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Australian Government Attorney-General's Department
Robert Garran Offices
3-5 National Circuit
BARTON ACT 2600

By email: FoRConsultation@ag.gov.au

Dear Consultation Committee

Consultation into Religious Discrimination Bill 2019

We welcome the opportunity to make a submission in response to the Exposure Draft of the *Religious Discrimination Bill 2019* (the **Bill**). This submission also considers the following:

- *Religious Discrimination (Consequential Amendments) Bill 2019*; and
- *Human Rights Legislation Amendment (Freedom of Religion) Bill 2019*.

About St Kilda Legal Service

St Kilda Legal Service (**SKLS**) provides free and accessible legal services to members of the community within the Cities of Port Phillip, Bayside, Stonnington and parts of Glen Eira. The Legal Service is committed to redressing inequalities within the legal system through casework, legal education, community development and law reform activities.

We are a generalist community legal centre that provides legal advice and casework assistance on a broad range of legal issues, and often sees clients experiencing poverty, drug addiction, mental illness and homelessness. SKLS operates four specialist programs: the

Community Outreach Program, the Family Violence Duty Lawyer Program, the Family Law and Family Violence Program and an LGBTIQ Legal Service.¹

SKLS also has a history of providing advice and casework assistance to members of the sex worker community. Our clients who work in the sex industry frequently report that they are unable to seek support from a range of services (including police, healthcare and accommodation services) for fear of negative attitudes as a result of being a sex worker and associated discrimination.

About the LGBTIQ Legal Service

The LGBTIQ Legal Service is a specialist program operated by SKLS. It commenced operation in May 2018, and is Australia's first LGBTIQ-specific health justice partnership. The LGBTIQ Legal Service is a state-wide service that provides advice and representation to the LGBTIQ community on a wide-range of legal issues, including housing, discrimination, employment matters and sexual harassment matters.

In the short life of our service we have represented numerous clients with discrimination complaints at the Victorian Equal Opportunity and Human Rights Commission, Victorian Civil and Administrative Tribunal the Australian Human Rights Commission and the Fair Work Commission.

LGBTIQ clients regularly contact our service for advice about discrimination on the grounds of gender identity and sexual orientation in employment, accommodation, healthcare settings and in the provision of goods and services.

Summary

We support the premise that people should not be discriminated against because of their religion. Specifically, we support the aims:

- a) *to eliminate, so far as is possible, discrimination against persons on the ground of religious belief or activity in a range of areas of public life; and*
- b) *to ensure, as far as practicable, that everyone has the same rights to equality before the law, regardless of religious belief or activity; and*
- c) *to ensure that people can, consistently with Australia's obligations with respect to freedom of religion and freedom of expression, and subject to specified limits, make statements of belief.*²

We submit, however, that the Bill as drafted is over extending and is privileging religious freedom above all other forms of protection. In its current form, the Bill *does not* ensure that “*everyone has the same rights to equality before the law*” nor does it ensure that people can

¹ We have chosen to use the umbrella title of “LGBTIQ” to advertise our service. We seek to be inclusive of all gender and sexually diverse people, however, including brotherboys, sistergirls, those who identify as asexual, pansexual and genderqueer, and those who use other terms to describe their sexuality and/or gender identity.

² *Religious Discrimination Bill 2019 (Cth)*, Exposure Draft, s3.

make statements of belief “*consistently with Australia’s obligations with respect to freedom of religion and freedom of expression*” (emphasis added).

Based on our casework experience, this submission focuses on the foreseeable impacts on LGBTIQ people and sex workers should this Bill be implemented in its current form. We are concerned it will lead to dangerous outcomes, ultimately casting doubt over the strength and validity of current protections for vulnerable people.

Summary of recommendations

We recommend as follows:

1. This Bill should be rejected in its current format, and a new Bill drafted using the current federal *Racial Discrimination Act* as a starting point.
2. In the event that the Bill is not rejected in its current form, we recommend the following sections are removed:
 - section 8(3)-(6);and
 - section 41.
3. In the event that the Bill is not rejected in its current form, we recommend that section 10 be amended to:
 - a) limit the definition of ‘religious body’ to ‘bodies established for religious purposes’; and
 - b) provide that the general exemption does not apply to conduct connected with commercial activities.
4. The Australian Government should appoint a Gender and Sexuality Commissioner at the federal level. The Gender and Sexuality Commissioner should have similar functions to the Victorian Commissioner for Gender and Sexuality.

We are also disappointed at the short time for feedback, given the significance of this Bill and associated amendments.

Section 8

Our concerns arising from the proposed section 8 can be divided into:

- impacts on the workplace; and
- impacts on healthcare.

