2 October 2019

Human Rights Unit, Integrity Law Branch
Integrity and Security Division
Attorney-General’s Department
FoRConsultation@ag.gov.au

BY EMAIL

To Whom It May Concern

Submission regarding the exposure draft of the Religious Discrimination Bill

The Victorian Equal Opportunity and Human Rights Commission welcomes the opportunity to respond to the Religious Discrimination Bill 2019 (Cth) exposure draft.

Summary

As an independent statutory agency responsible for protecting and promoting human rights in Victoria,¹ we support the protection of all rights, including freedom of thought, conscience, religion and belief and freedom from discrimination on the basis of religious belief or activity.² Religion can play an important role in the lives of individuals and this freedom is a key feature of contemporary society and human rights law.³ Rights, however, may be limited in some circumstances including when they need to be balanced to protect and promote other rights, including to protect other groups from discrimination.⁴

The Commission supports conventional religious anti-discrimination protections in the exposure draft such as the prohibition on direct and indirect discrimination on the ground of religious belief or activity (including by people who are atheists or agnostics) as set out in similar terms to protections in other federal discrimination laws.⁵ However, we are concerned that the exposure draft unjustly privileges religious belief and activity over other rights and does not appropriately balance rights. The effects are that it risks undermining some rights in practice – including access to safe and inclusive workplaces and health services – as well as undermining existing federal and state and territory anti-discrimination laws. The complexity and ambiguity of the exposure draft, particularly as it relates to state and territory anti-discrimination laws, will create uncertainty and confusion for individuals, workplaces and healthcare providers.

In summary we are concerned that the exposure draft:

- privileges religious expression over anti-discrimination protections for other groups, particularly lesbian, gay, bisexual, trans, intersex or queer people (LGBTIQ) and women, and undermines the coherence of Australia’s anti-discrimination framework, by overriding state and territory law (cl 41)
• restricts the ability to create safe and inclusive workplaces, by preventing employers from imposing reasonable conduct rules on employees’ religious expression outside of work hours (cl 8(3)-(4))

• undermines access to safe and inclusive health services and creates a risk of confusion among health providers seeking to comply with existing conscientious objection laws and policy directives, and where no state and territory conscientious objection laws exist, it introduces broad conscientious objection provisions without appropriate safeguards or regulation (cl 8(5) 8(6))

• prevents employers from deciding compliance with certain employee conduct rules (that extend to conduct outside of work or deal with conscientious objection) are inherent requirements of the job, restricting their ability to make employment decisions consistent with the promotion of the mission, values or human rights culture of the organisation or service (cl 31(6) – (7))

• departs from traditional anti-discrimination law by defining persons as including religious bodies or institutions (cl 5), affording religious businesses protections against discrimination ordinarily provided only to individual persons

• elevates the rights of religious bodies over those of individuals and other bodies by expanding when they can lawfully discriminate based on religious belief or activity (cl 10(2)).

The Commission encourages the Attorney-General to consider any concerns regarding the adequacy of current protections of the freedom of thought, conscience, religion and belief in the context of the need for a comprehensive national bill of rights, having regard to the need to carefully balance rights. We recommend that the Attorney-General removes clauses 41, 8(3)-8(6) and 31(6)-(7) from the exposure draft, amends clause 5 to include only natural persons in the definition of the term ‘person’ and limits the scope of the general religious exemption in clause 10. The Bill should not be introduced into Parliament in its current form.

Legal framework

Victorian law protects an individual’s right to hold a religious belief – or no religious belief – and practice that belief free from discrimination and vilification.

• The Equal Opportunity Act 2010 makes it unlawful to discriminate against a person in certain areas of public life based on ‘religious belief or activity’.6

• The Racial and Religious Tolerance Act 2001 prohibits religious vilification.7

• The Charter of Human Rights and Responsibilities Act 2006 protects the freedom of thought, conscience, religion and belief by recognising the right to have or adopt a religion or belief and demonstrate that religion or belief in worship, observance, practice and teaching.8

