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Integrity and Security Division
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BY EMAIL

To Whom It May Concern

Submission regarding the second exposure draft of the Religious Discrimination Bill

On 2 October 2019, the Victorian Equal Opportunity and Human Rights Commission (the Commission) made a submission (first submission) responding to the first exposure draft of the Religious Discrimination Bill 2019 (Cth) (the Bill).

In the first submission, the Commission noted its support for the conventional religious anti-discrimination protections in the Bill, such as the prohibition on direct and indirect discrimination on the ground of religious belief or activity. However, the Commission also noted that human rights 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.¹

The Commission submitted that the first exposure draft, which introduced unorthodox and novel provisions that privilege religious belief or activity over other human rights, did not strike the right balance between protecting religious belief or activity and other human rights, such as the right to be free from discrimination. We **attach** the first submission for your reference.²

On 10 December 2019, the Attorney-General released the second exposure draft of the Bill, which made several amendments to the first exposure draft. The Commission is concerned that the issues raised in our first submission have not been adequately addressed. Accordingly, this submission outlines how the second exposure draft fails to adequately address key issues raised in our first submission, and also outlines new concerns arising from the second exposure draft.

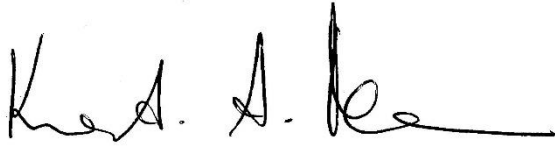
In particular, the Commission is concerned that the Bill:

- continues to privilege religious expression over other rights in a way that unfairly authorises discrimination against other vulnerable groups
- overrides state and territory discrimination law and consequently erodes some existing protections from discrimination for Victorians
- expands the circumstances in which religious bodies may discriminate in employment and service delivery against people of different or no beliefs by including exceptions for hospitals, aged care facilities, certain accommodation providers, religious camps and conference sites
- still authorises conscientious objections across a broad range of health services and does not make provision for health providers to provide information, disclose the objection or make effective referrals to other services, potentially putting people's health at risk
- still restricts the ability for employers to create safe and inclusive workplaces, by preventing them from imposing employer conduct rules on employees' religious expression outside of work hours.

The submission sets out the possible impact of these clauses and contains a number of recommendations which better strike the balance between religious freedoms and the right to be free from discrimination.

Please contact Tal Shmerling, Acting Legal Manager, on (03) 9032 3421, if you require further information. The Commission consents to this submission being published as a public document.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Kristen Hilton', with a long horizontal flourish extending to the right.

Kristen Hilton
Victorian Equal Opportunity and Human Rights Commissioner

Key Concern 1

Statements of belief provisions still privilege religious expression over discrimination protections

The Commission remains concerned that overall, clause 42 still fails to appropriately balance the right to religious expression with the right to be free from discrimination. The Bill continues to privilege religious expression over anti-discrimination protections for some members of the community, particularly LGBTIQ people and women. The Bill also continues to undermine the coherence of Australia's anti-discrimination framework, by overriding state and territory law preventing individuals from making complaints about certain 'statements of belief' which may otherwise be unlawful in some jurisdictions.

What's changed in the second exposure draft?

Clause 42(1) of the Bill has been amended to clarify that the exemption from any anti-discrimination law only applies to the statement of belief 'in and of itself'. In addition, clause 42(2) has been amended to expand the types of statements that would be considered discriminatory. Statements of belief are permitted *unless* the statement is malicious or would, or is likely to, 'harass, threaten, seriously intimidate or vilify' another person or group of persons.³

Do the changes address our concerns?

● The changes to clause 42 have not adequately addressed our concerns.

The Commission remains concerned that, overall, this provision fails to appropriately balance the right to religious expression with the right to be free from discrimination. The amendments raise four key issues.

First, clause 42(1) has been amended to clarify that the exemption from any anti-discrimination law only applies to the statement of belief 'in and of itself'.⁴ So while discriminatory conduct will be a breach of anti-discrimination law, any accompanying 'statements of belief' would be permitted. This can be contrasted to non-religious contexts, where a statement accompanying discriminatory conduct would also be discriminatory.

