Religious Discrimination Bill – Exposure Draft

Your Submission

This submission is made on behalf of the Transgender Victoria (TGV). TGV is the peak body representing transgender and gender diverse (TGD) Victorians. Our membership comprises TGD people of all cultural and faith backgrounds, including Christian, Orthodox Christian, Islam, Jewish, Hindu and Buddhist religious traditions as well as TGD people who hold no religious beliefs. TGV supports legislation which prevents discrimination against Australians on the basis of faith and religion, or for not holding those beliefs. Our membership experiences discrimination on the basis of our gender identity, racial and cultural characteristics and also our faith and religious beliefs. In addition, TGD individuals also identify as a variety of diverse sexual orientations and experience the discrimination on the basis of sexual orientation in the same way as the LGB part of the LGBTIQ community. Of particular relevance to the proposed legislation is that multicultural and multifaith TGD Victorians and Australians often experience the compounding effect of these discriminations which do not occur in isolation but act in concert to create profound, multi-faceted and systemic discrimination and disadvantage. This effect is known as intersectionality. As an example of intersectionality, Muslim TGD Australians will experience both Islamophobia from the broader community and discrimination on their TGD identities and sexual orientation from both their religious community and the broader community. The negative effects on the individual are usually very profound.

TGV is concerned that the draft Religious Discrimination Bill 2019 inhibits the rights of TGD Australians to practice in their faith traditions free from discrimination on the basis of the sexual orientation, gender identity or intersex characteristics. These further “protections” for religious groups contained in this legislation cuts through existing state and Commonwealth antidiscrimination legislation and permits discrimination against TGD Australians on the basis of their sexuality, gender identities and intersex characteristics provided this is done in the name of religious belief.

TGV believes that this is wrong and is based on the concept that TGD rights to freedom from discrimination and people of faith rights to freedom from discrimination are in opposition. TGV wholeheartedly rejects this concept. The narrative around religious freedom has already created great problems for multifaith TGD Australians struggling with reconciling their faith and TGD identities while also experiencing race-based discriminations. The actions of the government in drafting this legislation are driving a wedge between faith communities, multicultural communities, and TGD communities. This bill attempts to enshrine protection in law for those who create these problems and should not be put to parliament in its current form. This legislation winds the clock back on important steps towards equality that the TGD communities have fought to achieve and that the overwhelming majority of Australians support, as evidenced by the vote in the Marriage Equality survey.
Any freedom from religious discrimination bill should be presented to parliament concurrent with legislation which removes provisions in existing national laws which allow religious schools to exclude and discriminate against LGBTQ students and teachers, especially where those schools receive funding from the government. TGV notes with dismay that date for finalising the ALRC review into this matter has been delayed to December 2020. The government should also concurrently present legislative amendments to all legislation which ensure that organisations who receive government funding are not able to exclude TGD Australians from those government-funded services.

Australia has long prided itself as being the land of the fair go. Australians have consistently demonstrated that they value equality before the law. Australia is well on the path towards becoming a more equal place, and the TGV supports fair and balanced protections from all forms of discrimination for all people. Fair and balanced legislation will move us forward on this journey, legislating further discrimination will not.

To that end TGV submits that the bill in its present form is unacceptable and should not be presented to the parliament. The bill requires extensive revision to prevent religious beliefs being used as a cloak screen to prevent discrimination against

- LGBTQI+ Australians
- TGD Australians
- Female Australians
- Single mothers
- Disabled Australians
- Other to whom faith groups may regard as unacceptable

We have had a relatively short time to consider the details of this Bill and the other two bills which are proposed. Accordingly, our views on the religious discrimination package proposed by the Government are still evolving as we consider and understand all the potential impacts of this legislation on TGD people especially multifaith and multicultural TGD+ people.

TGV however has developed broad specific concerns about the application of this bill in the way it will affect all Australians in the groups above but particularly TGD+ Australians. Critical concerns exist in the following areas

1. **conscientious objections in health care**: it will be harder for health employers and professional bodies to require all health workers and services to treat TGD+ people equally in health care, despite any personal religious objections held by the health professional (s 8(5)-(6)). These objections could intersect with objections on the basis of race or cultural identity and thus affect TGV’s membership more intensely;

2. **privileged religious expression over discrimination protections**: certain religious statements will trump TGD+ legal discrimination protections in federal, state and territory laws, leaving TGD+ people vulnerable in public life, such as workplaces, schools and in the provision of goods and services (s 41). These objections could intersect with objections on the basis of race or cultural identity and thus affect the TGVs membership more intensely;

3. **Folau’s law**: it will be harder for large employers to foster an inclusive culture or achieve their mission by imposing reasonable employee conduct rules on religious expression outside of work hours (s 8(3)-(4)). These objections could intersect with objections on the basis of race or cultural identity and thus affect the TGVs membership more intensely.

