



31 January 2020

Kingsford Legal Centre

Submission to the Religious Freedom Bills – Second Exposure Drafts

Kingsford Legal Centre (**KLC**) welcomes the opportunity to make this submission to the Australian Government's second exposure drafts of a package of legislation on religious freedom. This submission refers to KLC's submission to the first exposure drafts (**enclosed**).

Summary of Recommendations

This submission makes the following recommendations:

1. Remove clause 11 from the *Religious Discrimination Bill (the Bill)*
2. Alternatively, if clause 11 is to remain in the Bill, narrow clause 11 to align with section 37 of the *Sex Discrimination Act 1984 (Cth) (the SDA)*
3. Remove clauses 32(8)–(11) of the Bill
4. Remove clauses 33(2)–(5) of the Bill
5. Convert the notes on clauses 8(6)–(7) of the Bill into substantive provisions
6. If the Bill is to include provisions for conscientious objection, the Bill must also require health practitioners to disclose to patients when they are making a conscientious objection and give patients appropriate referrals
7. Adopt an Equality Act to provide a consistent national framework for discrimination protection
8. Adopt a Charter of Human Rights that comprehensively enshrines human rights protections
9. Increase funding for the Australian Human Rights Commission (**AHRC**)

About Kingsford Legal Centre

KLC is a community legal centre which has been providing legal advice and advocacy to people in need of legal assistance in the Randwick and Bayside Local Government areas since 1981. KLC provides general advice on a wide range of legal issues, including discrimination and other human rights issues.

KLC has a specialist discrimination law service (NSW wide), a specialist employment law service, and an Aboriginal Access Program. In addition to this work, KLC also undertakes law reform and policy work in areas where the operation and effectiveness of the law could be improved.

In 2019 KLC provided 248 advices in the area of discrimination, which was over 14% of all advice provided. We have extensive experience in providing legal help to people who have experienced religious discrimination and for whom there is presently no effective remedy in NSW.¹

General comments on the Bill

It is disappointing that the Australian Government has not taken the opportunity to improve the Bill, but has instead released a second exposure draft that is even worse than the first.

The second exposure draft largely fails to address the concerns raised by KLC in response to the first exposure draft. The Bill maintains a piecemeal approach that increases the complexity of discrimination law, fails to appropriately respond to the problem of religious discrimination and weakens the overall level of discrimination protection in Australia. The second exposure draft has moved even further away from Australia's existing framework for discrimination protection than the first exposure draft, broadening already overbroad exceptions from discrimination law.

We reiterate our concerns in response to the first exposure draft. This submission addresses key changes in the second exposure draft.

¹ The protections for "ethno-religious" groups in the *Anti-Discrimination Act 1977* (NSW) are limited in scope and do not provide effective protection against religious discrimination.

Religious bodies

KLC maintains that the government should make laws to protect people from religious discrimination without weakening existing discrimination protections for marginalised people. As clause 11 creates a right for religious bodies to discriminate against others, it should be removed. Alternatively, if clause 11 is to remain in the Bill, it should be narrowed to align with the more limited exceptions in section 37 of the SDA.

The definition of a "religious body" should not be expanded to specifically include registered public benevolent institutions in clause 11(5)(b). Public benevolent institutions that do not engage solely or primarily in commercial activities are already included in the definition of a religious body in clause 11(5)(c). Clause 11(5)(b) therefore creates a right to discriminate for public benevolent institutions that engage solely or primarily in commercial activities. This is distant from the Bill's purported object of eliminating religious discrimination and would significantly weaken the discrimination protection available to marginalised people. It would set up an arbitrary regulatory framework in a commercial setting by applying different regulations to religious and non-religious bodies, without clear justification.

Recommendations:

1. Remove clause 11 of the Bill
2. Alternatively, if clause 11 is to remain in the Bill, narrow clause 11 to align with section 37 of the SDA

Conduct to avoid injury to religious susceptibilities

The reference to "conduct to avoid injury to the religious susceptibilities of adherents" in clause 11(3) of the Bill is broader than the equivalent reference in section 37 of the SDA. Clause 11(3) of the Bill requires that the conduct must be "in good faith". This is much broader than the requirement in section 37(1)(d) of the SDA that an act or practice must be "necessary" to avoid injury to the religious susceptibilities of adherents. Section 37(2) of the SDA further provides that the exception from sex discrimination law does not apply to certain acts or practices connected with Commonwealth-funded aged care.

Clause 11(3) is one of many ways in which the Bill increases the complexity of discrimination law by introducing different legal tests to those in existing discrimination law. If clause 11(3) is to remain in the Bill, it would be simpler and would achieve a better

balancing of rights if clause 11(3) were narrowed to align with the more limited exception in section 37 of the SDA. It would also better reflect human rights principles if exceptions from discrimination protection required consideration of reasonableness, necessity, proportionality and legitimacy of aims.