Case study of potential harm

Tamara is openly gay at work. Her co-workers tell her they overheard her manager saying that 'all gay people will go to hell' and that he 'doesn't want to work with sinners'. She applies for a promotion at work but is not successful. If the reason Tamara wasn't promoted is because of her sexual orientation, under existing anti-discrimination law, both the statements made by the manager *and* the act of not promoting her (the conduct) would likely be considered discriminatory. However, the Bill would likely make the statements in and of themselves lawful, while the conduct is unlawful. This example highlights the confusion that might arise from the Bill and the difficulty of having to draw a distinction between the statement and the conduct.

Second, the amendments made to clause 42(2)⁵ amend the types of statements of belief that would be considered discriminatory. Statements of belief are permitted *unless* the statement is malicious or would, or is likely to, 'harass, threaten, seriously intimidate or vilify' another person or group of persons. It remains unclear what statements will meet this threshold.

Third, clause 42(2)(b) still sets a high threshold, which focuses on the offender's conduct (i.e. whether the statement constitutes harassment or serious intimidation) or on the effect of the conduct on a third party (i.e. whether the statement constitutes vilification, which is defined in clause 5(1) to mean 'incite hatred or violence towards the person'). The threshold does not assess harm from the perspective of the victim group that experiences the statement, their community or

society at large. From our experience in relation to the application of Victoria's *Racial and Religious Tolerance Act 2001*, the threshold proposed in the second exposure draft will make it difficult for individuals to rely on. Under the *Racial and Religious Tolerance Act 2001*, the legal tests for vilification are high, requiring proof that hate conduct incited extreme negative emotions in an often-unidentifiable audience and fail to consider the harm caused to individuals, target communities and broader society. To date, there have been only two successful cases in the Victorian Civil and Administrative Tribunal (VCAT) and one successful prosecution of serious vilification.

Finally, clause 42(1) still provides that 'statements of belief' do not constitute discrimination for the purposes of anti-discrimination law. We repeat our concern that clause 42(1) overrides state and territory anti-discrimination law,⁶ preventing individuals from making complaints about certain 'statements of belief' which would otherwise be unlawful in some jurisdictions.⁷ This undermines the sovereignty of state and territory government to make laws, including efforts to reform discrimination or vilification laws

Recommendation 1 (restated from our first submission)

The Attorney-General should remove clause 42, dealing with discriminatory statements of belief and overriding state and territory anti-discrimination laws, from the Religious Discrimination Bill 2019 (Cth).

Key Concern 2

The Bill still restricts the ability of large employers to create safe and inclusive workplaces

Clauses 8(3)–(5) of the Bill continue to restrict an employer's ability to create safe and inclusive workplaces, by preventing certain employers from imposing employer conduct rules on employees' religious expression outside of work hours.

What's changed in the second exposure draft?

Clause 8(3) has been amended to expand the application of employer conduct rules from when a person is 'performing work' to conduct in the 'course of their employment'.

Do the changes address our concerns?

● The changes to clause 8(3) have not adequately addressed our concerns.

The Commission welcomes the amendment to clause 8(3) that expands the application of employer conduct rules from when a person is 'performing work' to conduct in the 'course of their employment'. This amendment clarifies that employers can regulate conduct of employees related to work, such as conduct at external office functions, conferences and work-related travel. However, the Commission remains concerned that overall the provision still means that large employers will have limited ability to make rules to restrict their employees' expression of views that are religiously based outside of work. This is even where those views are contrary to the employer's values or mission and are harmful to other employees, customers, members of the public or the employer's reputation.

Case study of potential harm

A worker at a large regional private health service posts on Facebook that survivors of sexual abuse are to blame because of their gender and sexual orientation. The post receives many likes and supportive comments from members of the local community.

Alvin, a gay man living in that area, sees the post and the support it receives and no longer feels comfortable going to the health service. There are no other health services available in his town, so he has to take time off work so he can travel a long distance to feel comfortable receiving the health services he requires.

Even though the views expressed by the worker are inconsistent with the health service's values, under the Bill the health service may not be able to take any action to have the statement removed or impose their conduct rules on their employee.

Recommendation 2 (restated from our first submission)

The Attorney-General should remove clauses 8(3) and 8(5), dealing with the application of employer conduct rules by businesses with an annual revenue of more than \$50 million, from the Religious Discrimination Bill 2019 (Cth).