The Commission can receive and conciliate complaints of religious discrimination or vilification that arise under the Equal Opportunity Act or Racial and Religious Tolerance Act. In 2018-2019 the Commission received 56 complaints of religious discrimination and since its introduction, we have received an average of 15 complaints of religious vilification per year (as at 12 June 2019). Complaints that cannot be resolved through conciliation can be lodged with the Victorian Civil and Administrative Tribunal (a no costs jurisdiction) for a legally enforceable decision. Other state and territories also provide protections against discrimination, hate speech and vilification, including on the basis of religious belief or activity.9 Despite existing protections, discrimination, hate speech and vilification remain an ongoing threat for religious (and other) communities in Australia, particularly minority groups.10

For this reason, the Commission welcomes federal legislation that protects against discrimination on the basis of religious belief of activity. The Commission supports the introduction of federal legislation in similar terms to existing state and territory anti-discrimination law and consistent with the structure and coverage of the four Commonwealth anti-discrimination laws.11 Such legislation should be complementary to and operate concurrently with state and territory laws – for example, by enabling a person to consider which jurisdiction to lodge their complaint.
To the extent that there are concerns about the adequacy of protections for religious freedoms, these should be addressed through a comprehensive federal human rights process.\textsuperscript{12} As discussed further below, the Commission does not support provisions within the exposure draft (cl 41) that override state and territory anti-discrimination provisions, or undermine the sovereignty of state and territory governments to make laws.

\textbf{Statements of belief provisions privilege religious expression over discrimination protections}

Clause 41(1) of the exposure draft provides that “statements of belief” do not constitute discrimination for the purposes of anti-discrimination law. Clause 5 defines a statement of belief as where a statement:

(i) is of a religious belief held by a person; and  
(ii) is made by the person in good faith; and  
(iii) is of a belief that may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion.

This provision also applies to statements made by non-religious persons, but requires that the statement must directly arise from the fact that the person does not hold a religious belief, and the statement must be about religion.\textsuperscript{13} Religious statements of belief, on the other hand, need only ‘be reasonably regarded as being in accordance with the doctrines, tenets, beliefs or teaching of the religion’ - a broader test, for example, than those afforded to religious bodies under other religious exemptions.\textsuperscript{14} This means the scope of protected speech for non-religious statements is narrower than religiously motivated statements.

The Commission has concerns that this provision fails to appropriately balance the right to religious expression with the right to be free from discrimination. This balancing act is a feature of modern human rights law. For instance, Article 18(3) of the International Covenant on Civil and Political Rights provides:

‘Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.’

However, by carving out special exceptions for religious belief, this provision privileges religious expression over the right to be free from discrimination.\textsuperscript{15} This imbalance is two-fold. First, it makes some groups, such as LGBTIQ people, more vulnerable to religiously motivated hate speech by reducing protections for them. For example, the exposure draft gives licence to the sort of harmful statements which were made towards the LGBTIQ community during the Same-Sex Marriage Survey process.\textsuperscript{16} Second, it may undermine equality of participation in public and political debates by granting religious communities greater levity for expressing their views than other communities that do not enjoy the protections in clause 41(1).

There are exceptions provided in clause 41(2) of the exposure draft where a statement is malicious, would or is 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.\textsuperscript{17} However it is unclear what statements will meet this threshold. Our preliminary view is that clause 41(1) arguably sets a higher threshold than the test in Victoria’s Racial and Religious Tolerance Act, which from our experience will make it difficult for individuals to rely on this exception.

\textbf{What are the potential harms?}

Clause 41 provides that statements of belief are protected from anti-discrimination law. In practice, this can mean religious people making statements of belief may be exempt from complying with other laws that non-religious people must comply with. This provision is likely to give licence to harmful and offensive statements in areas of public life. Examples of speech that may be permissible under this Bill include:
• Homophobia, Bi-Phobia, Transphobia, Intersex-phobia – we know the high rates of abuse that the LGBTIQ communities receive online and the harm it causes.\textsuperscript{18} Clause 41 may permit a range of hateful conduct aimed at LGBTIQ people and communities causing significant harm, such as being told they will go to hell for their sins.

• Misogynistic abuse – 47 per cent of women aged 18-24 have experienced gendered online abuse and harassment.\textsuperscript{19} This provision may contribute to, or exacerbate, misogynistic abuse under the guise of religious expressions. For example, by emboldening some people to characterise survivors of sexual assault or rape as being blame-worthy for not being sufficiently modest or chase.

