Dear Attorney,

Religious Discrimination Bill 2019 Exposure Draft

Victoria Legal Aid (VLA) is a Victorian statutory agency responsible for providing information, advice, and assistance in response to a broad range of legal problems. Working alongside our partners in the private profession, community legal centres, and Aboriginal legal services, we help people with legal problems such as family separation, child protection, family violence, discrimination, criminal matters, fines, social security, mental health and tenancy.

In 2018–19, VLA provided assistance to over 100,000 unique clients.¹ Our Legal Help telephone line is a resource for all Victorians to seek information, advice and assistance with legal problems. We work to improve access to justice and pursue innovative ways of providing assistance to reduce the prevalence of legal problems in the community. We assist people with their legal problems at courts, commissions and tribunals, including the Australian Human Rights Commission, as well as in our 14 offices across Victoria. We also deliver early intervention programs, including community legal education and non-legal advocacy.

VLA is the leading provider of legal advice and advocacy to people seeking assistance with discrimination matters in Victoria. Through our Equality Law Program, we provide telephone and in-person advice services in addition to representation in legal proceedings. In the last financial year, we provided 1,376 legal advices on discrimination, sexual harassment, victimisation and vilification. We provided over 50 advices regarding religious belief or activity discrimination which is protected under the Equal Opportunity Act 2010 (Vic). We also advise clients on the scope of the religious exceptions under discrimination law.

Informed by our work, we welcome the opportunity to comment on the exposure draft of the Religious Discrimination Bill 2019 (the Bill). We have focussed our submission on:

¹ Unique clients are individual clients who accessed one or more of Victoria Legal Aid’s legal services. This does not include people for whom a client-lawyer relationship was not formed, who received telephone, website or in-person information at court or at public counters or participated in community legal education.
• Outlining our in principle support for the introduction of religious discrimination protections; and
• Detailing our key concerns about the provisions proposed in the Bill which will substantially depart from established anti-discrimination protections in Australia, including:
  1. The ‘statement of belief’ provisions will undermine existing state and territory protections from discrimination and weaken the ability of employers to take proactive steps to prevent discrimination and promote inclusion.
  2. The unprecedented conscientious objection provisions will override existing state and territory laws and healthcare practitioner conduct rules and will impede the ability of healthcare bodies and services to ensure all patients have access to safe and inclusive services.
  3. The broad exemptions for religious institutions will expand scope for discrimination against other groups, including women and LGBTQ+ people, based on religious belief or activity.
  4. The high thresholds for harm are inadequate and risk authorising broad categories of harm which have a significant impact on people’s health, wellbeing and social participation but do not satisfy the high bar.

Our recommendations are set out on page 6. We would welcome any further opportunity to contribute to the wording and scope of the provisions of the Bill.

**Religious discrimination should be protected under federal anti-discrimination laws**

In principle, we support and welcome the inclusion of protection from discrimination on the basis of religious belief or activity under federal anti-discrimination laws.

Religious belief or activity discrimination has been protected under Victorian law since 1984. We have assisted many clients who have experienced discrimination on the basis of their religious belief or activity including clients who have been:

• refused a service because of their religion;
• subjected to abuse about their religious beliefs in the workplace; and
• prevented from practicing their religion at work or at school.

In our daily advice and casework, we see the negative impact these experiences have on our clients’ mental health, their relationships, their financial security and their feeling of acceptance and safety in our community.

Many of our clients who experience religious discrimination experience it alongside other forms of discrimination that are protected under federal anti-discrimination laws. These clients must choose between including all of the discrimination they experienced in a single claim under Victorian anti-discrimination laws or bringing a more limited claim under federal anti-discrimination laws. The federal and state systems operate concurrently and allow our clients to initiate their application in the jurisdiction which is most suitable, taking into account a range
of factors including the different scope, tests, processes and potential outcomes under federal and state laws.

In some circumstances the current lack of protection from religious discrimination in federal anti-discrimination laws can disadvantage our clients by forcing them to leave aspects of their complaint unanswered and unaddressed. The need for religious discrimination protection under federal anti-discrimination laws is highlighted by our client Assad's story, described in his own words (not his real name).

**Assad's story: Refusal to allow breaks to pray at work**

I follow my religion and as per my religion Islam I have to pray 5 times a day on time. Most of the time I was not able to pray when I was at work, most of the time my manager refused me to go for my prayers because of workload, shortage of staff etc. Sometimes my manager was more upset and made me feel intimidated.