Religious hospitals, aged care and accommodation providers

It is unwelcome that clauses 32(8)–(11) of the Bill create broad work-related exceptions for religious hospitals, aged care facilities and accommodation providers. Unlike the inherent requirements exception in clause 32(2) of the Bill, the exceptions for religious hospitals, aged care facilities and accommodation providers permit discrimination against an employee or prospective employee who is able to carry out the inherent requirements of the job.

This will permit religious hospitals, aged care facilities and accommodation providers to hire a person because they have a particular religion, rather than because they are the best person for the job. It is likely to reduce employment opportunities for qualified people, who will be denied protection from discrimination on the basis of their religion. The Royal Commission into Aged Care Quality and Safety noted the need for qualified aged care workers.² It is contrary to this finding to deny protections to qualified people who seek to work in areas of great importance to the community. It is likely to negatively impact the quality and accessibility of services for vulnerable people if broad exceptions are maintained for religious hospitals, aged care facilities and accommodation providers.

The exceptions in clauses 32(8)–(11) of the Bill are especially concerning, as many religious hospitals, aged care facilities and accommodation providers receive public funding to provide social services in areas of governmental responsibility. Community members have an interest in ensuring that such services are provided by the most qualified people and that public money is not spent in a discriminatory manner.

Recommendation:

- 3. Remove clauses 32(8)–(11) of the Bill**

² *Royal Commission into Aged Care Quality and Safety* (Interim Report: Neglect, 31 October 2019) vol 1, 222.

Religious camps and conference sites

KLC can identify no rational justification for the exceptions for religious camps and conference sites in clauses 33(2)–(5) of the Bill. These unique exceptions add unnecessarily to the complexity of discrimination law.

Hiring out religious camps and conference sites is often a commercial activity. It should be regulated accordingly. We are concerned that exceptions for religious camps and conference sites would impact disproportionately on marginalised people, particularly in regional, rural and remote Australia, where alternative venues may be limited.

Recommendation:

- 4. Remove clauses 33(2)–(5) of the Bill**

Health practitioner conduct rules

The key changes regarding health practitioner conduct rules are a step in the right direction. It is positive that clauses 8(6)–(7) of the Bill now include notes that the provisions do “not have the effect of allowing a health practitioner to decline to provide a particular kind of health service, or health services generally, to particular groups of people”. Given the importance of this principle for access to health services, KLC considers that it would be more appropriately stated as a substantive provision of the Bill, rather than as a note.

Despite some improvements, the Bill's provisions for conscientious objection remain excessively broad. The provisions continue to create avenues for discrimination and remain likely to restrict access to health services. They go much further than the provisions in existing federal discrimination law and are unwelcome in a Bill with the stated goal of increasing discrimination protection. We maintain that, if the Bill is to include provisions for conscientious objection, the Bill must also require health practitioners to disclose to patients when they are making a conscientious objection and give patients appropriate referrals.

Recommendations:

- 5. Convert the notes on clauses 8(6)–(7) of the Bill into substantive provisions**
- 6. If the Bill is to include provisions for conscientious objection, the Bill must also require health practitioners to disclose to patients when they**

are making a conscientious objection and give patients appropriate referrals

Definition of "vilify"

By defining "vilify" as meaning "incite hatred or violence towards the person or group", the Bill has introduced another new legal test, further fragmenting and complicating discrimination law. Rather than creating new legal tests for religious discrimination, it would be desirable to move towards a consistent national framework for discrimination protection. Accordingly, we repeat our recommendation that Australia adopt an Equality Act to harmonise discrimination protection.

Recommendation:

7. Adopt an Equality Act to provide a consistent national framework for discrimination protection

Objects clause

KLC supports the express statement in clause 3(2)(a) of the Bill that human rights have equal status in international law. It is disappointing that several substantive provisions of the Bill fail to implement this principle.

It remains the case that the objects of clause 3 would be better met by the adoption of a Charter of Human Rights that comprehensively enshrines human rights protections, including freedom from discrimination on the basis of religion.

Recommendation:

8. Adopt a Charter of Human Rights that comprehensively enshrines human rights protections

Courts' role in matters of faith

KLC submitted to the first exposure draft that what "may reasonably be regarded" as being in accordance with a religion was too broad for the purpose of establishing exceptions to discrimination law. The second exposure draft adopts the even broader test of "what a

person of the same religion ... could reasonably consider" to be in accordance with the religion.