The Commission draws attention to the interaction of this provision with clause 8(3), which may prevent conduct rules that regulate such statements amongst co-workers outside of work hours. These statements may be more harmful where an affected person must share a workspace with someone who engages in hate speech.

Clause 41(1)(a) and 41(1)(b) of the exposure draft overrides state and territory anti-discrimination law,\textsuperscript{20} preventing individuals from making complaints about certain ‘statements of belief’ (for example, offensive, humiliating, or insulting statements aimed at LGBTIQ individuals or communities) which would otherwise be unlawful in some jurisdictions. Such a provision is unprecedented in anti-discrimination law and has the effect of preventing federal and state and territory anti-discrimination laws from operating concurrently, as is the conventional approach.

By expressly overriding existing anti-discrimination laws, clause 41 limits the sovereignty of state and territory governments to receive complaints under existing anti-discrimination laws or to strengthen their anti-discrimination laws in relation to hate speech. For example, the Commission is acutely aware of the pervasive problem of hate speech and community calls to reform legislation in Victoria to include protections for other groups, particularly women, LGBTIQ people and people with disabilities, as well as to amend the incitement threshold test.\textsuperscript{21} Efforts to reform the Victorian Equal Opportunity Act to protect Victorians from hate speech could be undermined by this override provision.\textsuperscript{22}

This clause may also create confusion and legal complexity when relied on as a defence to claims of discrimination under state and territory law, with the effect of deterring complainants.\textsuperscript{23}

Clause 41 should be removed from the exposure draft. Doing so will enable federal and state and territory anti-discrimination law to operate concurrently and enable aggrieved persons to continue to access redress under state and territory law. This approach brings anti-discrimination protections for religious communities into line with protections for other attributes, where federal law operates concurrently with state and territory law anti-discrimination frameworks.\textsuperscript{24}

**Recommendation 1**

The Attorney-General should remove clause 41, dealing with discriminatory statements of belief, from the *Religious Discrimination Bill 2019* (Cth).

**Conduct rules do not strike an appropriate balance and introduce unnecessary complexity**

While the Commission supports clauses 8(1) and 8(2), which reflect conventional direct and indirect discrimination protections, we have concerns about the introduction of employer conduct rules in clause 8(3) to 8(6) which deem certain employee conduct rules to be unreasonable for large employers and in relation to conscientious objections by health practitioners.

**Conduct rules regarding statement of belief**

Clause 8(3) provides that large private employers (those with greater than $50 million annual revenue) that impose or propose to impose employee conduct rules restricting employee statements of belief outside of work hours, will be considered unreasonable, unless compliance with the code is proved necessary to avoid unjustifiable financial hardship. This provision prevents
the consideration of all the relevant circumstances of the case (as set out in cl 8(2)) in determining whether the application of the code is unreasonable and constitutes indirect discrimination. This would preclude, for example, the consideration of non-financial harm caused by employee statements.

In practice, this means that large employers will have limited ability to make rules to restrict their employees’ expression of views that are religiously-based (but not other views unrelated to religion) outside of work, even where those views are contrary to the employer’s values or mission and are harmful to the employer’s reputation or to other employees, customers or members of the public. Further, it may also be difficult for employers to assess and prove unjustifiable hardship in the abstract, before the harm has occurred.

There are exceptions provided in clause 8(4) that mirror clause 41(2), meaning statements of belief can be subject to conduct rules where they are ‘malicious, would or is 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’.25 As discussed earlier, it is unclear which statements of belief would be captured by the exception and therefore difficult in practice for employers to determine which type of conduct they can make rules about.

The Commission is concerned about the rationale of this clause and the impact on workplaces and services. By restricting the ability of employers to set codes of conduct, workplaces will find it more difficult to foster inclusive and safe work cultures and services. For example, public negative statements by a health service employee on social media about the homosexuality of survivors of sexual abuse may severely impact the quality and inclusiveness of the service, which seeks to gain the trust of clients.

Who is affected by this?

Employers may not be able to set reasonable conduct rules to prevent, stop or discipline employees who make statements about anything based on their religious beliefs outside of work hours, even where these statements are contrary to the employer’s mission or values such as ‘homosexuality is an abomination in the eyes of god’.

