be an appropriate step.

One submission suggested that the extension be subject to review. However, a review of an extension could lead to further delay and possible confusion for parties. Apart from a criticism of the Commissioner's investigatory or conciliation practices, a review of an extension of an investigation period is unlikely to enhance the resolution of the complaint. A mechanism to review an extension of time is not supported.

**Position 16:**

Amend the Act to provide the Commissioner with unilateral power to extend the time for an investigation.

**Position 17:**

Amend the Act to allow for extensions of time not exceeding an additional 6 months to investigate or conciliate matters (thus giving the Commissioner up to 12 months to investigate and conciliate a complaint).

## **Referral report**

Section 79 provides that once a matter is referred to the Tribunal for inquiry the Commissioner is within 48 days to provide the Tribunal with a report relating to the complaint.

The Commissioner includes in the referral report a reference to the fact that an attempt at conciliation has taken place, but does not set out or describe anything said or done in the course of conciliation proceedings. It is appropriate that no information about the confidential discussions held at conciliation be included in the referral report. The Tribunal finds this reference in the referral report useful and it is recommended that the legislation reflect current practice.

There was support in earlier submissions for including references to conciliation, the allegations and Commissioner's view in the referral report. The Tribunal made some specific suggestions about matters to include in the referral report. As noted above it supported a reference to conciliation having taken place, but not details of what was discussed.

The Tribunal's submission refined the matters raised in the question and proposed that a description of the ambit or nature of the complaint be made along with the Commissioner's views as to merit of complaint or to certain aspects of the complaint along with what evidence was available to assist in determining the complaint. Of course these would only be the views of the Commissioner and the Tribunal would not be bound by them.

Following the previous discussion and recommendations about the Commissioner amending a complaint, defining the ambit of the complaint including amendments to the complaint made by the Commissioner in the referral report would be useful.

**Position 18:**

Amend Section 79(3) so that the referral report includes reference to conciliation of a complaint (but not the details of what was discussed), a description of the complaint, a reference to amendments to the complaint and any material evidence to substantiate the complaint or to support the respondent's position.

## **Directions conference**

Once a matter is referred for inquiry by the Tribunal the first step in the process is a directions conference. As the Discussion Paper noted directions usually relate to the production of documents, times and dates for hearing, witness lists and any other matters that can facilitate the smooth running of the inquiry.

Section 80 of the Act provides that a directions conference is to be held in private, but directions conferences in other tribunals are generally open.

The main point that the Tribunal made in its submission was that closed directions conferences promoted conciliation and settlement. It gave parties a chance to consider the strength of their own and the other party's case before public (media) scrutiny. Once allegations are in the public arena, many parties move into damage control to refute and argue allegations.

However the Tribunal did note that there were instances where written decisions about the outcome of the directions conference would serve as useful precedents and directions in future matters. The Tribunal suggested that consideration be given to having a discretion to publish decisions of directions conferences. This seems reasonable and is recommended.

Section 80(3) states that a person, without reasonable excuse, must comply with a requirement to attend a directions conference and produce specified information. Failure to comply may result in a penalty of up to ten penalty units (\$1200).

Section 80(4) states that where a complainant does not comply with a requirement to attend a directions conference, the Tribunal may dismiss the complaint and order costs. There was concern raised that a complainant may not be able to attend due to some unforeseen event and thus have a reasonable cause for not attending.

Position 19:

Amend the Act to give the Tribunal discretion to publish decisions on interlocutory matters.

Position 20:

Amend Section 80(4) to include the words 'without reasonable excuse'.

## **Proceedings relating to inquiry**

Following examination of the issues no changes are brought forward here.

## **Representative complaints**

Section 82 provides that the Tribunal may deal with a complaint as a representative complaint if satisfied that the complaint was made by a person or an agent of a person who is a member of a class of persons against whom the alleged similar discrimination or prohibited conduct was directed on behalf of that class.

A major concern for the Tribunal in class action matters is the need to ensure that the person or agent purporting to represent a person or group of persons does in fact represent that person or group. Settlement orders can be binding and bar further

action by people who may not have participated in the matter, so it is important that the interests of members of the class be carefully considered.

The submissions supported an amendment that the Tribunal be satisfied that the majority of members of a class consent to the action.

**Position 21:**

Amend the Act to ensure that the Tribunal must be satisfied that the majority of members consent to a class action.

### **Ordinary complaint not precluded**

Following examination of the issues no changes are brought forward here.

### **Amendment of complaint**

Following examination of the issues no changes are brought forward here.

