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Submission on the Religious Discrimination Bill 2021

Liberty Victoria is grateful for the opportunity to make this submission on the Religious Discrimination Bill 2021 (the Bill).

Liberty Victoria is one of Australia's leading human rights and civil liberties organisations, tracing our history to Australia's first council for civil liberties, founded in Melbourne in 1936. We seek to promote Australia's compliance with the rights recognised by international law and in the treaties that Australia has ratified and has thereby accepted the legal obligation to implement. We are a frequent contributor to federal and state committees of inquiry, and we campaign extensively for better protection of human rights in the community. Further information may be found at www.libertyvictoria.org.au.

This is a public submission, not confidential.

Executive Summary

Liberty Victoria is opposed to discrimination on the basis of the attributes of religious belief and religious activity, just as on the basis of the other attributes protected under our laws, including the *Equal Opportunity Act 2010* (Vic) (EOA). The Commonwealth Parliament would do well to follow the example of State and Territory laws in this field.

However, the form of this Bill marks a significant departure from the model adopted by state anti-discrimination legislation. It prioritises one particular type of attribute (religious belief and religious activity) over others. It unbalances the important safeguards that protect people against discrimination and poses a real risk to several minority groups in Australia.

In summary:

- (1) We support laws to *protect* people from discrimination on the basis of religion and/or religious belief (or the absence of such a belief);
- (2) We strongly oppose elevating the rights of people with religious beliefs above the rights of other Australians by exempting 'statements of belief' from existing anti-discrimination laws. In a civilised and human rights respecting society, there is no basis for undermining Commonwealth, state and territory discrimination laws, thus exempting discrimination, because it has a religious underpinning; and
- (3) We oppose the way in which these laws make it easier for vital services, including health services and those providing housing, to discriminate against people.

The Bill should not be passed in its current form.

Introduction

1. In earlier remarks on the planned and then First Exposure Draft Bill (the first EDB) the then Attorney-General (A-G) appeared to contemplate a standard form of anti-discrimination legislation along the lines of existing federal (and most state and territory) legislation. In a consultation meeting in Melbourne on Wednesday 4 September 2019, the then A-G appeared to confirm this intention, and downplayed the significance of the EDB's departure from that standard model.
2. In Liberty Victoria's view there were many problems with the first EDB and more with the second EDB, few of which have been remedied, with some in fact aggravated, in this Bill. The problems are serious, as explained below.
3. The Bill requires significant amendments if it is to strike an appropriate balance between competing rights. It should not be enacted in its current form.

PART 1—PRELIMINARY

Proposed section 3 - Objects of this Act

4. The Objects in the proposed s 3 should be limited to the proposed s 3(1)(a) alone. Proposed ss 3(1)(b), 3(1)(c) and 3(2) are redundant, merely repeating well-known principles of human rights law.
5. Proposed s 3(1)(d) suggests an improper (and contradictory) object for the proposed Act, namely signaling an attempt to privilege religious speech over the human rights of others, and therefore should be omitted. (The "Simplified outline" in s 4 will need to be amended consistently with the other amendments here proposed.)

Proposed section 5 - Definitions

6. Most of the definitions in s 5 are standard and unremarkable. The definition of 'employment', however, is to be commended for including unpaid work; this is something that Liberty Victoria is pleased to see, and it should be extended to the other Commonwealth anti-discrimination laws.