Conduct rules can still be made by the public sector, smaller employers, and in relation to any statements unrelated to religion. This will likely cause confusion by creating different standards for acceptable statements depending on where someone works or their religious beliefs. Employers can still set reasonable conduct rules that apply during work time.

As is the case with clauses 8(5), 8(6) and 41(1), a more appropriate approach, consistent with existing state and territory anti-discrimination law, is to rely upon the indirect discrimination test in 8(1) and 8(2), which assesses rules or conditions in all the relevant circumstances, including the need to protect other employees and the community from harm.

Recommendation 2

The Attorney-General should remove clauses 8(3) and 8(4), dealing with the treatment of employer conduct rules by private businesses with annual revenue of more than $50 million, from the Religious Discrimination Bill 2019 (Cth).

Conduct rules regarding conscientious health objections

Clauses 8(5) and 8(6) deem health service employee conduct rules unreasonable (and discriminatory) where they restrict or regulate conscientious objections on religious grounds by health practitioners. Clause 8(5) reaffirms the operation of existing state and territory laws allowing for conscientious objections, suggesting where existing state and territory laws regulate conscientious health objections those laws will continue to apply.

In Victoria, state legislation allows for, and regulates, conscientious objection under the Voluntary Assisted Dying Act 2017 (Vic)26 and the Abortion Law Reform Act 2008 (Vic).27 Both these pieces of legislation go beyond authorising conscientious objection, to prescribing how to properly exercise that conscientious objection so that a patient’s healthcare and wellbeing is not jeopardised. For example, health practitioners that conscientiously object from providing abortions are obliged to inform the woman of their conscientious objection and make a referral to another
registered practitioner in the same regulated health profession who the practitioner knows does not have a conscientious objection to abortion (an effective referral). As such, health practitioners in Victoria will be required to continue to comply with these Victorians laws, including the requirement to make an effective referral in relation to abortions. As noted below, this provision (which appears to be unnecessary), is still likely to create confusion and lead some practitioners to contravene Victorian law.

Where there are no state or territory laws governing conscientious objections or potentially where state or territory law prohibits conscientious objection, clause 8(6) provides that a conduct rule preventing conscientious objections will be unreasonable unless it creates an unjustifiable adverse impact on the health organisation’s ability to provide a health service, or the patient’s ability to receive a health service. The effect of this is that employer and professional health body rules and policy directives can only override conscientious objections in the most serious of cases. For example, the Explanatory Notes to the exposure draft state that ‘if non-compliance with a health practitioner conduct rule could result in the death or serious injury of the person seeking the health service, this would generally amount to an unjustifiable adverse impact (emphasis added).’ The Commission is concerned this clearly sets the bar too high and will not appropriately safeguard patient health needs and wellbeing.

Clause 8(6) is unnecessary as conscientious objection laws are best left for state and territories, as acknowledged in the Explanatory Notes. The provision authorises conscientious objections across a broad range of health services and disciplines without a clear rationale (e.g. pharmacists, podiatrists, dentists and Aboriginal health services), and doesn’t require a nexus between the religious belief or activity and the health service in question. As such, it is not clear what treatments can or cannot be conscientiously objected to, and whether this authorises objections based on the presenting patient’s attributes – such as sexual orientation or gender identity – rather than the health service they are requesting. While the Commission would not support this legal interpretation, we are concerned the absence of clarity affords too much discretion to practitioners about when they can conscientiously object, which will likely impede access to health services.

Further, clause 8(6) does not set out any other obligations to patients, such as the provision of information, the requirement to disclose the objection, and making an effective referral. The absence of real consideration for patient care and wellbeing is a concern to the Commission, particularly given research has demonstrated ongoing compliance challenges for doctors with their existing legal obligations for conscientious objections to abortions in Victoria.