Key Concern 3

The Bill restricts the ability of qualifying bodies to make conduct rules

The Bill has introduced a new clause 8(4) which prevents qualifying bodies (i.e. bodies that accredit professionals or tradespeople) from applying conduct rules that would prevent someone in that profession, occupation or trade from making a statement of belief outside of that person practising their relevant profession, trade or occupation. This is, unless the body can show that compliance with the rule is an essential requirement of the profession, trade or occupation.

In practice, this means that qualifying bodies, such as medical boards or legal admission boards, that are empowered to confer, renew, extend, revoke, vary or withdraw an authorisation or qualification have limited ability to make or apply conduct rules to restrict a person's expression of views that are religiously based that may bring the profession into disrepute. This may have the effect of preventing people from pursuing certain professions because they do not consider them to be inclusive of people with their particular attribute, because of previous harmful public statements from members of that profession.

Case study of potential harm

Gavin is a partner in a law firm. After work, he makes comments on social media that, in his opinion, a female's place is in the home, raising children and serving a man like the Bible says. Several female lawyers make complaints about Gavin's statements to the Legal Services Board. The Board is unsure whether it can impose its legal professional rule that a solicitor should not bring the profession into disrepute, or take disciplinary action – the Board is concerned that the comments may be considered 'statements of belief' under the Bill, given they were made in Gavin's personal capacity and arguably do not relate to an essential requirement of the legal profession. The Board is not clear on what action it can take.

Recommendation 3 (new)

The Attorney-General should remove clause 8(4), dealing with the application of qualifying body conduct rules, from the *Religious Discrimination Bill 2019 (Cth)*.

Key Concern 4

Additional limits on the inherent requirements test are unnecessary

The Bill continues to prevent employers from deciding whether they can require compliance with employer and health practitioner conduct rules as inherent requirements of the job. Clauses 32(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 or activity. However, clauses 32(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

32(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 32(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 32(2)-(5) and in case law are sufficient.

What’s changed in the second exposure draft?

Clause 32(6) has been amended to refer to employer conduct rules that would have the effect of restricting an employee from making a statement of belief other than ‘in the course of the employee’s employment’ as opposed to ‘when the employee is performing work on behalf of the employer’.

Do the changes address our concerns?

● The change to clause 32(6)⁸ does not address our concerns.

Clauses 32(6) and 32(7) still impose unnecessary limits on the inherent requirement test set out in clauses 32(2)–32(5) by preventing certain employer and health practitioner conduct rules from being considered inherent requirements of the job, as stated in our first submission.⁹

Case study of potential harm

Khalil is a trans man and works for a large employer. The employer’s code of conduct requires that all staff should be respectful towards one another and that harassment and bullying will not be tolerated. After work one day, one of Khalil’s colleagues’ posts on Twitter that God created men to be men and women to be women and that people who transition from one sex to another are against God’s will. Khalil sees the post and makes a complaint to the Head of People and Culture the following day.

The Head of People and Culture wants to send an email to the staff member confirming that upholding this aspect of the code of conduct is a core part of their job and that social media posts that are not respectful could be viewed as harassment and bullying to other employees are unacceptable. The Head of People and Culture is not sure whether they can send the email. On one hand, they have an obligation under occupational health laws to ensure that the workplace is safe and free from bullying and an obligation to ensure that the employer conduct rules are complied with. On the other hand, they are not sure if the Bill would prevent this aspect of the code of conduct from being an inherent requirement of the job, as complying with it would restrict the employee from making statements outside of work hours.

The provision may have the effect of creating ambiguity leading to people being less likely to call out certain conduct, even if it is clear that the conduct is not in line with the relevant code of conduct. The Head of People and Culture decides not to send the email. Also, Khalil is unlikely to be able to lodge a discrimination complaint against his colleague or employer (via vicarious liability) because the Twitter post may be a statement of belief. As noted above, statements of belief do not constitute discrimination for the purposes of any anti-discrimination law under clause 42 of the Bill unless the statement is malicious or would, or is likely to, ‘harass, threaten, seriously intimidate or vilify’ another person or group of persons.

Recommendation 4 (restated from our first submission)

The Attorney-General should remove clauses 32(6) and 32(7), dealing with additional limitations on what may be an inherent requirement of a job, from the Religious Discrimination Bill 2019 (Cth).

Key Concern 5

Conduct rules regarding conscientious health objections

The Bill continues to undermine access to safe and inclusive health services. It also creates a risk of confusion among health providers seeking to comply with existing conscientious objection laws and policy directives. It does so by introducing broad conscientious objection provisions without appropriate safeguards in circumstances where no state and territory conscientious objection laws exist. Whilst it is clear for states like Victoria that have legislation dealing with conscientious objection for procedures such as abortion and voluntary assisted dying, it may not be as clear for states and territories that do not have equivalent legislation.