### **Hearing of inquiry**

Section 85 provides that an inquiry is to be held in public unless the Tribunal directs that it be held in private. As the Discussion Paper noted it is a general principle of our legal system that cases are heard in open courts. However there are circumstances where it is appropriate to close a hearing or suppress the names of parties or witnesses.

In particular the Tribunal submitted that as a general principle it could see cogent reasons to protect the identity of children involved in matters and requested an amendment to protect children in this way.

There was widespread support for such an amendment.

**Position 22:**

Amend the Act to ensure that a child's name or information revealing the identity of a child shall not be published unless permitted by the Tribunal.

### **Representation before the Tribunal**

Section 85(2) allows a person to be represented or accompanied at an inquiry "only with permission of the Tribunal". It is implicit in this provision that at any time the Tribunal may withdraw that permission. The Tribunal has requested the Act make it clear, particularly to those that are unrepresented and are up against a legal or other representative, that the permission is not everlasting and can be reviewed at any time during the progress of the enquiry.

Following examination of the issues and specific feedback from the Tribunal it has been suggested that it would be more transparent to spell out this power.

**Position 23:**

Amend Section 85 to explicitly provide that the Tribunal may give or withdraw permission for a party to be represented or accompanied at anytime during the progress of a matter.

## **Conduct of inquiry**

Following examination of the issues no changes are brought forward here.

## **Security for costs**

Following examination of the issues no changes are brought forward here.

## **Evidence**

Following examination of the issues no changes are brought forward here.

## **Publication of evidence**

Following examination of the issues no changes are brought forward here. It may however be affected by Position 22 above.

## **Orders**

The Discussion Paper looked at the range of orders that the Tribunal may make under section 89 when a complaint is substantiated. Where a complaint has not been substantiated the Tribunal must dismiss the complaint.

The main area for contention was the relief with respect to representative or class actions and the distribution of monies awarded to the complainants.

Many responses agreed with the idea of an administration fund but did not provide details or ideas about how the fund would be established, administered or audited. The Tribunal agreed it would be sensible to have section 89(4)(b) clarified and some provision inserted to ensure that the administration of such a fund occurs appropriately.

It would seem after exploring the options that the most appropriate and cost effective way to enact such an order would be to allow for orders establishing a trust under the control of the Public Trustee.

This should be explored further with both the tribunal and The Public Trustee through the drafting stage of this review.

### **Position 24:**

Amend the Act to allow for the establishment of a fund under the control of the Public Trustee for distribution of any settlement monies.

## **Enforcement of orders**

Following examination of the issues no changes are brought forward here.

## **Apologies and retractions**

Following examination of the issues no changes are brought forward here.

## **Reasons for orders**

Following examination of the issues no changes are brought forward here.

## **Conciliation and agreement**

At any stage of an inquiry if the Tribunal concludes that a complaint may be resolved by conciliation, it may, pursuant to section 94, refer the matter to a conciliation conference.

The Discussion Paper noted two views about the operation of section 94 that:

- a) matters should be referred back to the Commissioner for conciliation; or alternatively
- b) the complaint has been referred to the Tribunal for inquiry so it was no longer subject to the power of the Commissioner and therefore the Tribunal should use its own conciliation processes.

The majority of the earlier submissions supported the Tribunal's current approach to conciliation under the *Alternative Dispute Resolution Act 2001*.

The Tribunal has also suggested in its response that any settlement reached at a conciliation conference directed by the Tribunal should be enforceable as if it were an order of the Tribunal. Currently the situation is that the Tribunal may have to hold a further hearing to dismiss the matter, even though in reality it is not being dismissed, but has been settled by agreement. The rather negative message for the complainant from this process would be avoided if the settlement agreements themselves were enforceable as though orders, hence giving Tribunal ordered conciliations the same status as those ordered by the Commissioner.

Position 25:

Amend the Act to provide that agreements reached at Tribunal facilitated conciliation through the *Alternative Dispute Resolution Act 2001* be enforceable as if they were orders of the Tribunal.

## **Costs**

Following examination of the issues no changes are brought forward here.

## **OTHER PROVISIONS**

### **Information and documents**

Following examination of the issues no changes are brought forward here.

### **Interim orders**

Section 98 provides that the Tribunal, Commissioner or an authorised person, at any stage of an inquiry, investigation or a conciliation of a complaint, may make an interim order pending the completion of that inquiry, investigation or conciliation. The purpose of this section is to provide injunctive relief to prevent the continuation or recurrence of the alleged unlawful conduct. There are penalties attached to non-compliance.