---

**Are health practitioners following existing obligations?**

Section 8(1) of the Abortion Law Amendment Act 2008 (Vic) requires registered health practitioners to notify women of their conscientious objection and make a referral to another practitioner who does not have a conscientious objection. Despite these legal requirements, women are still facing barriers to these services. Women’s Health Victoria’s 1800 My Options service has reported the following examples of women’s experiences accessing sexual and reproductive health services:

- A woman in rural Victoria whose General Practitioner (GP) told her they would not assist her and would not refer her on. The woman was then afraid to approach another local GP, in case of similar treatment. She could only find services that were more than four hours away when using Google.
- A woman seeking medical termination of pregnancy (MTOP) early in pregnancy was told by her GP that they do not provide these services. The GP said that the only services available are private, and that they cost several thousands of dollars. No referral was made.
- A woman had contacted 9 clinics looking for an MTOP before accessing 1800 My Options. By this time, she had exceeded the gestational limit for MTOP, and the only option was a surgical termination which had financial implications.

Women’s Health Victoria’s 1800 My Options also reported women being told that abortion is not available after 12 weeks gestations; being given misinformation about MTOP (that it is dangerous, experimental and ineffective) and encountering hostility and judgment from
GPs. The impact of such treatment has included preventing women from seeking services elsewhere, particularly women from rural and remote areas, young women and women from non-English speaking backgrounds, for fear of encountering similar treatment.

In practice, these provisions will lead to confusion for patients, health practitioners and services, as well as have a negative impact on service quality, even where state and territory legislation provides for effective referrals. The lack of clarity about the operation of conscientious objections can create uncertainty and avoidance in patients, particularly those from marginalised backgrounds who may have experienced stigma in mainstream health services. An absence of clear guidance means a patient may be disrespected by a clinician, not provided a health service, information, a prescription or referral, and the health organisation is unaware as there are no reporting requirements on the health practitioner.

The Commission is concerned that the applicability of clause 8(6) is unclear and could undermine efforts by employers and health professional bodies to set standards and clarify legal obligations to ensure the provision of safe, inclusive and quality health services, particularly in rural and remote areas. It may also create resource implications for specialist services such as trans and gender diverse health services as patients feel unsafe accessing mainstream health and GP services.

Who is affected by this?
Without adequate safeguards, conscientious objections risk the health and wellbeing of marginalised communities, particularly LGBTIQ people and women who access commonly-stigmatised health services. Examples include:

An unmarried woman seeks contraceptives
A woman may approach her doctor for contraceptives. The doctor asks questions about whether the woman is married or not. After the woman explains that she is not married, the doctor refuses to provide contraceptives, describing her decision as sinful and dirty. The woman feels too ashamed to contact another doctor.

A transgender young person seeks Hormone Replacement Treatment
A young trans person seeks assistance from a rural GP. The practitioner refuses to provide a prescription for hormone replacement treatment, order baseline blood tests or provide a referral to an endocrinologist. In explaining their position, the GP states they cannot assist the person because God created men and women, and it would be an affront to their religion to interfere with God’s plans. The GP does not provide a referral to a transgender specialist GP and the young person fails to receive treatment. The young person’s mental health deteriorates, and they continue to suffer unsupported as they are afraid to approach another health service in case they receive the same response.

A gay man seeks pre-exposure prophylaxis (PrEP) to prevent HIV
A gay man attends his local GP to access information and a script for PrEP to avoid being exposed to HIV. His GP refuses to provide a script for PrEP or to provide any information about accessing the drug. The doctor does not disclose his religious views, but it is clear he is not comfortable discussing the matter with this patient because of his sexual orientation. The man is confused, embarrassed and unsure where to go for assistance. As a result, he does not access PrEP and risks contracting HIV.

Recommendation 3
The Attorney-General should remove clause 8(5) and 8(6), dealing with rules about conscientious objections by health practitioners, from the *Religious Discrimination Bill 2019* (Cth).
Restricting inherent requirement

Clause 31(2)-(5) set out exceptions that permit discrimination on the grounds of religious belief or activity in employment where the person is unable to carry out the inherent requirements of the particular job because of the person’s religious belief of activity. This provision replicates the general inherent requirements test in the *Australian Human Rights Commission Act 1986* (Cth). However, clause 31(6) and (7) of the exposure draft include two additional unnecessary limits on the inherent requirement test by preventing certain employer conduct rules from being considered inherent requirements of the job.