7. The definition of 'club', however, reproduces the definition in the *Sex Discrimination Act 1984* (CLR) with a significant variation: it omits the qualification that a 'club' 'sells or supplies liquor for consumption on its premises'. This expands the reach of the defined word enormously, with potentially undesirable consequences.
8. Several of the definitions in s 5 will, however, be rendered superfluous, and hence to be omitted, by the amendments here proposed.
9. It is commendable, however, that the anomalous definition of 'person' in the earlier Exposure Drafts does not appear. It is fundamental to human rights law that only human beings can have human emotions, feelings, attributes such as sex, race, sexual orientation or, indeed, religious beliefs, not to mention human dignity, and therefore only human beings – 'natural persons' in law - can have human rights. (Note, however, proposed s 16 below.)
10. It is our view that the proposed definition of 'vilify' is too narrow.¹ It is undesirable that an Act define and use a word as if it had a special meaning contrary to its ordinary definition. This error was made in the *Racial and Religious Tolerance Act 2001* (Vic), to the confusion of many, and should not be repeated in Commonwealth legislation. (The definition will not be needed, however, if the excisions this submission proposes are adopted.)
11. Proposed s 5(3) appears intended to grant religious bodies an unwarranted privilege to defy local by-laws: it should be omitted.

Proposed section 6 - Extended meaning of *ground*

12. Proposed s 6 is standard anti-discrimination law.

PART 2—CONDUCT ETC. THAT IS NOT DISCRIMINATION

13. Part 2 as proposed by the Bill – apart from proposed s 10(1) – is inconsistent with general principles of human rights law. It aims to place human rights connected with religious belief and/or religious activity above other human

¹ *Macquarie Dictionary*: **vilify** means "To speak evil of; defame; traduce".

rights with little or no attempt to assess reasonableness, necessity, proportionality and least restriction. It should be omitted.

14. This provision is unique in Australian law in aiming to declare various aspects of conduct associated with a single type of attribute (in this case religious belief or activity) as preemptively not discrimination, in defiance of practice in every other jurisdiction. It should be omitted.
15. It should be noted that freedom of expression is already protected by many human rights instruments in Australia, and freedom of political communication is protected by the Constitution. There is no need to introduce a presumption of lawful speech.

Proposed section 7 - Religious bodies may generally act in accordance with their faith etc.

16. Proposed s 7 is a dangerous provision that would allow for religious bodies to discriminate against a person by engaging in conduct that a person of the same religion could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of the religion.
17. Proposed s 7 operates at the definitional stage: it says that what religious bodies (very broadly defined) do, in purported good faith, is just not discrimination at all.
18. Subject only to the very narrow exceptions in s 8, s 7 gives permission for religious bodies to discriminate against others. It applies a very weak test to this broad permission to discriminate (in the sense of treating people differently based upon an attribute), and in order to be protected the particular conduct does not even need to be 'in accordance with' the 'doctrines, tenets, beliefs or teachings' of the religion concerned, but merely conduct that the religious body 'could reasonably consider to be' in accordance those things.
19. Further, given the great numbers of religions² listed by the Australian Bureau of Statistics, and the vast variety of their teachings (amplified by the vagueness of 'reasonably consider') it would appear impossible to know in advance what is allowed by this provision. However, it will apparently permit people to be

² *Australian Standard Classification of Religious Groups*, 1266.0 (3rd ed) ABS 2016: over 130, indeed

discriminated against (on the basis of attributes such as gender identity and sexuality) if a hypothetical reasonable person from that religion *reasonably considers* the conduct to be based on the religion's doctrines, tenets, beliefs or teachings.

20. Finally, noting the weakness of the 'protections' in s 8 and the operation of s 9 (below), s 7 allows for discrimination in the provision of essential services, such as the provision of healthcare, aged care, emergency housing, and education. It is vital that all people, regardless of their attributes, be able to access these services. There is no basis for condoning discrimination and therefore harm in the provision of these services.
21. Section 7 is a claim of religious privilege to the extent of making one form of rights dominant over others, a global 'religious exemption' at odds with the then A-G's assertion at the aforementioned consultation that religious exemptions were to be the subject of the ALRC inquiry and not part of this Bill. The proposed section instead pre-empts that inquiry. It should be omitted.

Proposed section 8 - Certain conduct by religious hospitals, aged care facilities, accommodation providers and disability service providers that is not covered by section 7

22. Section 8 provides narrow exceptions to the general right to discriminate contained in s 7. It is our view that these narrow exceptions are not sufficient to overcome our very substantial concerns with the operation of s 7.
23. Further, the notes to the section point to where religious privileges again override it.