Many supported the current position as it could be used to stop unlawful conduct, protect parties and witnesses and preserve evidence. The Tribunal felt that this was at odds with the Commissioner's role and submitted that it was preferable that the Tribunal undertook these quasi judicial functions. The Commissioner agrees with the Tribunal and it is therefore recommended that the Tribunal be able to make interim orders not only on matters that have been referred to the Tribunal for inquiry but on the application of the Commissioner or authorised person who are undertaking an investigation or conciliation.

#### **Position 26:**

Amend the Act to provide that only the Tribunal has power to make interim orders.

### **Dismissal of complaint**

The Tribunal may dismiss a complaint if it is not substantiated. It may also dismiss a complaint at any time during the inquiry process if it is satisfied that:

- (a) the complaint is trivial, vexatious, misconceived or lacking in substance; or
- (b) dismissing the complaint would, for some other reason, be just and appropriate.

Where a complaint is before the Commissioner (section 68) it may be withdrawn by the complainant but there is no power for the complainant to withdraw a complaint once it is before the Tribunal. As the Discussion Paper pointed out, the withdrawal of a complaint is often a desirable way to resolve a complaint rather than dismissal.

The option of withdrawing a complaint before the Tribunal was supported by submissions. The Tribunal suggested that if complainants are permitted to withdraw their complaint at the inquiry stage any statutory amendment should indicate that no further complaint about the matter be made.

Similarly there is no provision to withdraw an application for review, hence requiring the Tribunal the unnecessary step of convening to dismiss an application on the basis it has been withdrawn.

#### **Position 27:**

Amend the Act to allow a complainant to voluntarily withdraw a complaint from inquiry or an application for review and to provide that if it is withdrawn there can be no further complaint or application in relation to the same matter.

## Order for costs

It has been highlighted in feedback following the Recommendations Paper that the Tribunal operates in a civil jurisdiction and sits alongside the Civil Division of the Magistrates Court, but the operation of costs is very different and at least some synergy could be argued as between the jurisdictions.

In particular, the Section 33 of the *Magistrates Court (Civil Division) Act 1992* gives a Magistrate discretion to order a legal practitioner involved in a matter to pay all or part of the costs of the proceedings. This is a discretion very rarely used but one which exist to allow the court to make an order where, presumably, it finds that the costs have been inflated and additional costs to parties are attributable to the actions of the practitioner.

The Tribunal agrees that a provision such as Section 33(2) of the *Magistrates Court (Civil Division) Act 1992*, whilst likely to be rarely used, would provide flexibility to the Tribunal which would aid its operations.

### Position 28:

Amend Section 99A to give the Tribunal discretion to order a party's representative to pay all or part of the costs of proceedings.

## Appeals to the Supreme Court

Section 100 provides for appeals to the Supreme Court of determinations of the Tribunal on matters of law, dismissals, orders and cost orders. The Discussion Paper canvasses the interaction of section 100 with the *Judicial Review Act 2000*.

It seems that there are two parallel review systems in operation. This has raised a number of concerns for parties and the Tribunal. There may be additional costs for the parties and the legal system if a *Judicial Review Act* application is made. A *Judicial Review Act* application creates some uncertainty as there may be no finality to proceedings and the status of a Tribunal decision. Overwhelmingly submissions supported a bar to judicial review applications.

The comments of the Supreme Court in *Mazukov v Anti-Discrimination Tribunal* (2004) TASSC 68 are also relevant to the question raised.

“I conclude that the *Judicial Review Act* does apply to these decisions of the Tribunal.....I would like to observe that it seems surprising that the Parliament intended this result. The *Anti-Discrimination Act 1998* sets up a Commissioner to receive and accept or reject complaints of discrimination. If a complaint is rejected, the Act provides a mechanism for the review of that decision by the Tribunal. If a complaint is accepted, investigated, but dismissed, the Act confers a like review mechanism. By not exempting these decisions from the provisions of the *Judicial Review Act*, the Parliament has opened the way to another tier of appeals in discrimination matters that could include not only appeals to a single judge of the Court, but also appeals to the Full Court, and even applications for special leave to the High Court of Australia. The Schedule to the *Judicial Review Act* contains a list of statutes,

decisions pursuant to which are exempted from the operation of that Act, but the *Anti-Discrimination Act* is not included.”

Therefore the following is recommended –

Position 29:

Amend the Schedule to the *Judicial Review Act 2000* to include the *Anti-Discrimination Act 1998* in the list of Acts exempt from the *Judicial Review Act 2000*.