Clause 31(6) prevents rules from being inherent requirements of the job if it would have the effect of restricting or preventing an employee from making a ‘statement of belief’ outside of work hours and is not reasonable for the purposes of clause 8. Similarly, clause 31(7) prevents certain health practitioner conduct rules from being an inherent requirement of the job if they involve a condition, requirement of practice that would have the effect of restricting or preventing a health practitioner from conscientiously objecting to providing a health service because of their religious belief of activity. In other words, conduct rules that are not deemed ‘reasonable’ under clause 8 will not be considered inherent requirements of a job. In those cases, they cannot be the basis for discrimination by employers.

These additional limitations are unconventional and presupposes situations where it is essential to a particular job that employees comply with codes of conduct that may apply outside of work hours, or in relation to conscientious objection to the provision of essential health services. The conventional limitations on inherent requirements set out in clause 31(2)-(5) and in case law are sufficient. Considering their interaction with problematic clause 8 and the impact on employer’s ability to make recruitment decisions to hire people, clause 31(6) and (7) should be removed from the exposure draft.

**Recommendation 4**
The Attorney-General should remove clauses 31(6)-(7), dealing with additional limitations on what may be an inherent requirement of a job, from the *Religious Discrimination Bill 2019* (Cth).

Effect of including religious bodies in the definition of a ‘person’

In clauses 7 and 8 of the exposure draft, a person may not be discriminated against on the ground of their religious belief or activity. As noted earlier, the Commission supports conventional provisions for direct and indirect discrimination. However, the definition of a ‘person’ in clause 5 imports the meaning from section 2C of the *Acts Interpretation Act 1901* (Cth), which includes a ‘body politic or corporate as well as an individual.’ A note in the clause 5 definition confirms that this is intended to include a religious body or religious institution.

The Commission has concerns about the consequences of importing body corporates (including religious institutions, religious schools, religious charities or religious businesses) into the meaning of persons. Ordinarily in anti-discrimination law, persons refer to natural persons, not organisations such as religious bodies. This is because human rights are rights inherent and inalienable to all human beings by reason of their humanity, as set out in the preambles to the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. Complaints of breaches of rights should only be brought by bodies or incorporated entities when necessary for the realisation of the rights of natural persons who are its members. However, organisations can already assist affected individuals to realise their rights through representative complaints mechanisms, as provided for in federal and state and territory anti-discrimination laws. In such circumstances organisations can assist in making the complaint, but the individual(s)’ interests remain the focus.

Extending protection of this nature to organisations is therefore both unprecedented and unnecessary.

A consequence of this is a body corporate including a religious business, will have the ability to make claims of discrimination against natural persons or other organisations – with unforeseeable
consequences. It may, for example, allow religious businesses to bring complaints in relation to tendering processes, where a religious education service is not successful in securing a tender to deliver sexual health education in schools.

These issues can be addressed by removing the definition of ‘person’ from clause 5 of the Bill so that it no longer imports the meaning from section 2C from the Acts Interpretation Act. This brings the approach into line with existing anti-discrimination law.

**Recommendation 5**
The Attorney-General should remove the definition of ‘person’ from clause 5 of the Religious Discrimination Bill 2019 (Cth) and amend the Explanatory Notes to make clear that a complaint of discrimination on the basis of religious belief or activity, may only be made by a natural person.

**Effect of granting religious bodies broader exceptions**
Clauses 10(1) and 10(2) of the exposure draft broadly define religious bodies and sets out the general exemption they enjoy against discrimination under this law. While federal and state and territory law contain exemptions for religious bodies, this provision broadens the definition of religious bodies and scope of exemptions unnecessarily.

It does so in clause 10(1) by providing that a religious body does not discriminate if the conduct is engaged in ‘good faith’ and ‘may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion...’. This broadened religious exemption, although only in relation to discrimination based on religious belief or activity, could embolden discrimination against other groups, including LGBTIQ people, women and other religious groups. Given the concerns reported by the Ruddock Religious Freedom Review about religious exemptions and the current review of the religious exemptions within the Sex Discrimination Act 1984 (Cth) by the Australian Law Reform Commission, it would be inappropriate for this legislation to include a broader religious exemption.