What's changed in the second exposure draft?

The definition of 'health service'¹⁰ no longer includes dentists, radiologists, occupational therapists, optometrists, physiotherapists, podiatrists and Aboriginal and Torres Strait Islander health practices. In addition, clause 8(6) has been broadened to apply to a health practitioner 'providing or participating in a particular kind of health service'.

Do the changes address our concerns?

● The changes to clause 8(6) do not adequately address our concerns.

Overall, the Commission remains concerned about the introduction of the clauses relating to conscientious objections by health practitioners. The amendments raise three key issues.

First, the Commission welcomes the narrowing of the range of health practitioners providing health services that can make conscientious objections under clause 8(6). However, the Commission is concerned that the definition of 'health service' still includes a broad 'medical' category, which is not defined and may have a wider application than originally intended. The meaning of 'medical' requires clarification to only apply to medical services delivered by a person registered under the Health Practitioner Regulation National Law to practice in the medical profession.¹¹

Second, the Commission is also concerned that the clause has been broadened to apply not only to a health practitioner 'providing a health service', but also to any health practitioners 'participating in a particular kind of health service'. This ambiguously expands the scope of health practitioners who can make a conscientious objection. We are concerned that the meaning of 'participating' could be applied more broadly than intended to include actions such as referrals. This is especially concerning in a small service or health services in rural and remote areas.

Finally, the Commission notes that the explanatory notes state that the objection must be to providing or participating in a particular kind of health service, such as procedures like abortion or voluntary assisted dying.¹² The objection cannot be to the personal attributes of the person seeking the service.¹³ The Commission remains concerned that it may be difficult to draw a distinction between the service and the personal attributes of the person seeking that service. For example, a transgender person seeking sex reassignment surgery is seeking this service because of their personal attributes.

Recommendation 5 (restated from our first submission)

The Attorney-General should remove clauses 8(6) and 8(7), dealing with rules about conscientious objections by health practitioners, from the Religious Discrimination Bill 2019 (Cth).

Case Studies of potential harm

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 woman seeks medical termination of pregnancy (MTOP) early in her pregnancy. She is told by her GP that they do not provide these services. The GP informs her that the only services available are private and cost several thousands of dollars. The GP does not make any referrals. She then calls several other clinics looking for a MTOP before accessing 1800 My Options, a service provided by Women's Health Victoria. By this time, she has exceeded the gestational limit for MTOP, and the only option is a surgical termination which has financial implications.

Key Concern 6

Protections for corporations who are associated with religious individuals

The Bill continues to depart from traditional anti-discrimination law, by extending discrimination protections to 'persons' (including a natural person or a corporation)¹⁴ associated with individuals who hold or engage in a religious belief or activity. This affords businesses protections against discrimination ordinarily provided only to individual persons.

What's changed in the second exposure draft?

The definition of 'person' in clause 5 has now been removed. However, there is a new clause 9 which allows complaints to be made by persons who have an association with an individual who holds or engages in a religious belief or activity. Whilst the term 'person' is not defined in the Bill, the Explanatory Notes import the meaning of person in clause 9 from section 2C of the *Acts Interpretation Act 1901* which extends to corporations. This means corporations may make complaints of religious discrimination in their own right as associates of an individual with a religious belief.

Do the changes address our concerns?

● Our concerns with this part of the Bill were initially addressed by the removal of the definition of person in clause 5. However, this change is undermined by the introduction of clause 9.

One of the Commission's key concerns about the first exposure draft was that it allowed corporations and religious organisations to make claims of discrimination in their own right by including body corporates in the definition of 'person' in clause 5. The definition of 'person' in clause 5 has now been removed. The explanatory notes confirm that the Bill 'does not envisage that non-natural persons, such as bodies corporate, will hold or engage in religious beliefs or activities.'

While the Commission welcomes this change, it is undermined by the introduction of clause 9 which extends protections from discrimination to persons associated with individuals who hold or engage in a religious belief or activity. The Bill does not define what the term 'person' means. However, the explanatory notes on the second exposure draft¹⁵ import the meaning of person in clause 9 from section 2C of the *Acts Interpretation Act 1901*. Accordingly, a person, for the purposes of the Bill, includes natural persons, bodies corporate and bodies politic.¹⁶ This means corporations can still make claims of discrimination against a natural person as associates of an individual with a religious belief.