## **Proof of exceptions or exemptions**

Following examination of the issues no changes are brought forward here.

## **Bullying**

As noted earlier the Vines Report was a reason for the review of the complaints handling processes of the Act. The Discussion Paper highlighted an outstanding matter from the Vines Report regarding bullying and the interaction with sections 16 and 17.

Section 17 states that a person must not engage in any conduct which offends, humiliates, intimidates, insults or ridicules another person on the basis of gender, marital status, relationship status, pregnancy, breastfeeding, parental status or family responsibilities in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed.

Under section 17 the attributes against which a person must not offend, humiliate, intimidate, insult or ridicule another person are limited to only 7 out of the 19 attributes listed in section 16.

It appears that the list of seven attributes are those which were in the *Sex Discrimination Act* (which was, in part, the predecessor of this Act) prior to the enactment of this legislation. However the intent of Section 17 and its application to all attributes is a close fit with the intent of the legislation and the extension of section 17 to cover the other attributes has widespread support, through the earlier phases of this review and through the earlier Vines review.

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

That is not to diminish the fact that the extension of Section 17 to all attributes is a contentious issue with the vast majority of submissions about this recommendation raising the issue that such an action would unduly limit freedom of speech and religious freedom.

Section 17 does not simply provide for an individual to “complain because they are offended”, it requires a prohibition on conduct which offends, humiliates, intimidates, insults or ridicules another person in circumstances “*that a reasonable person, having regard to all the circumstances would anticipate that the other person would*

*be offended, humiliated, intimidated, insulted or ridiculed*'. This is a test which places a significant threshold on the application of the section.

Discussing and debating issues such as religion or politics, even comparing philosophical views and promoting the benefit of one view 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 opinions and argument.

As outlined in earlier papers it is not accepted that free speech would be unduly fettered or religious freedom significantly curtailed if an amendment were made in the terms proposed.

The inclusion of the additional attributes will not itself make the offending, humiliation etc a criminal offence as has been suggested recently for vilification however the Tribunal does have the power, as part of its armoury in dealing with complaints and in addition to its power to award compensation, to impose a fine of up to 20 penalty units (\$2200).

Position 30:  
Amend Section 17 so that it applies to all the attributes in Section 16.

## **Penalties**

Following examination of the issues no changes are brought forward here. However an increase in the level of penalty that may be imposed might be a matter that should be considered in conjunction with the extension of section 17.

## **GENERAL ADMINISTRATION OF THE ACT**

Part 7 of the Act deals with matters that relate to the general administration of the Act and the complaints handling process.

### **Immunity for complainants and witnesses**

The immunity provision at section 102 allows persons to bring their complaints to the Commissioner without fear of being the subject of prosecution from the respondent.

The submissions supported the principle that where complaints are made and evidence is given in good faith then the immunity should apply. The submissions also supported the inclusion of the words 'in good faith' as it would clarify matters beyond doubt.

Position 31:

Amend Section 101 to include the words 'in good faith'.

### **Immunities**

Section 103 provides immunity for the Commissioner, and the chairperson and members of the Tribunal. The Discussion Paper looked at the issue of providing immunities for authorised officers and conciliators who perform important functions under the Act.

This was clearly supported in the submissions as these officers are undertaking functions on behalf of the Commissioner and exercising professional judgment and certain powers under the Act that affect the parties.

Position 32:

Amend the Act to extend immunity from suit to authorised officers and conciliators.

### **Commissioner and Tribunal members not required to give evidence in certain cases**

Following examination of the issues no changes are brought forward here.

### **False and misleading statements**

Following examination of the issues no changes are brought forward here.

### **Offences in respect of proceedings**

Following examination of the issues no changes are brought forward here.

### **Admissibility in other proceedings**

Following examination of the issues no changes are brought forward here.

## Application of the Act

Following examination of the issues no changes are brought forward here.

## Application of the Anti Discrimination Act 1998 to the Commonwealth

Following examination of the issues no changes are brought forward here.

## Definitions

As well as dealing with the complaints handling processes the review looked at some supplementary and miscellaneous issues in relation to definitions.

It appeared from the Discussion Paper process and from submissions in response to that paper that a number of definitions require some amendment. Accordingly the following recommendations for change are made -

### Position 33:

- a) Amend the definition of 'club' to include 'or' after the words 'from the funds of the association'; and
- b) Amend the definition of 'competitive sporting activity' to include the word 'and' before the word 'umpiring'.