Further, the broad definition of ‘religious bodies’ (to include religious schools, religious charities and other religious bodies not solely or primarily engaged in commercial activities) does not require the religious body to have been established for a religious purpose and arguably includes religious businesses, which could have significant unintended consequences. While further clarity is required within the legislation, it would be concerning should the law exempt religious charities or organisations (such as nursing and aged care services, health services, welfare and employment agencies) from discrimination where the conduct is connected to commercial activities of the organisation.

**Recommendation 6**
The Attorney-General should amend clause 10 of the exposure draft to:

a) limit the definition of ‘religious body’ to ‘bodies established for religious purposes’
b) make clear that the general exception does not apply to conduct connected with commercial activities.

In summary, the exposure draft does not strike the right balance between protecting religious belief and other rights including the right to be free from discrimination. The exposure draft introduces unorthodox and novel provisions that privilege religious belief or activity in a way that is likely to diminish existing protections from discrimination, particularly under state and territory law. Of particular concern is the likely confusion and subsequent undermining of efforts by employers and others to promote safe, inclusive and equal workplaces and services.
We would be pleased to provide further information about this submission and the operation of Victorian laws. Please contact Amy Rogers, Team Leader, Policy, on (03) 9032 3432, if you require further information.

The Commission consents to this submission being published as a public document.

Yours sincerely

Kristen Hilton
Victorian Equal Opportunity and Human Rights Commissioner
1 The Commission is an independent statutory agency with responsibilities under the Equal Opportunity Act 2010 (Vic), the Charter of Human Rights and Responsibilities Act 2006 (Vic) and the Racial and Religious Tolerance Act 2001 (Vic).
3 Charter of Human Rights and Responsibilities Act 2006 (Vic) s 14. Article 18 of the International Covenant on Civil and Political Rights provides 'Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others, to manifest his religion or belief in worship, observance, practice and teaching.'
4 For example, section 7 of the Charter of Human Rights and Responsibilities Act 2006 (Vic) provides when and how a human right may be limited in Victoria.
5 See Racial Discrimination Act 1975 (Cth); Disability Discrimination Act 1992 (Cth); Sex Discrimination Act 1984 (Cth); Age Discrimination Act 2004 (Cth).
6 Equal Opportunity Act 2010 (Vic) ss 6, 8-9. The Commission also notes that there are several exceptions for religious bodies, for example in s 82 of the Equal Opportunity Act 2010 (Vic).
8 Charter of Human Rights and Responsibilities Act 2006 (Vic) s 14. However, the Commission does not handle complaints about the Charter. In many cases these complaints can be made to the Victorian Ombudsman.
9 For example, other states include hate speech protections for other attributes, such as the Anti-Discrimination Act 1998 (Tas) which has protected attributes in s 16, protected in s 17, that include race, age, sexual orientation, lawful sexual activity, gender, gender identity, intersex variations of sex characteristics, marital status, relationship status, pregnancy, breastfeeding, parental status, family responsibilities, disability, industrial activity, political belief or affiliation, political activity, religious belief or affiliation, religious activity, irrelevant criminal record, irrelevant medical record, or an association with a person who has, or is believed to have, any of these attributes. See also Discrimination Act 1991 (ACT) s 67A(1); Anti-Discrimination Act 1991 (Qld) s 124A(1).
11 Race Discrimination Act 1975 (Cth); Sex Discrimination Act 1984 (Cth); Disability Discrimination Act 1992 (Cth); Age Discrimination Act 2004 (Cth).
13 Religious Discrimination Bill 2019 (Cth) cl 5.
14 See example, Equal Opportunity Act 2010 (Vic), s 82 protects conduct by religious bodies against claims of discrimination if the conduct conforms with the doctrines, beliefs or principles of the religion, or, is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion. Similarly, s 37(1)(d) of the Sex Discrimination Act 1984 (Cth) provides a test that the conduct will be protected if the act ‘conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.’ However, s 37(2) provides that religious bodies do not enjoy this protection if the body is a Commonwealth-funded aged care service, or related to employment of persons to provide that aged care service.
17 As defined in cl 27(1)(b) Religious Discrimination Bill 2019 (Cth).