If clause 9 is removed from the Bill, it will not prevent an associated person, including a company, from making a representative complaint to the Australian Human Rights Commission under section 46P of the *Australian Human Rights Commission Act 1996*.¹⁷

Case study of potential harm

The CEO of a restaurant chain, who is also a Christian, makes several public comments about the LGBTIQ community including that marriage should be between a man and woman and that members of that community will go to hell. One of the major vendors to his restaurant chain informs the restaurant chain that they will not be engaging in any further business with them because of the comments as they are a supporter of LGBTIQ rights. In this scenario, the restaurant chain may be able to lodge a complaint of discrimination against the vendor as an 'associate' of a person, i.e. the CEO, with a religious belief or activity in the provision of goods and services.

Recommendation 6 (new)

The Attorney-General should amend clause 9 of the Religious Discrimination Bill to make it clear that an associate may only be a natural person (for example partners, parents, carers and advocates).

Key Concern 7

Granting religious bodies broader exceptions that permit discrimination

The Bill continues to elevate 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 in clause 11.

What's changed in the second exposure draft?

The previous definition of a 'religious body' in clause 11(5) which included registered charities, has been expanded to include public benevolent institutions. In addition, the second exposure draft further expands the circumstances in which religious bodies can lawfully discriminate based on religious belief or activity through the introduction of clauses 11(3) and 11(4).

Do the changes address our concerns?

● The Commission's concerns in relation to clause 11 have not been addressed. They have been partly exacerbated by the introduction of new provisions and the amendment to the definition of religious body.

These changes outlined above raise three key issues.

First, the previous definition of a 'religious body', which included registered charities, has been expanded to include public benevolent institutions.¹⁸ This definition will capture all registered charities that are also registered as public benevolent institutions which are conducted in accordance with religious doctrines.¹⁹ A registered charity which is not a registered public benevolent institution, and is not engaged solely or primarily in commercial activities, may still fall within the scope of clause 11(5)(c) if conducted in accordance with religious doctrines, tenets, beliefs and teachings.²⁰ These changes mean that even more bodies will be permitted to discriminate under the Bill.

Recommendation 7 (restated from our first submission)

The Attorney-General should amend clause 11 to:

- limit the definition of 'religious body' to 'bodies established for religious purposes'
- make clear that the general exemption does not apply to any conduct connected with commercial activities.

Second, the test for whether a religious body is entitled to an exemption from discrimination has also been broadened in clause 11(1) of the Bill. The previous test was an objective test which required an assessment of whether the religious body is engaging in 'conduct that may reasonably be regarded as being in accordance with teachings of the religion.'²¹ The new test is a more subjective test that looks at whether the religious body is engaging in conduct that 'a person of the same religion as the religious body could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of that religion.'²²

Arguably, under this revised test it takes only two people to establish a religious requirement exists and deserves protection. It is not clear how the issue of two people of the same faith having different interpretations about aspects of their religion would be resolved. The test has also been expanded to include conduct that includes giving preference to persons of the same religion as the religious body and conduct that avoids injury to the religious susceptibilities of adherents of the same religion as the religious body.²³

Case Study of potential harm

Elyse lives in a rural town that has recently been affected by floods. She approaches a relief service run by a Christian charity, which is giving out clothes and meals to affected community members. She asks if she can volunteer. The relief service staff tell Elyse that to volunteer she must uphold and act consistently with Christian doctrines including mandatory group prayer at certain times of the day. Elyse explains that she doesn't feel comfortable participating in group prayer because she is an atheist. However, she still wants to do what she can to contribute in this time of crisis. The Christian charity refuses to accept her as a volunteer.

Finally, the introduction of clauses 11(3) and 11(4) means that a broader range of conduct by religious bodies is now exempt from conduct that would otherwise be considered discriminatory. Religious bodies will not be considered to engage in discriminatory conduct if conduct is engaged in good faith to avoid injury to the religious susceptibilities of adherents of its religion. It will also not be discriminatory if the religious body engages in conduct that gives preference to persons of the same religion as the religious bodies.²⁴

Recommendation 8 (new)

The Attorney-General should redraft the tests in clauses 11(1)–(4) relating to the requirements that need to be met for an exemption from discriminatory conduct for religious bodies to apply, to ensure that an adequate balancing of rights is struck to better protect the rights of people who are employed with, interact with or receive services delivered by that religious body. The test should take into account factors including whether the conduct is reasonable, justified and proportionate in the circumstances.