Submissions and medical opinion evidence clearly support transsexuality being considered as a matter of gender identification not sexual orientation. It is therefore inappropriate to include reference to transsexuality as a sexual preference.

### Position 34:

Amend the definition of sexual orientation to exclude transsexuality.

For some time organisations representing intersex persons have been lobbying Government to have their condition appropriately recognised in equal opportunity law. It is scientifically clear that a person who is intersex is neither a female or male person, nor are they a transsexual. It is inappropriate for persons with an intersex condition to be treated as or considered to be transsexuals therefore it is proposed that intersex be included as attribute under section 16 and defined.

### Position 35:

Amend the Act to define the term 'intersex' and include it as a separate attribute.

The Commissioner for Children noted that the term 'child' was not defined in the Act. It may be that this is not necessary as the *Age of Maturity Act 1973* applies, it is still thought that the rights of the child are better protected by specific mention in the legislation.

In defining 'child' it also needs to be made clear that some children, namely, the mature minor may still be complainants and it is incumbent on the Commissioner and/or Tribunal to allow them to speak for themselves in the process whilst still protecting them from exploitative settlement of the complaint (see Positions 3 and 4).

Position 36:

- a) Amend the Act to define the term 'child' as a person under the age of 18 years and
- b) to allow for the Commissioner to accept a complaint from a child if satisfied the child has capacity to be the complainant.

**New issue: The Tribunal's registry**

This is an issue raised in feedback following the release of the Recommendations Paper. Unlike legislation setting up other Tribunals in this state there are no specific provisions related to a Registrar or other staff being appointed to assist the Tribunal. This has been queried by applicants on more than one occasion. The Tribunal have asked that specific provisions allowing for a Registrar and other staff to be appointed to help the Tribunal be inserted in the legislation, as it is for most other Tasmanian Tribunals, to put this question beyond doubt.

Position 37:

Amend the Act to allow for the appointment of a Registrar and other staff to assist the Tribunal.

## **ADDITIONAL MATTER**

### **Exemptions for educational Institutions**

In the Recommendation Paper a suggested change to the Act which had been proposed by the Catholic Church was outlined and it was suggested that:

“At this stage there appears to be some support for the Church’s position [that an exemption for religious educational institutions be included in the Act]. However, this support must be weighed against a number of public policy considerations that relate to the provision of educational services, religious freedoms and the protection of human rights. Rather than make a recommendation at this stage it is appropriate to seek a broader community view on the proposal for an amendment outlined above by the Catholic Church so comment is invited on whether the Act should be amended to allow religious and denominational schools to limit the enrolment of students based on their lack of affiliation to the church or faith. “

#### **Feedback on Recommendation Paper:**

The Tasmanian Act contains an exemption which allows, under certain circumstances, discrimination in employment in educational institutions, on the grounds of religious belief or affiliation (S51). The Act also provides (S56) that the Commissioner may grant exemptions from particular provisions of the Act upon application.

In its submission to the review the Catholic Archdiocese of Hobart (CAH) requested that there be the same exemption for discrimination in school enrolment as for teaching i.e. the ability to give preference to admission of students of that particular religion. The Archdiocese was supported by 30 contributors to the review.

Two (2) submissions, including that from the Anti-Discrimination Commissioner argued that there has been insufficient community consultation on this issue and sought to have this issue further debated rather than included with other suggested amendments.

The Archdiocese proposed the following amendment:

#### **‘S51A Enrolment policy and management of religious educational institutions**

- (1) A person that operates or proposes to operate an educational institution conducted in accordance with the doctrines, tenets, beliefs, teachings, principles or practices of a particular religion may discriminate against another person on the grounds of religious belief, religious affiliation or religious activity in relation to the admission to and continuation of enrolment in such an educational institution.
- (2) A person that operates or proposes to operate an educational institution conducted in accordance with the doctrines, tenets, beliefs, teachings, principles or practices of a particular religion may discriminate against another person on the grounds of religious belief, religious affiliation or religious activity in the course of establishing, directing, controlling or administering such an educational institution.’