Impacts on the workplace

We already know that LGBTIQ people suffer significant forms of discrimination and harassment, including sexual harassment, in the workplace.³ While we do not suggest religious beliefs are the cause of this discrimination, we are concerned this Bill will privilege the expression of religious beliefs at the expense of LGBTIQ people and other individuals who are often vulnerable in the workplace.

Already commonly referred to as the “Folau Clause”, s8(3) allows private employers with revenues of at least \$50 million to stop an employee from making religious-based statements outside work hours. This provision is further linked to the employer being able to show the need to avoid “unjustifiable hardship”. This raises a number of questions, such as:

- Why this protection is only extended to employees in workplaces with large revenue, what about smaller workplaces or the public sector?
- Why should we not expect workplaces with revenue under \$50 million to protect basic needs such as the safety of staff, and cultures of inclusivity?

The following examples demonstrate how LGBTIQ people may be impacted by this legislation.

Example 1: Lack of workplace protections

A transgender woman working as a receptionist has a co-worker who regularly tweets humiliating and intimidating comments about transgender people on the grounds that they are ‘upsetting the natural order that God created’. This makes her feel uncomfortable to work with him.

When she complains to her human resources department about his tweets, her human resources department explains to her that they are unable to implement a code of conduct to prevent him from doing this as his tweets would be considered a ‘statement of belief’, and they would not be able to demonstrate that his behaviour is causing an ‘unjustifiable financial hardship’ to their organisation as the business would not be financially impacted if she felt too unsafe to continue to work there. Her human resource department also informs her that as a result of the operation of s8(3), they would not be able to take disciplinary action against her co-worker, leaving her feeling unsafe and unsupported by her workplace.

Example 2: Lack of workplace protections

On a Friday night, a group of colleagues go out for social drinks after work. One co-worker tells his gay colleague that he believes that he is an “abomination in the eyes of God”. When the gay employee raises this issue with his union delegate, he is told that there is

³ In February 2019, SKLS and the LGBTIQ Legal Service submitted a detailed response to the National Inquiry into Sexual Harassment in the Australian Workplaces which focussed on the experiences of LGBTIQ people. A copy of our submission can be access online at <http://www.skls.org.au/policy-research/>

unfortunately nothing they can do as his co-worker was not performing work at the time, and will be protected by s8(3).

If the intention of these additional subsections (including 8(3) and 8(4) is to protect religious expression, the Bill already contains provisions in relation to general indirect discrimination, which protect people from discrimination on the bases of their own religious belief or activity. This includes section 8(1) which outlines the provisions for “indirect discrimination” namely. Further to this, section 7 outlines the grounds for direct discrimination and Part 3 of the Bill, which deals with the areas of public life in which discrimination on the ground of religious belief or activity would be prohibited.

We submit that subsections 8(3) and 8(4) are therefore unnecessary and do not appropriately balance the right to freedom of expression of religious employees against the right to anti-discrimination of other employees, including LGBTIQ people.

Impacts on healthcare

Section 8(5) and (6) of the Bill relates specifically to health practitioners, which is widely defined to include Aboriginal and Torres Strait Islander health practices, dentists, doctors, radiologists, midwives, nurses, occupational therapists, optometrists, pharmacists, physiotherapists, podiatrists and psychologists.⁴

These proposed sections cause significant concern in that they will undermine the right to safe and inclusive health services. These sections go above and beyond what is already permitted by the Australia Medical Association (the **AMA**), namely:

- conscientious objections, whereby medical practitioners are able to refuse “to provide, or participate in, a legal, legitimate treatment or procedure which would be deemed medically appropriate in the circumstances under professional standards”⁵; and
- the requirement to provide care “impartially and without discrimination on the basis of age, disease or disability, creed, religion, ethnic origin, gender, nationality, political affiliation, race, sexual orientation, criminal history, social standing or any other similar criteria”.⁶

The operation of “conscientious objections” has already been considered and in most cases, is limited to certain types of services (e.g. abortion⁷ and euthanasia). Further, it provides clear guidelines such as the requirement that medical practitioners inform the patient of their objection, and that they are able to seek the advice of another health professional. In these situations, medical practitioners are also required to ensure that patients have enough information to exercise their rights and access the care they need by, for example, approaching another practitioner or service.

⁴ s5 Religious Discrimination Bill

⁵ *Australian Medical Association, Conscientious Objection – 2019*, accessed online on 18 September 2019 at <https://ama.com.au/position-statement/conscientious-objection-2019>

⁶ *Australian Medical Association Code of Ethics*, s4.6.2.