I felt really sad because 5 time prayer is compulsory for me to pray but I was not able to pray while I was at work. In fact I have offered that I could make up the time by working extra hours but my manager strictly advised me that I have to stick to my roster and there are no excuses. During Ramadan month they allowed me to change my break time but sometimes they didn’t allow me to break my fasting on time as because of heavy workload.

They left me nowhere, with no option apart from me to ask forgiveness to my God.

I made a complaint of race discrimination against my employer to the Australian Human Rights Commission, but I was told that I could not include a claim of religious discrimination based on their refusals to let me pray.

This was very disappointing to me and meant I could not get an outcome for this treatment that I feel was absolutely unjust.

We strongly support protection under federal anti-discrimination laws against discrimination on the basis of religious belief and activity, including not holding a religious belief and not participating in a religious activity.

If the Bill is enacted it will represent the fifth substantive piece of anti-discrimination legislation at a federal level. The introduction of new, separate anti-discrimination laws with different coverage, legal tests, provisions and exemptions creates uncertainty and inconsistency which should be addressed. Victoria Legal Aid recommends that federal anti-discrimination laws be consolidated and modernised into a single equality act to promote fairness, consistency and certainty for our clients.

**Areas of concern with the proposed anti-discrimination laws**

While a significant proportion of the Religious Discrimination Bill is similar to provisions in existing federal anti-discrimination laws on the basis of race, sex, age and disability, the Bill introduces new provisions with substantially depart from established anti-discrimination
protections in Australia. We have serious concerns about the potential impact of the following provisions on people who have experienced discrimination and their ability to seek legal redress.

1. Statement of belief provisions undermine existing protections from discrimination

In the last 5 years the Equality Law Program has given 241 advices relating to LGBTQ+ discrimination. We have assisted clients who have been subjected to discrimination by religious employers, schools and service providers. For example, we have had an LGBTQ+ client whose employer spoke to them at length with concern about the forms of torture they would experience in hell if they did not change their “lifestyle” and live in accordance with God’s wishes. We are concerned that under the proposed provisions these clients, together with women and members of religious minority groups, would not have grounds to bring a claim about the significant impact this kind of interaction has on their mental health, feeling of safety at work and financial security.

The current drafting of the provisions of the Bill relating to statements of belief in clauses 5, 8(3)-(4), 31(6) and 41 are unprecedented and unnecessary. These provisions undermine existing protections from discrimination currently available to our clients who experience discrimination in a range of areas of public life and introduce unnecessary uncertainty which will create confusion for our clients when considering their legal options. In addition, these provisions are likely to have wide-ranging consequences for vulnerable groups and limit the ability of employers to take proactive steps to prevent discrimination and promote inclusion.

- **Clause 41 – ‘Statements of belief do not constitute discrimination etc.’**: Part 4 of the Bill destabilises Australia’s existing anti-discrimination framework by effectively overriding federal, state and territory laws and regulations which currently prohibit discrimination or vilification. This override provision is unprecedented and would preclude federal and state anti-discrimination laws from operating concurrently. In practice, this would block Victorians from seeking redress when they have experienced discrimination, by removing the availability of current protections under the *Equal Opportunity Act 2010* (Vic) or in employment under the *Fair Work Act 2009* (Cth).

- **Clause 5 – Definition of ‘statement of belief’**: The definition of statement of belief in clause 5 includes qualifying terms to establish a low threshold (e.g. ‘in good faith’ and ‘may reasonably be regarded’). This definition will apply to a broad range of statements, including the expression of religious views which are harmful or discriminatory towards other groups in society.

- **Subclauses 8(3) and 8(4) – Considerations that are not reasonable relating to statements of belief**: The carve-out for statements of belief from employer conduct rules in subclauses 8(3) to (4) weakens the Bill’s protections against indirect discrimination by introducing a permanent rule which supersedes existing legal principles. This blanket rule will override any considerations of the specific facts and circumstances of the case, such as the vulnerability of people the employer seeks to protect from the expression of harmful views or non-financial damage to an employer’s reputation or workplace safety. In practice, this will severely impact the ability of large
employers to create safe and inclusive workplaces or to ensure that employees who publicly represent them uphold their core values.

- **Clause 31(6) – Employer conduct rules relating to statements of belief not an inherent requirement of employment:** Clause 31(6) also prohibits employers from enforcing ‘employer conduct rules’, defined in clause 5 of the Bill, restricting otherwise unlawful statements of belief outside work hours as an inherent requirement, making it harder for employers to engage in prevention or provide safe workplaces for their employees.

In practice, these provisions are likely to have a disproportionate impact on existing rights of women, religious minorities and LGBTQ+ people and make them more vulnerable to vilification and hate speech based on religious views.