Key Concern 8

Expansion of circumstances in which religious bodies may discriminate – hospitals, aged care facilities, certain accommodation providers, religious camps and conference sites

The Bill has expanded the exceptions available to religious hospitals, aged care facilities and certain accommodation providers to discriminate against people with different or no beliefs with the

introduction of new clauses 32(8)–32(12). It has also added an exception in new clauses 33(2)–33(5) for religious camps and conference sites to engage in conduct that would otherwise be discriminatory against people with different or no beliefs in the provision of accommodation on these camps and sites. This is provided they have a publicly available policy that describes who they will provide accommodation to.

These provisions raise two key issues. First, the Bill has expanded its list of exceptions relating to areas of public life in clauses 32(8)–(11). Religious hospitals, aged care facilities and accommodation providers are exempt from discrimination against people with different or no beliefs in relation to their staffing arrangements. This is even though it is not an inherent requirement of the role to be of a certain religion or belief. They are also exempt in situations where they seek to form partnerships with other people or organisations who adhere to their religious principles.²⁵ This expands the number of areas where religious bodies can lawfully discriminate.

Case study of potential harm

Ali, a Muslim man, applies for a job as a receptionist in a Catholic-run hospital. The hospital advises him it cannot hire him because he is not of the Catholic faith and the hospital requires all staff interacting with the patients to be Catholic. The hospital notes that it relies on an exception under the federal religious discrimination law which allows it to select job candidates in this way, even though being a Catholic is not an inherent requirement of the receptionist role.

Further, the Bill allows religious camps and conference sites to discriminate against people with different or no beliefs in relation to the provision of accommodation at those camps and conference sites under clauses 33(2)–33(5) if they have a public policy that states who they will provide accommodation to. The expansion of the exception to the actual provision of accommodation is not common in anti-discrimination law and undermines the application of Victoria's *Equal Opportunity Act 2010*. 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*²⁶ which found that a Christian camp provider unlawfully discriminated in refusing a booking request for same-sex attracted youth attending the proposed camp amounted to unlawful discrimination and did not fall within the religious exceptions in the *Equal Opportunity Act 2010*.²⁷

Case Study of potential harm

A Jewish school seeks to book a campsite run by a religious Christian organisation for a personal development weekend for senior students. The religious Christian organisation declines the booking because the school intends to teach students about Jewish cultural and religious traditions in the modern world. The camp tells the school that Jewish people are not welcome at the campsite because they do not accept Jesus as their Christ.

Recommendation 9

The Attorney-General should remove from the Bill the exemptions in:

- (a) clauses 32(8)–(11), dealing with exemptions from religious discrimination in employment and partnerships for religious hospitals, aged care facilities and accommodation providers, and
- (b) clauses 33(2)–(5), dealing with exemptions from religious discrimination relating to accommodation for religious camps and conference sites.

¹ 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.

² An electronic version of the Commission's submission to the first exposure draft of the Religious Discrimination Bill 2019 (Cth) can be found on our website; <https://www.humanrightscscommission.vic.gov.au/policy-submissions/item/1840-submission-on-the-draft-religious-discrimination-bill-oct-19>, accessed 31 December 2019

³ Previously, the exclusion applied unless the statements would or are likely to, 'harass, vilify or incite hatred or violence'.

⁴ Clause 42(1) of the second exposure draft of the Religious Discrimination Bill 2019 (Cth)

⁵ Previously clause 41(2) in the first exposure draft of the Religious Discrimination Bill 2019 (Cth)

⁶ Clause 42(1)(a) imports the meaning of "anti-discrimination law" from section 351(3) of the *Fair Work Act 2009* (Cth), which includes the *Age Discrimination Act 2004* (Cth), the *Disability Discrimination Act 1992* (Cth), the *Racial Discrimination Act 1975* (Cth), the *Sex Discrimination Act 1984* (Cth), the *Equal Opportunity Act 2010* (Vic), the *Anti-Discrimination Act 1991* (Qld), the *Equal Opportunity Act 1984* (WA), the *Equal Opportunity Act 1984* (SA), the *Anti-Discrimination Act 1998* (Tas), the *Discrimination Act 1991* (ACT), and the *Anti-Discrimination Act 1992* (NT).