This broader test worsens the problems that were present in the first exposure draft. It takes the test in the Bill further away from the test in section 37 of the Bill and further away from a requirement that conduct actually be in accordance with a given religion. The test is of an uncertain scope, creating difficulties for community members in knowing their rights and responsibilities. It is unclear how a person could get appropriate evidence of "what a person of the same religion ... could reasonably consider" to be in accordance with the religion. Such a broad and uncertain test has the potential to generate substantial litigation, increasing the workload of under resourced courts and adding to delays in the federal court system.

Other matters: The Australian Human Rights Commission

KLC reiterates that the AHRC is critical to promoting human rights, including freedom from discrimination on the basis of religion. The Bill will significantly increase the workload of the AHRC, despite the fact that the AHRC has faced numerous budget cuts. The government has not made clear how it will adequately resource the AHRC to perform additional functions in this context and must increase funding to the AHRC.

Recommendation:

9. Increase funding for the AHRC

Conclusion

KLC continues to support laws to protect people from religious discrimination, without weakening existing discrimination protections for marginalised people. The Bill fails to achieve this objective. We urge the government to continue consultation with a view to integrating protection against religious discrimination within a consistent national system for discrimination protection. Religious discrimination, and discrimination generally, are too important not to get right.

Yours sincerely,
KINGSFORD LEGAL CENTRE



Emma Golledge
Director



Sean Bowes
Law Reform Solicitor



2 October 2019

Kingsford Legal Centre

Submission to the Exposure Draft Religious Discrimination Bill 2019

Kingsford Legal Centre (**KLC**) welcomes the opportunity to make this submission to the Australian Government's package of legislative reforms on religious freedom.

Summary of Recommendations

This submission recommends that:

1. Australia ensure protection from discrimination on the basis of religious belief in the form of a Human Rights Act
2. The Attorney-General extend the public consultation period on the Bill to allow further views from the public on the Bill
3. The Bill be re-drafted to reflect our recommendations particularly in relation to clause 10, clause 41 and clause 82(d)
4. Australia adopt an Equality Act, with harmonised tests across attributes;
5. In the alternative, clause 8 (2)(d) of the Bill be removed to ensure consistency with the SDA
6. Clause 10 should be removed;
7. In the alternative, clause 10 be redrafted to align with the exemptions in section 37(1)(a) - (c) of the *Sex Discrimination Act 1984 (Cth)*
8. The Bill should make it explicit that religious organisations that receive public funding or perform a service on behalf of government should not be exempt from anti-discrimination law and are not covered by Clause 10(2)(a)-(c)
9. Clause 41 of the Bill be removed
10. The employer conduct rule provisions that relate to relevant employers in clause 8(3) and clause 31(6) of the Bill be removed.
11. That clauses 8(5), 8(6) and 31(7) be removed from the Bill
12. That the Attorney-General's Department increase funding for the Australian Human Rights Commission

About Kingsford Legal Centre

KLC is a community legal centre which has been providing legal advice and advocacy to people in need of legal assistance in the Randwick and Botany Local Government areas since 1981. KLC provides general advice on a wide range of legal issues, including discrimination and other human rights issues.

KLC has a specialist discrimination law service (NSW wide), a specialist employment law service, and an Aboriginal Access Program. In addition to this work, KLC also undertakes law reform and policy work in areas where the operation and effectiveness of the law could be improved.

In 2018 KLC provided 297 advices in the area of discrimination, which was over 13% of all advice provided. We frequently are contacted by people who believe they have been discriminated against on the basis of religion.

General Comments on the Bill

KLC is strongly of the view that the aim of further legislation in this area should be to promote substantive equality within Australia and to enshrine Australia's international human rights obligations in Australian law. Any proposed legislation in this area should not reduce current protections in Australian discrimination law

KLC supports the recognition in Australian law of the right to freedom from religious discrimination. KLC supports that the objects of the Religious Discrimination Bill (**the Bill**) (clause 3) includes a statement about the indivisibility and universality of human rights. However, we believe that the current Bill erodes Australia's existing human rights protections rather than enhancing them. The Bill also further contributes to Australia's piecemeal approach to the domestic protection of international human rights and once again creates a new and separate legislative framework for this protection with significantly new legal tests. KLC believes that the objects of clause 3 would be better met with the adoption of a Human Rights Act that comprehensively enshrined human rights protections, including freedom from discrimination on the basis of religion.

Recommendation:

- 1. Australia ensure protection from discrimination on the basis of religious belief in the form of a Human Rights Act.**

Maintaining the correct balance in discrimination law

KLC has long advocated that there is inadequate protection for people who experience religious discrimination in Australia. This is exacerbated in NSW where there is insufficient coverage at the state level.¹ KLC has extensive experience providing legal advice to people who have experienced the detrimental impact of religious discrimination, which has significant impacts on their lives and for which there is currently no legal remedy.

