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Submission on the Religious Discrimination Bill Exposure Draft

Liberty Victoria is grateful for the opportunity to make this submission.

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.

Introduction

1. In earlier remarks on the planned, now Exposure Draft, Bill ("**the EDB**") the Attorney-General appeared to contemplate an ordinary anti-discrimination law along the lines of existing federal (and State/Territory) legislation. In a consultation meeting in Melbourne on Wednesday 4 September he appeared to confirm this intention, and downplayed the significance of the EDB's departure from that "stock standard" model.

2. Liberty Victoria submits, however, that there are many problems with the EDB. They are serious, as explained below. To remedy them and return the Bill to an acceptable, human rights compatible position it needs a number of amendments.

PART 1—PRELIMINARY

Clause 3 Objects of this Act

3. To begin with, the Objects clause, cl.3, should be trimmed to the current cl.3(1)(a) only. EDB 3(1)(b) and 3(2) are redundant, as merely repeating well-known principles of human rights law; the specific reference to religious belief or activity in cl.3(1)(b) does, however, dog-whistle an intention to privilege that right over others, despite the plain meaning. (The "Simplified outline" in cl.4 will need to be amended consistently with the other amendments here proposed.)

Clause 5 Definitions

4. Most of the definitions in cl.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.

5. Several of the definitions in cl.5 will, however, be rendered superfluous, and hence to be omitted, by the amendments here proposed.

One definition, that of "***person***," is anomalous and requires separate comment. 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. The attempt in clause 5 to insist that "person" includes corporations and entities other than natural persons borders on the bizarre. This would enable, and is presumably intended to enable, churches, religious schools, religious charities and the like to claim to be victims of religious belief or activity discrimination. Such a notion is unprecedented, incompatible with all other Australian anti-discrimination laws and inconsistent with Australia's international human rights treaty obligations. The definition must be omitted, and it must be made clear that only natural persons can suffer discrimination.

PART 2—CONCEPT OF DISCRIMINATION ON THE GROUND OF RELIGIOUS BELIEF OR ACTIVITY

Clause 7 Discrimination on the ground of religious belief or activity—direct discrimination

6. Part 2 begins with a stock standard cl.7 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).)

Clause 8 Discrimination on the ground of religious belief or activity—indirect discrimination

7. The expanded definition of indirect discrimination in cl.8 is, however, seriously inappropriate, apart from sub-clauses (1), (7) and (8), and sub-clause (2) amended by omitting both the reference to "subsections (3), (5) and (6)" and paragraph (d).

8. The other parts of this clause amount to a considerable overreach whose effect is the entrenching, or even expanding, of unjustifiable religious privilege as embodied in the concepts of "employer—or health practitioner—conduct rule", "relevant employer" and "statement of belief".

9. Sub-clause (4) is an attempt to ameliorate the overreach of the preceding sub-clause (3); it is worthy, in trying to make it clear that some "statements of "belief" are too odious to be tolerated, but in practice this would be almost certainly unworkable without endless uncertainty and litigation. The attempt to construct realistic examples of what would or would not be encouraged or forbidden by these provisions is almost as pointless as an infinite regression. It anyway becomes redundant when sub-cl.(3) is omitted.

10. Sub-cl.(3) is a novelty, 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), and makes a mockery of the concept of equality.

11. Equally unprecedented, and a grave overreach, are sub-clauses (5) and (6) concerning health practitioners. As with sub-cl.(3) it is difficult to navigate through the cascade of multiple negatives to determine what they 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 ABS[1] 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. While some suggest this provision is intended merely to make health services unable to effectively provide certain services, such as abortion, it seems equally likely to enable any of the vast range of health practitioners to refuse to treat, or to treat

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

unfavourably, any person whose existence in some way offends the practitioner's 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. Sub-clauses (5) and (6) must be omitted.

12. The remaining provisions of clause 8, namely sub-clauses (7) and (8), are routine and should remain. The same applies to clause 9.

Clause 10 Religious bodies may act in accordance with their faith

13. Clause 10, on the other hand, must be omitted entirely. It is a claim of religious privilege to the extent of supremacy, a grandiose global "religious exemption" at odds with the Attorney-General's assertion at the aforementioned consultation that religious exemptions were to be the subject of the ALRC inquiry and not part of this EDB. Clause 10 indeed utterly pre-empts that inquiry.

14. It seems hardly necessary to elaborate on this conclusion. Since it has reached the status of inclusion in the EDB, however, some further detail is apparently required.

15. To begin at the end, sub-clause 10(3) states that cl.10 "applies despite anything else in this Act". This means that clauses such as clause 60 (which enables State and Territory laws to operate concurrently) do not apply, and thus clause 10 amounts to a claim to override any inconsistent State or Territory law. 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": sub-clause 8(3), and cl.27(1)(b).