2. **Conscientious objection changes introduce uncertainty for patients receiving healthcare services**

The new and unprecedented provisions in the Bill which override existing state and territory laws and healthcare practitioner conduct rules relating to conscientious objection will impede the ability of healthcare bodies and services to ensure all patients have access to safe and inclusive services and create unnecessary confusion among healthcare providers and patients.

Subclauses 8(5) and (6) override state and territory healthcare-related conscientious objection laws by restricting the ability of employer and healthcare practitioner conduct rules to apply where an individual objects based on their personal beliefs. This is the first time that federal laws have sought to override state and territory conscientious objection laws, and it is uncertain how it will be interpreted by the courts or understood by practitioners or patients before it is clarified.

The Bill applies more broadly by allowing healthcare providers to conscientiously object in other situations based on religious belief, regardless of whether there is a nexus between their religious beliefs and the health service being provided or not. We are concerned that this will leave our clients without the protection of discrimination law in circumstances where they are accessing essential medical services. For example, one client approached us for advice about discriminatory comments made by a GP who told them that they were living a life of sin, effectively excluding them from their local medical practice despite the fact their medical problem was completely unrelated to their sexuality.

All Victorians should be able to access basic healthcare without fears of being subjected to discrimination or mistreatment based on the personal views of the individual providing the service. This is particularly the case for regular users of healthcare services (e.g. people with disability and people experiencing mental health issues) or people who have limited access to healthcare services because of their geographic location or a lack of specialist services (e.g. people living in country Victoria, people in detention or trans and gender diverse patients). For these communities, it is crucial that existing state and territory laws and healthcare practitioner conduct rules support service providers to proactively make sure all patients have access to safe and inclusive services.
In practice, the proposed provisions are likely to undercut access to safe and inclusive health services, create unnecessary confusion among health providers and may cause patients to believe that discrimination in healthcare based on religious views is acceptable (cl 8(5) 8(6)).

3. **Broad exemptions for religious institutions expand scope for discrimination**

The Bill provides unprecedented protections for religious institutions both from discrimination and in terms of the unlawful discrimination they can engage in.

The definition of a ‘person’ in clause 5 extends to a religious body or institution. Generally, anti-discrimination laws provide protections for natural persons, not organisations or corporations. This definition departs from established practice and creates uncertainty in how these provisions may apply in practice.

Subclause 10(1) also lowers the threshold for the religious body exception from the standard currently set in similar federal anti-discrimination laws (e.g. *Sex Discrimination Act 1984* (Cth)) by introducing additional qualifying terms (e.g. ‘good faith’ and ‘may reasonably be regarded’). These provisions will broaden the circumstances in which religious groups could lawfully discriminate against other groups based on religious belief or activity, including women and LGBTQ people.

4. **High thresholds for harm inadequate**

The Bill includes provisions which seek to introduce new thresholds of harm for the unprecedented provisions which we have outlined in this submission. For example, clauses 8(4) and 41(2) of the Bill provide that the statement of belief exceptions would not apply to statements which are malicious, are or are likely to harass, vilify or incite hatred or violence towards another person or group, or would counsel, promote, encourage or urge conduct that would constitute a serious offence under clause 27. These terms are not defined in the Bill. However, our view is that these new provisions introduce high thresholds which will be difficult for people who have experienced discrimination to prove and which risk authorising broad categories of harm which have a significant impact on people’s health, wellbeing and social participation but do not satisfy this high bar.

**Recommendations**

Informed by our specialist discrimination law practice and the experiences of our clients, we recommend that:

- Protections from religious discrimination be introduced at a federal level, but that federal anti-discrimination laws are updated and amalgamated to remove inconsistencies and unnecessary complexity to make it easier for duty holders to understand their obligations and for clients to understand their rights.

- The new and unprecedented provisions which would undermine existing protections from discrimination against other groups and introduce significant uncertainty for our clients are removed from the Bill, including:
  - clauses 8(3)-(6), 27, 31(6)-(7) and 41 should be removed from the Bill;
- the provisions in clauses 5 and 10 of the Bill relating to religious bodies should be amended to be consistent with existing provisions under comparable federal anti-discrimination laws; and
- the associated references in clauses 3, 4 and 5 of the Bill should be amended or removed as appropriate to give effect to the concerns raised in this submission.

Yours faithfully

AIMEE COOPER
Program Manager, Equality Law Program
Civil Justice

ROWAN MCRAE
Executive Director
Civil Justice, Access and Equity