22 The Racial and Religious Tolerance Act 2001 (Vic), which provides protections from racial and religious vilification only, is not listed as an anti-discrimination law for the purpose of cl 41(1). However, the broader section 17(1) of Tasmania’s Anti-Discrimination Act 1998 (Tas), providing protections against hateful speech for LGBTIQ people, women and people with disability, is explicitly overridden by clause 41(b), suggesting this provision is concerned to prevent other groups (particularly LGBTIQ people) from making complaints of hate speech.


24 See for example Racial Discrimination Act 1975 (Cth) s 6A.

25 As defined in cl 27(1)(b) Religious Discrimination Bill 2019 (Cth).

26 Voluntary Assisted Dying Act 2017 (Vic) s 13(1)(b)(i).

27 Abortion Law Reform Act 2008 (Vic) s 8(1).


29 Paragraph 140 of the Explanatory Notes of the Religious Discrimination Bill 2019 (Cth) acknowledges that clause 8(5) ‘recognises that statutory conscientious objections provisions are primarily a matter for the states and territories.’

30 A “health service” is defined in cl 5 as a ‘service provided in the practice of any of the following health professions: a) Aboriginal and Torres Strait Islander health practice; b) dental (not including the professions of dental therapist, dental hygienist, dental prosthetist or oral health therapist); c) medical; d) medical radiation practice; e) midwifery; f) nursing; g) occupational therapy; h) optometry: i) pharmacy; j) physiotherapy; k) podiatry; l) psychology.


32 There is already evidence of confusion and non-compliance by doctors in existing conscientious objection regimes: Louise Anne Keogh, Lynn Gillam, Maria Bismark, Kathleen McNamara, Amy Webster, Christine Bayly, & Danielle Newton, ‘Conscientious objection to abortion, the law and its implementation in Victoria, Australia: perspectives of abortion service providers’ (2019) 20(11) British Medical Journal Medical Ethics 1.

33 Ibid.

34 This example is based on case studies provided by St Kilda Legal Service’s LGBTIQ outreach legal service <https://www.sksl.org.au>.


36 Section 5 of the Equal Opportunity Act 2010 (Vic) defines a person as “an unincorporated association and, in relation to a natural person, means a person of any age”, which is mirrored in section 3 of the Racial and Religious Tolerance Act 2001 (Vic). A person means a “human being” under the Charter of Human Rights and Responsibilities Act 2006 (Vic). The meaning of “person” in section 2C of the Acts Interpretation Act 1901 (Cth) is not imported into section 17(1) of the Equal Opportunity Act 2010 (Vic). The definition of “person” in section 3 of the Charter of Human Rights and Responsibilities Act 2006 (Vic) is also not imported into section 17(1) of the Equal Opportunity Act 2010 (Vic). The definition of “person” in section 3 of the Acts Interpretation Act 1901 (Cth) defines a person as “an unincorporated association and, in relation to a natural person, means a person of any age”.

37 Universal Declaration of Human Rights preamble provides “Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world...”;

38 Universal Declaration of Human Rights, 10 December 1948, 217 A (III); International Covenant on Civil and Political Rights preamble provides “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world; Recognizing that these rights derive from the inherent dignity of the human person”;


41 See: Equal Opportunity Act 2010 (Vic) s 82; Anti-Discrimination Act 1991 (Qld) s 109(d); Anti-Discrimination Act 1977 (NSW) s 56. See example, Equal Opportunity Act 2010 (Vic), s 82 protects conduct by religious bodies against claims of discrimination if the conduct conforms with the doctrines, beliefs or principles of the religion, or, is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion. Similarly, s 37(1)(d) of the Sex Discrimination Act 1984 (Cth) provides a test that the conduct will be protected if the act ‘conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion.’ However, s 37(2) provides that religious bodies do not enjoy this protection if the body is a Commonwealth-funded aged care service, or related to employment of persons to provide that aged care service.

42 See the recommendations 5, 6, 7 and 8 which articulate the need to reform religious exceptions to better balance with anti-discrimination protections: Expert Panel, Religious Freedom Review (2019) <

43 While paragraph 174 of the Explanatory Notes indicate that this would not include aged care or religious hospitals, this should be better clarified, for example through explicit provisions such as s 37(2) of the Sex Discrimination Act 1984 (Cth).