TGV believes that the government should act to amend the legislation in such a way that protection is given in all these three areas. Some more detailed comments in each of these areas follow.
1. **Ensuring Health Services Remain Accessible to All (Sections 8(5)-(6))**

State and Territory health laws carefully balance the health needs of patients with the right of health professionals to object to the provision of certain health services on religious grounds. Under State and Territory laws, the right to conscientiously object is generally limited to certain types of health service (such as abortion and euthanasia) and may be conditional, (e.g. conscientious objection to assisting in: abortion subject to a duty to refer and to assist when necessary to preserve life or in an emergency: Abortion Law Reform Act 2008 (Vic), s 8; Termination of Pregnancy Act 2018 (Qld), s 8; ) such as requiring assistance where necessary to preserve life or provided a referral is organised for the patient. Under this Bill, health professionals (including services) cannot be restricted or prevented in exercising their existing rights to conscientiously object through the imposition of additional requirements by employers or professional bodies (s 8(5)).

However, in all health services not currently covered by State or Territory conscientious objection laws – being the majority of health services – the Bill would make it unlawful for health employers and professional bodies to restrict or prevent health professionals from conscientiously objecting to providing health services on religious grounds. Health employers and professional bodies which seek to regulate conscientious objection by health professionals must show their rules are ‘necessary to avoid an unjustifiable adverse impact’ on the provision of the health service or the health of the patient (s 8(6)).

Our concerns about these provisions include:

- they cover a wide range of health professionals – including doctors, nurses, pharmacists, optometrists, occupational therapists, speech therapists, psychologists, podiatrists and physiotherapists;
- they are not limited to any particular type of health service in which a conscientious objection may be considered appropriate. So, it is unclear whether, for example, a pharmacist may decline to dispense hormones to a transgender or gender diverse customer or a GP may decline to prescribe PREP or PEP to a gay man based on a religious conviction;
- they impose a higher legal bar than the ‘reasonableness’ test used in other indirect discrimination provisions, which leaves unclear whether the imposition of requirements such as a duty to assist in emergency situations or a duty to refer a patient will be lawful;
- employers of health professionals may face concurrent complaints of discrimination from: (1) patients who have been denied treatment on grounds such as their sexual orientation and gender identity; and (2) employees who been being required to provide health services which contradict their religious beliefs.

While exemptions are not provided on the grounds of race or cultural identity, prejudice against both of these characteristics exist in the community and may compound the likelihood of refusal of access to the health needs of TGV members. In all these situations TGV members may be more likely to experience discrimination in these cases where their racial or cultural identity differs from the white Anglo-Saxon “norm”.

2. **Overriding Discrimination Protections for ‘Statements of Belief’ (Section 41)**

Section 41 of the Bill overrides federal, state and territory discrimination protections, and Tasmanian offensive conduct provisions, by preventing ‘statements of belief’ from being the subject of a complaint under these laws provided that such statements:

- are not malicious;
- do not or are not likely to harass, vilify, or incite hatred or violence against another person or group of persons;
- do not counsel, promote, encourage or urge conduct constituting a serious offence.
‘Statements of belief’ are statements by religious people, made in good faith, which ‘may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings’ of their religion, or good faith statements made by non-religious people about religion.

Our concerns about these provisions include:

- they give licence to a wide range of potentially harmful and offensive statements to be made by religious people, contributing to hostile, unsafe or non-inclusive workplace, schools and other public environments (e.g. a boss saying to their gay employee ‘I believe homosexuality is a sin’; a customer service representative saying to a trans woman ‘God made you a man’);
- they exempt religious people from complying with other laws that non-religious people must comply with – non-religious people are only afforded the right to make statements about religion, not general statements in accordance with their beliefs;
- they do not require religious people to make statements which actually conform to their religion in order to obtain protection – statements which ‘may reasonably be regarded as being in accordance’ with religion are protected. This is a broader legal protection than afforded to religious bodies under other religious exemptions;
- they do not define what constitutes a ‘statement’ and whether it is exclusively limited to verbal and written communications, not accompanied by other acts or omissions (such as refusals of service);
- they set the bar too low in allowing statements which otherwise counsel, promote, encourage or urge conduct constituting a breach of law (not just a serious offence);
- they may remove or reduce discrimination protections in circumstances where no separate harassment or vilification protections exist. For example, disability-based harassment is separately protected under s 35 of the Disability Discrimination Act 1992 (Cth), while sex, sexual orientation, gender identity and intersex-based harassment (not involving sexual harassment) relies on standard unlawful discrimination protections under the Sex Discrimination Act 1984 (Cth).