⁷ *Abortion Law Reform Act 2008* (Vic). S8.

What is being proposed by the Bill is a blanket allowance for a wide range of health practitioners to refuse treatment, without any consideration for patient's ongoing access to care. Also, the refusal would not be limited to a discrete range of medical treatments (such as assisted dying or abortion), but could extend to refusing to treat a patient based on an attribute of the patient themselves, provided that their refusal to treat the patient can be tied to their religious believe.. This is discussed further in our examples below.

Even with the current rules around “conscientious objections” we have seen doctors unlawfully refuse to provide women seeking abortions with referrals⁸. This gives rise to a legitimate concern that this Bill will give even more excuses for health practitioners to refuse care based on prejudicial views against individuals where those views may be based on religious beliefs. We believe this may put even more people at risk and we are particularly concerned about the impact this will have on LGBTIQ people seeking medical treatment or allied health services.

The following is a list of scenarios of particular concern:

Example 3: Denied PrEP

A Christian pharmacist refuses to provide PrEP (a HIV medication to prevent the transmission of HIV)⁹ to a young bisexual male because the pharmacist believes that homosexuality is a sin. Further, in line with s8(6), the doctor may then argue that PrEP is not “necessary” as there are other forms of sexual protection to avoid HIV.

Example 4: Denied hormone treatment

A trans man goes to a pharmacist to get his hormone replacement therapy (HRT) script filled. The pharmacist refuses him service on the grounds that they believe on religious grounds that it is against God's wishes to ‘change gender’.

Example 5: Denied medical treatment

A Catholic obstetrician refuses to provide maternity care and assistance to a lesbian couple trying to have a baby via sperm donation on the basis that the obstetrician has a religious objection to rainbow families.

⁸ The University of Melbourne, ‘Doctors’ conscientious objection to abortion can affect women’s health: study’, 31 January 2019, accessed online on 25 September 2019 at <https://about.unimelb.edu.au/newsroom/news/2019/january/doctors-conscientious-objection-to-abortion-can-affect-womens-health-study>

⁹ The use of PrEP (pre-exposure prophylaxis) is supported by the Victoria Government, namely the Department of Health and Human Services. For information about its use and prescription can be found in the document *Victorian guidance on pre-exposure prophylaxis (PrEP)*, State of Victoria, DHHS, August 2019 and revised April 2018. Available online at <https://www2.health.vic.gov.au/public-health/preventive-health/sexual-health/resources-forsexual-health-and-viral-hepatitis>

Example 6: Denied physiotherapy treatment

A trans man with visible surgery scars goes to a physiotherapist to seek treatment for a sports injury. When he removes his shirt, the physiotherapist sees his surgery scars and identifies him as a transgender person. The physiotherapist tells the trans man that he will not provide him with physiotherapy treatment as he believes that transgender people are an affront to God.

Example 7: Health services denied to sex workers

Through our case work experience, it has been reported to us that discrimination in medical settings is one of the most prevalent forms of discrimination faced by sex workers. This can take the form of inappropriate comments from treating professionals, charging instead of bulk billing and imposing unwanted STI tests in a hospital when it has been disclosed that a patient is a sex worker.

Even though sex work in Victoria is legal¹⁰, if this Bill is implemented we are concerned that not only will this form of discrimination increase, but there will be no avenue for recourse. Instead, with the threat of discrimination, sex workers will be fearful of seeking medical assistance (from GPs, mental health practitioners and other health practitioners). Not only would this stand in direct contrast to an individual's right to health, but it would further marginalise an already vulnerable group.

These sections relating to conscientious objections provide no guidance or threshold as to when a health practitioner can rely on them. For example, if a doctor is uncomfortable even consulting a certain client – say, a transgender woman – then their refusal to do so could be completely protected under law. The same is true of any health provider – this could be an occupational therapist, a support worker, or a highly specialised medical provider.

The only exception to this is provided in s 8(6) when “compliance with the rule is necessary to avoid an unjustifiable adverse impact on” a provider’s ability to “provide the health service”, or to the health of a client “who would otherwise be provided with the health services”. This provision sets an alarmingly high threshold before the consequences of potentially discriminatory behaviour can even allowed to be considered with regard to a practitioner’s employment.

We are concerned that health services that are not considered necessary to avoid an unjustifiable adverse impact on a client’s health will therefore be “fair game” for discriminatory practices under the guise of religious belief and practice. How adverse must the impact be before such discrimination is considered ‘unjustifiable’? In accordance with the Australian Government Attorney General’s Department:

¹⁰ Under the *Sex Work Act 1994* (Vic), sex work can be carried out legally in Victoria under licensing conditions.