Proposed section 9 - Areas of public life in which the conduct of religious hospitals, aged care facilities, accommodation providers and disability service providers is not discrimination

24. For the above reasons, this proposed section should also be omitted.

Proposed section 10 - Reasonable conduct intended to meet a need or reduce a disadvantage

25. Proposed s 10 at first glance appears to be a routine ‘special measures’ provision, to use the international treaty term. That would raise no issues requiring comment.
26. In truth, however, it is anything but routine. Proposed s 10(1)(c)(i), in relation to conduct that ‘is intended to meet a need arising out of a religious belief or activity of a person or group of persons’ – together with the otherwise anomalous proposed s 10(2) – amounts to a claim of religious privilege with none of the safeguards stated in other proposed provisions, and entirely unrelated to the proper recognition of reducing disadvantage in s 10(1)(c)(ii) or, for example, of promoting equality (as in the *Sex Discrimination Act 1984* (Cth) s 7D). Whether the need for it to be “reasonable in the circumstances” – s 10(1)(a) - can restrain this *carte blanche* remains to be seen.
27. Furthermore, proposed ss 10(2) and 10(1)(c)(i) together state that s 10 ‘applies despite anything else in this Act’. This means that proposed sections such as s 68 (which enables State and Territory laws to operate concurrently) do not apply, and thus s 10 amounts to a claim to override any inconsistent State or Territory law when meeting ‘a need arising out of a religious belief or activity of a person or group of persons’. It also vitiates other provisions limiting the ambit of religious belief or activity by excluding conduct that ‘is malicious... or would, or [be] likely to, harass, vilify or incite hatred or violence against’ others, or could “counsel, promote, encourage or urge conduct that would constitute a serious offence’: proposed ss 15(3) and 12(2).

Proposed section 12 Statements of belief

28. It is well recognised within society and at law that words can be incredibly harmful. This is the basis on which we aim to prevent discrimination and vilification; words have the power to seriously wound, even where they do not encourage others to violence against a person.
29. In that context, s 12 of the Bill permits the making of harmful ‘statements of belief’ by exempting such statements from important state and commonwealth Acts that have been enacted to prevent people from harm. Section 12 prioritises

freedom of speech over the rights of people from other minorities to live free from discrimination and vilification. It would override all Commonwealth, state and territory anti-discrimination laws, including the *Fair Work Act 2009* (Cth), to protect comments motivated by belief that offend, humiliate, intimate, insult and ridicule others. It is too broad and should be omitted.

30. In this regard, the discussion in the (first) Explanatory Notes of the effect of proposed s 12 (clause 41 in the first EDB) obscures the risk of harm caused to vulnerable people by the words of these 'statements of belief' and/or their manner of delivery.
31. The first main issue is that to be a protected statement of belief, there is no requirement that a statement of belief be objectively based in a person's religion. All that is required by the definition in s 5 is that a person genuinely considers their belief to be in accordance with the doctrines, tenets, beliefs or teachings of the relevant religion. This is entirely subjective. The individual making the comments only need to demonstrate that they genuinely believe it to be in accordance with their faith.
32. A second issue is illustrated by paragraph 407 of the (first) Explanatory Notes illustrates this point. Before considering the harms that 'statements of belief' will cause, consider what such statements may say. The Note states:

For example, a statement made in good faith by a Christian of their religious belief that unrepentant sinners will go to hell may constitute a statement of belief. However, a statement made in good faith by that same person that all people of a particular race will go to hell may not constitute a statement of belief as it may not reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of Christianity.
33. An issue arises regarding the assertion that racist beliefs may not be regarded as in accordance with the religious doctrines, in part because of the point noted above, and additionally the question: which Christianity? The ABS lists 'Christianity' as one of the five main religions in Australia, but it has dozens of sub-groups. How does the author know that not one single one of the more than 120 religious groups could lead to an adherent holding such racist religious views? Many organised religions have had racist doctrines.
34. Consider, for example, the case of the Dutch Reformed Church in South Africa and its absolute support of *apartheid*. The Church insisted on the total

separation and segregation of the races, holding strong views on miscegenation and prohibiting inter-racial marriage. The Church Congress stated that “only carrying out the policy of apartheid in the light of God’s Word and with God’s blessing would provide deliverance from the dark danger of colour mixing and bastardization.”³

35. Further, consider the Supreme Court of Virginia in the case of *Loving v Virginia*, sentencing a white man and black woman for the crime of marrying:

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.⁴

36. It is clearly entirely possible that some persons may harbour, and utter in purported ‘good faith’, ‘statements of belief’ that would distress vulnerable people and clearly constitute ‘unfavourable treatment’ on the basis of whichever bigotry was being displayed – where in relation to race, sexual orientation, disability, gender identity, unmarried pregnancy... – if done or condoned at a place of work or other area in which discrimination is made unlawful by state or territory laws. Such statements would cause harm, yet be protected by proposed s 12 of the Bill, expressly overriding those laws.

37. It is important to understand that such statements are harmful. They cause psychological distress, especially in people who have an attribute like those just mentioned where persecution and vilification are commonplace incidents of life and the history of such groups. The history of group prejudice, and instances experienced by an individual, combine to create ‘minority stress’. There is ample evidence that this leads to heightened risks of illnesses such as depression and anxiety disorder, including suicidality.⁵

38. The marriage law postal survey in 2017 illustrated these harms. Most of the ‘No’ case was expressly or implicitly based in religious beliefs, and the constant reiteration of such ‘statements of belief’ had, as the marriage equality campaign

³ Susan Rennie Ritner, ‘The Dutch Reformed Church and Apartheid’, *Journal of Contemporary History*, (1967) 2:17, 24.

⁴ Quoted by the US Supreme Court, voiding the Virginia miscegenation statute: 388 US 1 (1967)

⁵ Verrelli, *S et al.*, Minority stress, social support, and the mental health of lesbian, gay, and bisexual Australians during the Australian Marriage Law Postal Survey, *Australian Psychologist* 2019; 54:336–346.

expected and warned, serious consequences for many people, including children of same sex couples who were being lambasted in the media by hurtful 'statements of belief'.

39. For all these above reasons and more, proposed s 12 has the potential to cause great harm. It moves the proposed legislation away from providing a shield for people of faith, and permits them to pick up swords. It is inconsistent with Australia's international human rights treaty obligations and with the stated Objects of the Bill. Liberty submits it should be omitted.

PART 3 - CONCEPT OF DISCRIMINATION ON THE GROUND OF RELIGIOUS BELIEF OR ACTIVITY

Proposed section 13 - Discrimination on the ground of religious belief or activity—direct discrimination

40. Part 3 begins with a standard definition of direct discrimination and is unobjectionable. (It is old-fashioned drafting, though, involving the use of a 'less favourably' comparison; a better model would be s 8 of the *Equal Opportunity Act 2010* (Vic).)

Proposed section 14 - Discrimination on the ground of religious belief or activity—indirect discrimination

41. The s 14 definition of indirect discrimination is likewise an unobjectionable, standard definition.

Proposed section 15 - Discrimination on the ground of religious belief or activity—qualifying body conduct rules

42. Proposed s 15 is seriously flawed, because of the unwarranted privileging of religious speech through the 'statement of belief'. Because of the breadth of allowable statements of belief, and because the relevant provisions do not sufficiently protect people with protected attributes from harm, the passage of this provision would carry high risk of undermining equality for people from minority groups. The provision are also unprecedented in any State or Territory anti-discrimination law applying to discrimination on the basis of

religious belief or activity (or any other attribute, for that matter). It should be omitted.

