# Religious Discrimination Bill 2019 – second exposure draft

**31 January 2020**

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.

In 2018–19, VLA provided assistance to over 100,000 clients. VLA is the leading provider of legal advice and advocacy to people seeking assistance with discrimination matters in Victoria. In the last financial year, we provided 1,376 legal advices on discrimination, sexual harassment, victimisation and vilification. 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 second exposure draft of the Religious Discrimination Bill 2019 (**the Bill**). We **attach** our previous submission on the first exposure draft dated 2 October 2019. In our previous submission, we outlined our in principle support for the introduction of federal religious discrimination protections. However, we also detailed our key concerns with provisions of the Bill which substantially depart from established anti-discrimination protections across Australia.

While there have been some minor improvements, the second exposure draft of the Bill increases our concerns in terms of its potential negative impact for members of our communities vulnerable to discrimination, vilification and harassment, including women, people with disability and members of the LGBTIQ+ community.

The following provisions of the Bill are of particular concern:

1. **Override of existing protections:** The ‘statement of belief’ provisions in the Bill would override critical protections from discrimination and vilification, including by weakening the ability of employers and professional bodies to take proactive steps to prevent discrimination.
2. **Conscientious objection in healthcare:** The ‘conscientious objection’ provisions would introduce harmful discrimination in the provision of healthcare and undermine the ability for patients to access safe and inclusive services.
3. **Broad religious exemptions:** The broad exemptions for religious institutions (expanded in the second exposure draft) would authorise harmful conduct which would have a significant impact on people’s health, wellbeing and social participation.

The Bill in its current form winds back and overrides existing protections from discrimination, vilification and harassment and in our view should not be introduced.

This submission will now briefly outline VLA’s position on the amendments in the second exposure draft of the Bill.

## 1. Welcome improvements to the Bill

We welcome the following amendments:

* **Protection for associated persons:** Cl 9 ensures that associated people are protected from discrimination under the Bill. This important amendment would ensure that relatives, friends and allies do not experience discrimination for associating with a person of faith. However, the Bill should make clear that this protection only applies for natural persons, not corporations.
* **Objects clause:** The amended objects clause in cl 3 expressly provides for the indivisibility and universality of human rights and their equal status in international law, and the principle that every person is free and equal in dignity and rights.

## 2. Areas of concern in the second exposure draft

The second exposure draft of the Bill still contains amendments which risk interfering with crucial protections from discrimination for many Victorians experiencing hardship and disadvantage.

Victoria Legal Aid has significant concerns around the following amendments:

* **Religious exceptions for commercial activities:** The amended definition of religious body in cl 11(5) provides that religious charities that are registered public benevolent institutions (**PBIs**) are covered by broad exemptions from discrimination protections, even where they are solely or primarily engaged in commercial activities. Discrimination in the secular, commercial marketplace on the basis of religion should not be permitted, including by organisations registered as PBIs.
* **Preferencing by religious bodies:** The second exposure draft includes new provisions at cl 11(2), 11(4), 32(9), 32(11), 33(3) and 33(5) which allow religious bodies to expressly give preference to people who share their religion. The introduction of the unprecedented concept of ‘preferencing’ into Australian discrimination law would introduce confusion and uncertainty for our clients. VLA lawyers would be unable to advise our clients on their rights and avenues for redress with certainty, and victims of discrimination would be unable to establish whether a religious body’s actions were caused by lawful preferencing or unlawful exclusion without taking legal action.
* **Conduct to avoid injury to religious susceptibilities:** The amended religious bodies exception at cl 11 allows discrimination ‘to avoid injury to the religious susceptibilities of adherents of the same religion as the religious body’. While commentary explaining the changes states that this provision aligns with existing provisions in other anti-discrimination laws, cl 11(3) of the Bill does not include the important qualifier that the conduct be *necessary* to avoid injury to religious susceptibilities (see e.g. *Sex Discrimination Act 1984* (Cth) s 37(1)(d)). In addition, the term ‘religious susceptibilities’ has not yet been interpreted by a higher court, which means that the scope of this exception remains uncertain.
* **Religious hospitals, aged care and accommodation providers:** The new cl 32(8) to (11) would allow religious hospitals, aged care facilities and accommodation providers to lawfully discriminate in employment – including decisions around recruitment, disciplinary measures and dismissal. This new provision will have a significant impact on the hundreds of thousands of employees (and prospective employees) working in hospitals, aged care facilities and accommodation providers across the country, including those publicly funded by the government, who may be subjected to discrimination if the Bill comes into effect.
* **Religious camps and conference sites:** The accommodation exceptions in cl 33(2) to (5) would allow religious camps and conference centres to lawfully discriminate against others when hiring out accommodation facilities. This exemption would wind back existing protections in Victoria, including by effectively overriding the Victorian Court of Appeal’s decision in *Christian Youth Camps Limited v Cobaw Community Health Service Limited* [2014] VSCA 75 which found that a Christian camp provider unlawfully discriminated in refusing a booking request for same-sex attracted youth.
* **Employer conduct rules:** Cl 32(6) has been amended to restrict an employee’s statements of belief from ‘other than at a time when the employee [is] performing work on behalf of the employer’ to ‘other than in the course of the employee’s employment’. This potentially clarifies the test (e.g. to apply to outside regular work hours such as conduct during breaks or at work-related social functions), but our concerns with the employer conduct rules outlined in our previous submission remain.
* **Qualifying body conduct rules:** The new qualifying body conduct rules in cl 5, 8(2)(d), 8(4), 16 and 32(4) would prevent qualifying bodies from imposing rules about a person’s conduct unless it is an ‘essential requirement of the profession, trade or occupation’. In effect, this would prevent professional bodies from taking disciplinary action against professionals who engage in discriminatory behaviour on social media.
* **Health practitioner conduct rules:** The amended cl 5 narrows the list of health services covered by conscientious objection provisions and clarifies that the objection must relate to a ‘particular kind of health service’. While this drafting is clearer than first exposure draft, the conscientious objection provisions would continue to unjustifiably undermine access to healthcare and in our view should be removed from the Bill.
* **Definition of ‘vilify’:** The amended definitions section in cl 5 defines the term ‘vilify’ to mean ‘incite hatred or violence’. In our view, statements of belief which cause harm should not be permitted under the Bill, regardless of whether they are religious or not. A lower threshold of ‘vilify’ would provide stronger protections against harmful behaviour (e.g. acts reasonably likely to offend, insult, humiliate or intimidate another person or group of people). However, we recommend that the statements of belief provisions be removed from the Bill entirely.
* **Subjective test of reasonableness:** The amended definition of statement of belief in cl 5 inserts an untested and unprecedented subjective element into the reasonableness test which would require judges to determine whether ‘a person of the same religion as the first person could reasonably consider [the statement] to be in accordance with the doctrines, tenets, beliefs or teachings of that religion’. This subjective element would broaden the scope of potential discrimination according to a religious body’s doctrines, tenets and beliefs and prevent judges from taking into account other relevant factors which should be considered to reach a balanced and fair outcome for both parties.

## 3. Recommendations

Informed by our specialist discrimination law practice, we recommend that:

* the recommendations in VLA’s previous submission (see **attached**) be adopted;
* amendments extending discrimination protections to associated persons and clarifying the universality of human rights in the objects clause be retained in the Bill; and
* remaining amendments in the second exposure draft be removed.

We would welcome any further opportunity to contribute to the wording and scope of the provisions of the Bill.

Please contact us on [aimee.cooper@vla.vic.gov.au](mailto:aimee.cooper@vla.vic.gov.au) or (03) 9269 0215 with any queries.

Yours faithfully



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