The right to health is the right to enjoyment of the highest attainable standard of physical and mental health.

Further, this right to health must be considered for all policies or programs that, among other things:

- *relates to access to information on the health and well-being of families, including information and advice on family planning;*
- *relates to access to health facilities, goods, including essential medications and services, especially for vulnerable or marginalised groups; and*
- *relates to the prevention, treatment and control of epidemic and endemic diseases, including HIV/AIDS.¹¹*

We are particularly concerned the proposed protection of religious health practitioners would perversely result in preventing health services whose specific purpose is to address inequality for disadvantaged communities from achieving that purpose on religious grounds.

For example, under s 8(8) healthcare service organisations that exist to meet the specialised needs of disabled people could be bullied into hiring or continuing to employ somebody who believes that disability is God's punishment for sin, and therefore that disabled people deserve to be disabled (and thus disadvantaged). In an employment discrimination case, the organisation would be in the position of having to prove that the impact of such beliefs on its clients' health is unjustifiably adverse according to the absurdly high threshold set by this Bill.

These examples highlight our key concern that the drafting of sections 8(5) and 8(6) creates a significant imbalance by giving all the protections to health practitioners, whilst giving no protections to potentially vulnerable clients.

Recommendation: In the event that the Bill is not rejected in its entirety, we recommend that sections 8(3)-(6) be removed.

Section 10 – Religious bodies

Section 10 provides a protection to religious bodies engaging “*in conduct that may reasonably be regarded as being in accordance with the doctrines, tenets, beliefs or teachings of the religion in relation to which the religious body is conducted*”¹².

We note the broad definition of “religious body” that includes educational institutions, registered charities, and “any other body” conducted in accordance with a particular religion. It is unclear why the Bill has extended the definition of “religious body” beyond the definition

¹¹ Australian Government Attorney-General's Department, *Right to Health*, accessed online on 26 September 2019 at <https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Righttohealth.aspx>

¹² *Religious Discrimination Bill 2019, Exposure Draft*, s10.

under current legislation. For example, the *Equal Opportunity Act 2010* (Vic) includes general exceptions for certain religious bodies¹³ and religious schools¹⁴.

As discussed by the Australian Human Rights Commission:

*“Charities and ‘other bodies’ are also included within the broad definition of ‘religious bodies’. They are only excluded if their activities are ‘solely or primarily’ commercial. This leaves open the potential for certain religious bodies to be exempt from claims of religious discrimination in a range of commercial activities, provided the body also engages in other activities as well”.*¹⁵

This broad definition of “religious body” under the Bill raises significant concerns in relation to the impacts on vulnerable people as a result of interactions with charities.

See examples below.

Example 8: Charities and impacts on homelessness

A young transgender woman, experiencing homelessness and in urgent need of accommodation, could be refused access to a women’s crisis shelter on the basis that their religious teachings are that transgender people are sinners.

We already know that the LGBTIQ community experience higher rates of youth homelessness,¹⁶ therefore allowing exemptions as per the proposed s10 would place this already vulnerable group at significant danger.

Example 9: Charities and impacts on drug dependency

A lesbian with a drug dependency may be legally turned away from a religious-affiliated drug and alcohol counselling program.

Example 10: Charities refusing to assist sex workers

A sex worker is referred by court staff to a charitable program to receive support to obtain formal clothing to wear to court. A staff member at the religious charity refuses to assist

¹³ *Equal Opportunity Act 2019* (Vic), s82.

¹⁴ *Ibid*, s83.

¹⁵ Submission of the Australian Human Rights Commission in response to the Religious Freedom Bills, paragraph 72, accessed online on 2 October 2019 at humanrights.gov.au/our-work/legal/submission/religious-freedom-bills

¹⁶ Lynne Hillier et al, *Writing Themselves In 3: The third national study on the sexual health and wellbeing of same sex attracted and gender questioning young people* (Australian Research Centre in Sex, Health and Society, 2010). Jed Horner, ‘Expanding the Gaze: LGBTI People, Discrimination and Disadvantage in Australia’ in Andrea Durbach, Brenden Edgeworth and Vicki Sentas (eds), *Law and Poverty in Australia: 40 Years after the Poverty Commission* (Federation Press, 2017) 92, 95,

this person because the workers believe that sex workers contravene God's laws by engaging in sinful behaviour.