43. Section 15(3) is an attempt to ameliorate the overreach of the preceding sub-s (1)(b); it is worthy, in trying to make it clear that some 'statements of belief' are too harmful to be tolerated. However, in Liberty Victoria's view, the restraints are insufficient. We further note that in practice, the operation of a narrow exception to a general freedom to discriminate places an unworkable burden on people who have been discriminated against, requiring them in practice to litigate to enforce the exceptions.
44. It is difficult to navigate through the labyrinth of uncertainties to determine what these provisions actually mean in any given context. This difficulty is exacerbated by the near impossibility of knowing what every one of the numerous religions recorded by the ABS⁶ might encourage or lead their membership to believe, let alone their multitudinous different and often ill-defined beliefs and varied activities, not to mention the vagaries of such believers' individual consciences.
45. The field is not just familiar religious beliefs, such as, for example, the Roman Catholic belief that people who divorce or remarry, or who have sex outside Catholic marriage, are sinful and hell bound. There are without doubt many even more outrageous beliefs to be found among the 130 or so religious groupings the ABS identifies in Australia.

Proposed section 16 - Discrimination extends to persons associated with individuals who hold or engage in a religious belief or activity

46. Proposed s 16 (after the omission of the parenthetical references to 'section 15 and Part 2') is a routine provision of anti-discrimination law (provided s 16(3) is omitted). It is marred by some curious drafting in s.16(2): the expression 'a person that is an individual' uses the impersonal relative pronoun 'that' where the context is precisely about the person being a natural person, for whom the pronoun 'who' is the only correct option. Proposed sub-s 16(3) is the reason for this oddity in sub-s 16(2), and it should be omitted. It appears to be a relic of the error in the Exposure Draft Bill where human rights were proposed to be

⁶ *Australian Standard Classification of Religious Groups*, 1266.0 (3rd ed) ABS 2016: over 130.

attributed to entities other than human beings. Proposed s 16(3) appears to endow a body corporate with the capacity to experience a human rights violation as if it were a natural person. This is nonsensical, and the sub-clause must be omitted.

Proposed section 17 - Conduct engaged in for 2 or more reasons

47. Proposed s 17 is routine anti-discrimination law.

PART 4—UNLAWFUL DISCRIMINATION

48. Part 4 establishes what is to be unlawful in Divisions 2 (work) and 3 (other areas). It is a standard anti-discrimination provision; or rather, would be if (and only if) the earlier provisions were amended as described above.

49. Proposed Division 4 sets out 'Exceptions and exemptions'. Most are standard in anti-discrimination laws, though some may need further scrutiny. In particular, the blanket privilege accorded to 'charitable' benefits involving 'religious belief or activity' by proposed s 36 is unsupportable, and that item should also be omitted.

50. Consistent with earlier remarks, sub-sections of s 39 concerning employer and health 'conduct rules' and other religious preferences should be omitted.

51. Similarly the equally unjustifiable privileges accorded to 'religious camps and conference sites' in s 8(c) and s.40(2)(5) should be omitted.

PART 5—Offences

52. The provisions here appear routine and unobjectionable.

PART 6—FREEDOM OF RELIGION COMMISSIONER

53. We do not see the need for a separate freedom of religion commissioner. The human rights commissioner handles other attributes adequately, though no

doubt additional funding would be needed for work developing, educating and promoting, as well as handling complaints under, a new attribute.

54. In this respect Liberty agrees with the conclusion of the Religious Freedom Review's Expert Panel ('the Ruddock Review'), which was 'of the view that the appointment of an additional commissioner is not necessary'.⁷
55. To the extent that a commissioner responsible for the attribute of religious belief or activity might be needed, it could best fall to the Human Rights Commissioner.⁸

PART 8—... constitutional provisions

56. In essence, the Bill relies on the external affairs power (as other Commonwealth anti-discrimination laws do), however, unlike other anti-discrimination laws, the Bill gives a privileged status to religious freedoms. This may well make the Bill inconsistent with international law⁹, so that reliance cannot be placed on that constitutional head of power for the Bill to be valid. It is unlikely any other head of power can support such a law. If the government insists on the external affairs power, this will require that, consistently with the foregoing discussion, the Bill needs to be significantly amended, making it align with other anti-discrimination laws.