These provisions do not prohibit statements on the grounds of race or cultural identity and prejudice against both of these characteristics exist in the community and any statement including race or cultural identity may compound the harm caused by any statement made under the protection of this section to TGV members. In all these situations TGV members may be more likely to experience discrimination and abuse in these cases where their racial or cultural identity differs from the white Anglo-Saxon “norm”.

Promoting Inclusive Workplace Cultures (Section 8(3)-(4))

The Bill makes it unlawful for a private sector employer with revenues of at least $50 million in the current or previous financial year to restrict or prevent an employee from making a ‘statement of belief’ outside of work hours unless compliance with that rule is necessary to avoid ‘unjustifiable financial hardship’ to the employer (s 8(3)). Like for conscientious objections (see above), ‘statements of belief’ which are malicious, harassing, etc. are excluded.

Employer conduct rules imposed by other types of employers, or during work times, must comply with general indirect discrimination provisions, which require rules that otherwise disadvantage employees on religious grounds to be reasonable in all the circumstances. In addition to our concerns above, the test for ‘unjustifiable financial hardship’ is novel and does not appear to take into account other harms that employers should be able to legitimately consider when setting employment conduct rules, such as damage to staff morale or safety, cultures of inclusivity and achieving non-financial organisational objectives such as promoting health and wellbeing. Standard indirect discrimination definitions in law would already look at the reasonableness of such requirements – so it is unclear why a specific class of employers should be singled out.
These provisions would appear to reduce the ability of the defined class of employers to promote diverse and inclusive cultures which benefit our members who often find them excluded from employment. Large companies are often in the forefront of diversity and inclusion not just because of moral and ethical imperatives but also for the proven benefits that they bring to their businesses and the economy as a whole. The evidence is widespread that diverse and inclusive organisations perform better on a variety of measures including:

- Innovation
- Customer focus
- Effectiveness

The evidence in the multicultural, LGBTI and TGD areas are especially strong\(^1\). This bill in seeking to reduce the ability of large organisations to improve in these areas would seem to run counter to the liberal party position as enunciated by the Prime Minister “We are on your side. If you have a go in this country, you’ll get a go. That’s what fairness in Australia means. My ambition is for an even stronger Australia – to keep our economy strong, to keep Australians safe and to keep Australians together.”

TGV submits that this legislation in its present form does not indicate that the federal government is not on the side of TGD Australians and that this legislation weakens Australia, its economy and endangers the safety of TGD Australians.

Furthermore, the Prime Minister has stated that he is concerned about the mental health of the Australian community. The debate around Religious Discrimination Bill has a negative impact on mental health of TGD communities in general, and multicultural and multifaith TGD communities specifically. The mental health of these communities is the worst of any group in the country. Over 70% of young TGD people have anxiety, depression and self-harmed\(^2\). This is due to the extreme discrimination and prejudice they face their gender identity in a hostile environment frequently from their faith communities. This Bill will only exacerbate the negative effect that some faith communities have on the scandalously poor mental health of the TGD community. Feeling unsure of personal safety, sense of belonging, and the real possibility of discrimination by members of faith communities as well as the wider society can add to the minority stress commonly experienced by TGD individuals. This has the potential to reduce their productivity in the workplace, as well as alienating TGD individuals from financially contributing to the Australian economy as they face the possibility of being refused employment based on their multiple identities. Creating a political and social environment that reduce productivity and participation in the workforce can work against the Australian government’s aspirations for productivity that foster strong economic growth.

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**Final Statement**

TGV believes that the bill in its current form is overly complex and while it could be revised it probably should be scrapped and a new law drafted. TGV supports legislation which prevents discrimination against Australians on the basis of faith and religion, or for not holding those beliefs. Our membership experiences discrimination on the basis of our racial and cultural characteristics, our faith and religious beliefs and also on the basis of TGD identities. Any new law should be a simple anti-discrimination bill without conferring the numerous special privileges and rights that the current proposed legislation provides for.

In addition the TGV believes the scope of the ALRC report into religious exemptions in antidiscrimination should not be narrowed as has occurred but should be returned to the original April 2019 terms of reference and be further broadened to include the desirability of matters raised in the exposure draft particularly in relation to balancing various competing rights of religions and various groups including TGD Australians as summarised above. In addition, the ALRC inquiry should include reviewing legislative amendments to all legislation which ensure that organisations who receive government funding are not able to exclude TGD Australians from those government-funded services. Accordingly, the timing of the release of the ALRC report into religious exemptions in antidiscrimination legislation should be brought forward to as early a date as possible and in any case be no later than the date originally set, 10 April 2020. No legislation of the type proposed in the exposure draft legislation should be further considered until the ALRC report is available.