### **Arguments against this amendment:**

- That this was not widely explored in the review papers and in fact the recommendation was that this should be subject to separate and further consultation.
- That the main purpose of the Anti-Discrimination Act is to protect persons from unlawful and unfair discrimination, and this should be paramount. Consequently, as a general principle, faith based bodies receiving public funds for secular purposes should be required to comply with anti-discrimination laws.
- That religious affiliation is not the only reason that parents choose private or religious based school. As a fundamental principle all children have the right to high quality school education and the rights and protections afforded them by law.
- That the amendment proposed by the Archdiocese would open the floodgates in respect of other religious institutions such as hospitals or health care facilities, family and welfare services.
- That the amendment proposed by the Catholic Archdiocese of Hobart is drafted to address concerns expressed about policies for managing increased demand for places in Catholic schools. Generally speaking, legislation should not be used to implement policy, and the CAH should consider the option of applying for an exemption under S56.
- That the suggested amendments go beyond admission and enrolment in asking for the exemption to apply to any and all aspects of the school life.
- That the exemption could be better targeted through an exemption under section 56 as the need to apply such policies may not be a continuous issue for denominational schools or for all denominational schools.

### **Arguments in support of this amendment:**

- That the Tasmanian legislation is out of step with like legislation in all other jurisdictions in Australia which exempt from the provisions of the Act, either specifically or impliedly, the preferential enrolment policies exercised by educational institutions run by religious organisations. This has proved to be a non-contentious issue in other states/territories.
- The Archdiocese sees their proposal as a *preferential* enrolment policy as opposed to an *exclusionary* enrolment policy.
- The amendment is clearly addressing and limited to education. One of the specific purposes of religious schools is to teach and encourage certain value positions. This is not usually part of the mission of a hospital or welfare organisation.
- The legislation could define 'educational institution' to ensure it was limited to the intended bodies.

- The current requirement affects all educational institutions that use a preferential enrolment policy, and interferes with the basic and universally accepted principle of the right to freedom of religion.
- The protection or exercising of a basic legal right should not be 'at the whim of an administrative officer' ie by being dealt with administratively by way of an application for an exemption under the Act.
- A Section 56 exemption may be in force to a maximum of 3 years, and renewal may be sought for another period not exceeding 3 years. This would require expending considerable expenses at regular intervals, and is an unfair burden as it relates to the protection of the right to religious freedom.

### **Discussion:**

There does appear to be substantive arguments in favour of an amendment which would allow for preferential admission of students in religious schools. Equally there are very strong arguments in favour of a broader public values and human rights approach which would both cancel out these arguments and militate for the current approach which allows for application for specific exemptions.

Accepting the fundamental reasons in favour of the exemption also brings with it certain riders and the draft CAH amendment subsection (2) would, arguably, extend the provision to all aspects of school life, which takes it beyond the primary reason.

In establishing a primary reason for the exemption it is inherent to limit the exemption to take into account the principle of minimum interference with the purpose of the legislation. For that reason any amendment that is adopted should be limited to the issue of admission to denominational schools and not other aspects of school life.

In a similar way it can be argued that the primary reason for the exemption is met if the exemption is limited to application to the time of admission and should not allow for exclusion of a student once admitted. The educational needs of the "non-preferenced" students, predominantly children, will not be served by a situation where their enrolment is under constant review and there is a real prospect of exclusion if there is a need to bring in a student who meets the preferential criteria or should a student, at some point, no longer meet the preferential criteria.

There is a cogent public values argument that once enrolled the needs of the student must receive greater weight than they would at a time when a school is being chosen in the first instance.

Having examined the issue it is clear that the need for the exceptions in the CAH suggested subsection (2), which go beyond the primary reasoning for the exemption, could be dealt with in the same way as any other application for exemption; that is, by way of an application under Section 56 of the *Anti Discrimination Act 1998*.

The Anti Discrimination Commissioner sums up the argument against even a limited exception thus:

"The purpose of the Act is to prohibit discrimination and other specified conduct. It is beneficial legislation designed to protect people from discriminatory practices. Current exceptions in the Act allow discrimination to occur where it is a special measure for a disadvantaged group, for safety or

public health reasons, where it would cause an unjustifiable hardship, where it is required under legislation, or where an attribute is an essential requirement for a position. The proposed exception does not, in my view, fall within these categories and it does not further the purposes of the Act. “

In the Recommendations Paper the issue was raised for consultation and having received feedback and examined the issue it is suggested that a provision which is far more limited than that requested by CAH would meet the primary needs of those who supported this provision.

**Position 38:**

Amend the Act to allow discrimination on the basis of religious belief, religious affiliation or religious activity in educational institutions conducted in accordance with the doctrines, tenets, beliefs, teachings, principles or practices of a particular religion in so far as the policies of that educational institution provide for preferential admission to those students who also adhere to the particular religion.

The exemption should not extend beyond the point of admission.