Context and Conclusion

57. The context for this Bill, and in particular for all the items that Liberty in this submission urges should be omitted, is generally agreed to be the campaign by certain privileged religious and political groups to frustrate marriage equality in 2017, and, having failed in that effort, their follow-up attempts to frustrate the public will clearly demonstrated in the powerful majority vote in the Postal Survey.

⁷ *Religious Freedom Review*, 2018, p102 paragraph 1.415.

⁸ *Ibid.* p103, paragraph 1.416.

⁹ See: <https://www.theguardian.com/world/2019/sep/30/religious-discrimination-bill-may-breach-constitution-by-allowing-doctors-to-refuse-treatment> (at 21 December 2021).

58. As has been observed elsewhere, the ‘No’ campaign sought vigorously to make many issues other than marriage equality the focus of the Postal Survey, and indeed held out precisely the sort of claims of religious privilege that mar this Bill. The ‘Yes’ vote in that survey roundly rejected those claims too.¹⁰ Liberty urges the government to re-draft the Bill accordingly. (Liberty has not had time to assess the other two bills in this package, and urges that the same principles here adopted be applied to those as well.)

59. As Liberty has argued in previous submissions:

The people’s emphatic rejection of the NO campaign’s claims, together with the shocking abuse revealed in the Royal Commission, and the consequent loss of public respect by religious institutions, together mark a shift in public opinion that can no longer be denied.¹¹

60. That loss of respect is not new,¹² and the furore unleashed by the release of the ‘Ruddock Review’ recommendations in late 2018 showed that it continues. Notwithstanding that public response, and indeed the Review’s fairly restrained approach to the demands of the more insistent religious lobbyists, the government has persisted with seeking to implement them in the present Bill.

61. In this submission Liberty Victoria has set out a number of significant problems with the Religious Discrimination Bill 2021, and proposes some necessary omissions and changes required to make it a human rights compatible instrument.

62. This Bill also reflects a missed opportunity. If the Government was serious about protecting human rights of all persons, it should follow the lead of various States and the ACT, the United Kingdom, New Zealand and Canada, and enact a federal charter of rights. Such a charter could carefully balance all human rights, including freedom of expression, freedom of religion and


¹⁰ Jamie Gardiner, *The Meaning of YES...and NO*, <<https://libertyvictoria.org.au/content/meaning-yes%E2%80%A6and-no>> (at 21 December 2021).

¹¹ Liberty Victoria, *Submission 196*, 21 January 2019, Senate Legal and Constitutional Committee Inquiry into the *Sex Discrimination Amendment (Removing Discrimination Against Students) Bill* 2018.

¹² See, for example, Matt Wade, 12/10/2017, “Ipsos global poll: Two in three Australians think religion does more harm than good in the world” *Sydney Morning Herald*, <https://www.smh.com.au/national/ipsos-global-poll-two-in-three-australians-think-religion-does-more-harm-than-good-in-the-world-20171012-gyz7ii.html> (at 21 December 2021)

freedom from discrimination, in a matter well understood under international law. Sadly, this Bill, in its current form, seeks to privilege one type of attribute and conduct (statements of religions belief and activity) over other attributes and important human rights protections, such as freedom from discrimination. It does not get the balance right.

63. Liberty Victoria strongly opposes the Bill in its current form.
64. Thank you for the opportunity to make this submission regarding the important work being undertaken by this review. If you have any questions regarding this submission, please do not hesitate to contact Liberty Victoria Vice-President Jamie Gardiner or the Liberty office on 9670 6422 or info@libertyvictoria.org.au.



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