16. Clause 10 operates at the definitional stage: it says that what religious bodies (very broadly defined) do is just not discrimination at all. It applies a very weak

test to this broad permission to discriminate (in the meaning of the word in all other anti-discrimination laws): it does not even need to be "in accordance with" the "doctrines, tenets, beliefs or teachings" of the religion concerned, but merely action that "may reasonably be regarded" as such. Given the great numbers of religions listed by the ABS, and the huge variety of their teachings etc (amplified by the vagueness of "reasonably regarded") it must be impossible to know in advance what is licensed by this provision. In seeking to understand this provision it is essential to recall that, though clearly inspired by a desire to pander to a small collection of shock jocks, MPs and lobbyists and their narrow interpretation of one favoured religion, it is applicable to all religions, including those whose teachings etc are especially intolerant, misogynist, homophobic, abusive or murderous.

Clause 11 "Special measures" (Conduct that is not *discrimination*—reasonable conduct intended to meet a need or reduce a disadvantage)

17. Part 2 of the EDB concludes with what appears to be a routine "special measures" provision in clause 11. It raises no issues requiring comment at this point.

PART 3—UNLAWFUL DISCRIMINATION

18. Part 3 establishes what is to be unlawful in Divisions 2 (work) and 3 (other areas). It is just a "stock standard" anti-discrimination law; or rather, would be if (and only if) the earlier provisions were amended as described above. Division 4 sets out "Exceptions and exemptions". Most are stock standard, though some may need further scrutiny.

PART 4—STATEMENTS OF BELIEF DO NOT CONSTITUTE DISCRIMINATION ETC.

Clause 4 Statements of belief do not constitute discrimination etc.

19. Division 4 of Part 3 sets out exceptions to the unlawfulness provisions, most of which are "stock, standard" in anti-discrimination laws. Consistent with earlier

remarks, however, cl.31(6)&(7) concerning employer and health "conduct rules" must be omitted.

20. Part 4 of the EDB concerning "statements of belief" is another overreach and claim of religious privilege that should be omitted from the bill. The discussion in the Explanatory Notes of the effect of clause 41 reveals a complete lack of interest in, or perhaps awareness of, the harm caused to vulnerable people by the words of these never-to-be-discrimination "statements of belief," or their manner of delivery.

21. Paragraph 407 of the Explanatory Notes illustrates their insouciant naïveté. 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."

22. The first problem is, 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 harbouring such racist religious views? After all, consider a couple of Christian opinions on interracial marriage.

23. First, consider 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."[2]

24. Secondly, 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.[3]

25. It is clearly entirely possible that some persons may harbour, and utter in "good faith," abhorrent "statements of belief" that would distress vulnerable people and clearly constitute "unfavourable treatment" on the basis of whichever bigotry was being displayed—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 cl.41 of the EDB, expressly overriding those laws.

26. 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.

27. 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 expected and warned, serious consequences for many people,

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

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

including children of same sex couples who were being lambasted in the media by hurtful "statements of belief."

28. Clause 41 is abhorrent. It is inconsistent with Australia's international human rights treaty obligations and with the stated Objects of the Bill. Liberty submits it must be omitted from the EDB.

Part 5—Offences

29. The provisions here appear routine and unobjectionable.

PART 6—FREEDOM OF RELIGION COMMISSIONER

30. This title rather gives the game away. Far from being an anti-discrimination Bill, this title invokes the notion imported from the USA of "religious freedoms"—a euphemism for religious privilege.

31. Even under a less jarring title Liberty does not see the need for a separate 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.

32. 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."[4]

PART 8—… constitutional provisions

33. In essence, the EDB relies on the external affairs power (as other Commonwealth anti-discrimination laws do), however, unlike other anti discrimination laws, the ERB gives a privileged status to religious freedoms.

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4 *Religious Freedom Review*, 2018, p102 paragraph 1.415

This is likely to make the Bill inconsistent with international law[5] and, therefore, 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 firmly pruned, making it align with other anti-discrimination laws.

Context and Conclusion

34. The context for this EDB, 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, the follow-up attempts to frustrate the public will clearly demonstrated in the powerful majority vote in the Postal Survey.

35. 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 EDB. The "Yes" vote in that survey roundly rejected those claims too.[6] Liberty urges the government to re-draft the EDB 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.)

36. 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

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5 See https://www.theguardian.com/world/2019/sep/30/religious-discrimination-bill-may-breach-constitution-by-allowing-doctors-to-refuse-treatment

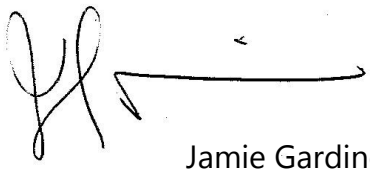
6 Jamie Gardiner, *The Meaning of YES…and NO*, https://libertyvictoria.org.au/content/meaning-yes…and-no (accessed 2/10/19)

respect by religious institutions, together mark a shift in public opinion that can no longer be denied.[7]

37. That loss of respect is not new[8], 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 EDB.

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

    Liberty Victoria urges that this be done.



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7 Liberty Victoria, *Submission 196*, 21 January 2019, Senate Legal and Constitutional Committee Inquiry into the *Sex Discrimination Amendment (Removing Discrimination Against Students) Bill* 2018 (Senator Wong's Bill)

8 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 (accessed 2 October 2019)