⁷ Clause 42 should be removed from the second exposure draft to bring anti-discrimination protections for religious communities into line with protections for other attributes and to allow federal law to operate concurrently with state and territory law anti-discrimination frameworks. See for example the *Racial Discrimination Act 1975* (Cth) s 6A(1) which provides that the Act is not intended, and shall be deemed never to have been intended, to exclude or limit the operation of a law of a State or Territory

⁸ Previous clauses 31(2)-31(5) in the first exposure draft of the Religious Discrimination Bill 2019 (Cth)

⁹ Please refer to page 8 of our submission to the first exposure draft of the Religious Discrimination Bill 2019 (Cth)

¹⁰ Under clause 5 of the second exposure draft of the Religious Discrimination Bill 2019 (Cth)

¹¹ Definition taken from Health Records Act 2001 (Vic). Also see Health Practitioner Regulation National Law (Victoria) Act 2009

¹² Explanatory Notes, Second Exposure Draft, Religious Discrimination Bill 2019, paragraph 167, page 22 <https://www.ag.gov.au/Consultations/Documents/religious-freedom-bills-second-draft/explanatory-notes-second-exposure-draft-religious-discrimination-bill-2019.pdf>, accessed 3 January 2020

¹³ Ibid, Explanatory Notes, Second Exposure Draft, Religious Discrimination Bill 2019, paragraph 167, page 22

¹⁴ Ibid, Explanatory Notes, Second Exposure Draft, Religious Discrimination Bill 2019, paragraph 203, page 26

¹⁵ Ibid, Explanatory Notes, Second Exposure Draft, Religious Discrimination Bill 2019, paragraph 64, page 10

¹⁶ Ibid, Explanatory Notes, Second Exposure Draft, Religious Discrimination Bill 2019, paragraph 64, page 10

¹⁷ Section 46P(2) of the *Australian Human Rights Commission Act (Cth) 1996* provides that a complaint may be lodged by a person aggrieved by the alleged acts, omissions or practices on that person's own behalf; or on behalf of that person and one or more other persons who are also aggrieved by the alleged acts, omissions or practices; or by 2 or more persons aggrieved by the alleged acts, omissions or practices: on their own behalf; or on behalf of themselves and one or more other persons who are also aggrieved by the alleged acts, omissions or practices.

¹⁸ Clause 5(1) of the second exposure draft provides that a registered public benevolent institution means an institution that is (a) a registered charity and (b) registered under the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) as the subtype of entity mentioned in column 2 of item 14 of the table in subsection 25-5(5) of that Act

¹⁹ Ibid, Explanatory Notes, Second Exposure Draft, Religious Discrimination Bill 2019, paragraph 223, page 28

²⁰ Ibid, Explanatory Notes, Second Exposure Draft, Religious Discrimination Bill 2019, paragraphs 221 and 223, page 28

²¹ Previous clause 10(1) in the first exposure draft of the Religious Discrimination Bill 2019 (Cth)

²² Clause 11(1) in second exposure draft of the Religious Discrimination Bill 2019 (Cth)

²³ Clauses 11(2)-(4) in second exposure draft of the Religious Discrimination Bill 2019 (Cth)

²⁴ Explanatory Notes, Second Exposure Draft, Religious Discrimination Bill 2019, paragraph 216, page 28

²⁵ See clause 15 of the Religious Discrimination Bill 2019

²⁶ [2014] VSCA 75

²⁷ *Christian Youth Camps Limited & Ors v Cobaw Community Health Services Limited & Ors* [2014] VSCA 75 (16 April 2014), <http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSCA/2014/75.html>, para 11, accessed 31 December 2019. The Court of Appeal in *Christian Youth Camps Limited & Ors v Cobaw Community Health Services Limited & Ors* [2014] VSCA 75 had the task of balancing the right to freedom from discrimination and the right to religious freedom where the two were in conflict. The Court of Appeal at paragraphs [2], [9], [14] and [514] found that no religious exemptions applied and that the refusal to provide accommodation at the religious camp site amounted to discriminatory conduct. CYC tried to appeal the case to the High Court, however the special leave application was dismissed (See *Christian Youth Camps Limited v Cobaw Community Health Services Limited & Ors* [2014] HCATrans 289).