The privileging of institutions over individuals is problematic because at a broader social level this will enable large, powerful and well-resourced religious bodies to deny certain vulnerable people basic charitable services as well as dignity. The section may open the door for other forms of discrimination to be practiced by disguising it as religious discrimination. Whilst we haven't specifically addressed this in our submission, it is foreseeable that people of diverse racial backgrounds could also be discriminated against more openly by charities that happen to be religious, by exploiting the fact that those people are likely to also hold diverse religious beliefs.

Recommendation: In the event that the Bill is not rejected in its entirety, we recommend that section 10 be amended to:

- a) limit the definition of 'religious body' to 'bodies established for religious purposes';
and
- b) provide that the general exemption does not apply to conduct connected with commercial activities.

Section 41 - Privileging religious expression over discrimination protections

It is deeply concerning to see that the Bill aims to override state and other federal laws; it goes so far as to provide that a statement of belief does not constitute discrimination for the purposes of *any* discrimination law in Australia – including current laws surrounding racial, sex, disability and/or age discrimination at Commonwealth level, and all equivalent laws at state and territory level.

This section will have the effect of allowing people who hold, or purport to hold, religious views to express views in a range of areas of public life which may otherwise breach state-based anti-discrimination laws. Whilst we acknowledge that subsection 2 provides that the protection does not apply to any statement that is malicious, likely to harass, vilify or incite hatred or violence, this is a new legal definition that will require the emergence of a body of case law before the public can be clear on what the boundaries of this conduct may be. In this sense, the Bill increases uncertainty in our laws, and may lead to an escalation in litigation in this area.

We submit that this is an inappropriate response and that the Bill in its current form is unworkable. Future Bills of this nature should make it clear that *it does not* override any existing protections for other groups under state laws; rather than making existing laws and protections obsolete.

Recommendation: In the event that the Bill is not rejected in its entirety, we recommend that section 41 be removed.

Prioritising Religious Freedom Commission over Gender and Sexuality Discrimination Commissioner

We note that the *Religious Discrimination (Consequential Amendments) Bill 2019* intends to make consequential amendments to existing legislation in order to implement the proposed new office of Religious Freedom Commissioner.¹⁷

On 1 August 2013, it became unlawful to discriminate against a person on the basis of sexual orientation, gender identity and intersex status under federal law.¹⁸ Since that time, the Government has not taken the important step of creating a dedicated Human Rights Commissioner with the sole role of protecting the rights of LGBTIQ people, as is the case for the other protected attributes under federal anti-discrimination law.¹⁹ This function is currently held as part of a general role by the head of the Australian Human Rights Commission, Ed Santow.²⁰

It is our view that in order to defend the rights of LGBTIQ people at the federal level, it would be appropriate to create the new role of Federal Commissioner for Sexual Orientation, Gender Identity and Intersex Status Issues, with functions similar to that of the Victoria Government's Gender and Sexuality Commissioner.

Given that a Federal Gender and Sexuality Discrimination Commissioner position has not been created by parliament, we believe that all new positions should be held off until this office is first formed.

Recommendation: The Australian Government should appoint a Gender and Sexuality Commissioner at the federal level. The Gender and Sexuality Commissioner should have similar functions to the Victorian Commissioner for Gender and Sexuality.

Scope for a “Religious Discrimination Act”

At a federal level, we have a range of “anti-discrimination laws” which make it unlawful to discriminate against people on a number of protected attributes including age, disability, race, sex, gender identity and sexual orientation. These include:

- *Age Discrimination Act 2004*;
- *Disability Discrimination Act 1992*;
- *Racial Discrimination Act 1975*; and
- *Sex Discrimination Act 1984*.

¹⁷ *Religious Discrimination Bill 2019* Cth, Exposure Draft, s45, and *Religious Discrimination (Consequential Amendments) Bill 2019*

¹⁸ The *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth) inserted new grounds into the *Sex Discrimination Act 1984* (Cth).

¹⁹ For a full list of Federal Commissioners, see <https://www.humanrights.gov.au/about/commissioners>, accessed online on 26 September 2019.

²⁰ Information on the role of the Human Rights Commissioner, accessed online on 26 September 2019 at <https://www.humanrights.gov.au/about/commissioners/human-rights-commissioner-mr-edward-santow>.

None of these pieces of legislation give protected people the right to discriminate against others in the manner that is proposed by the Bill. Whilst we respect the right to religious freedom in all areas of life, this should not be provided at the expense of other protected attributes. By doing so, it will undermine the protections already enshrined in Australia's anti-discrimination laws.

Recommendation: This Bill should be rejected in its current format, and a new Bill drafted using the current federal *Racial Discrimination Act* as a starting point

We respectfully request that you consider these recommendations.

Yours faithfully

ST KILDA LEGAL SERVICE INC



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