Case study: Jake

Jake is a student at a Catholic high school. He believes that he is being treated unfairly because he is not Catholic. Jake was not allowed to attend overseas trips with school, and his nomination for the Student Representative Council was removed by the school. We advised Jake that a discrimination complaint would be unlikely to succeed, as religion is not a protected attribute in discrimination law.

Case study – Ali

Ali is a young Muslim man in prison. He was given external leave to undertake studies at an educational institution. At the educational institution, Ali regularly prayed in outdoor areas. He was told that he was not allowed to pray there. When he continued to pray, Ali's education leave was cancelled, and he was not allowed to continue his studies. This caused significant distress to Ali and his family.

We advised Ali that he would not be able to successfully make a discrimination complaint, as the law does not protect a person from discrimination on the basis of their religion. The lack of legal protections in NSW and at the federal level meant that Ali couldn't access to his right to education nor freedom of religion.

In KLC's view the Bill does not adequately or appropriately address the current gap in the law for protection from religious discrimination. We cannot support the Bill in its current form as does not achieve the correct balancing of rights essential in discrimination law and it permits discrimination if undertaken on the basis of religious belief. The International Covenant of Civil and Political Rights outlines that freedom to manifest one's religion or beliefs can be limited in to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.² The Bill opposes this, limiting the rights of others in favour of religious freedoms.

¹ *Anti-Discrimination Act 1977* (NSW) s 4.

² *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18(3).

The creation of broad exceptions has the effect of reducing discrimination protection in other areas and for groups vulnerable to discriminatory practices and conduct. KLC is particularly concerned about the potential of the Bill to permit conduct and speech that impacts on the enjoyment of the rights of groups in need of discrimination protection such as women, people who are not married and LGBTIQ+ people. This is antithetical to the purpose of discrimination law and runs counter to the international human rights law which the Commonwealth's ability to legislate derives from.

Given the broad scope of the Bill which goes beyond creating a new 'ground' or 'attribute' of protection to include a redrawing of the role of federal discrimination law in relation to state law and the intrusion of the Bill into matters of health care, KLC is strongly of the view that there needs to be wider public consultation on these aspects. We believe that the current consultation period is insufficient for members of the public to engage in this very important discussion, that in our view extends beyond enhancing discrimination law to include discrimination on the basis of religion.

Recommendation:

- 2. The Attorney-General extend the public consultation period on the Bill to allow further views from the public on the Bill**
- 3. The Bill be re-drafted to reflect our recommendations particularly in relation to clause 10, clause 41 and clause 82(d)**

The Bill adds to the complexity of Discrimination Law

The Bill in creating a standalone Act and new tests creates further complexity in discrimination law which in KLC's view reduces the accessibility and efficacy of discrimination law. The Bill further entrenches Australia's siloed approach to discrimination law and misses an opportunity to consider whether there should be greater harmony and consolidation of federal discrimination law. This siloed approach creates differing legal tests, exemptions and defences based on the type of discrimination experienced. This is undesirable in human rights legislation and creates real legal barriers in recognising the impact of intersectional discrimination.

KLC recommends that the Commonwealth consider the development of a single Equality Act which contains unified legal tests for discrimination and harmonises the current complex legislative framework of federal discrimination law. KLC strongly recommends that through this process the Commonwealth Government consider the evolution of discrimination law tests away from those replicated in the current legislation toward a more straightforward and accessible legal definition. In particular, that consideration be given to having one legal test for discrimination, removing the complexity of the 'direct' and

'indirect' tests, and an approach that does not segment areas of life by definitions such as 'goods and services' and 'accommodation'. This process would have significant cost benefits in reducing the complexity of the differing legal tests, would allow an opportunity to consult widely on the scope of discrimination law in Australia and to increase protection in areas such as religious discrimination, in a way which is consistent with other human rights protections to be free from discrimination. A streamlined definition of discrimination would allow for greater accessibility and understanding for both practitioners and the community.³

KLC also notes that this Bill differs in its legal tests and scope to other areas of federal discrimination law – significantly widening the purview of the legislation and creating new legal tests, once again increasing the complexity of the law in this area. For example, the Bill includes coverage for conscientious objections by health professionals and creates new tests of 'unjustifiable financial hardship' and 'unjustifiable adverse impact'.⁴ It alters the test of reasonableness used in the *Sex Discrimination Act 1984* (Cth) ('SDA') by adding a subclause around employer conduct rules. This increases the complexity of the law and increases both the cost to employers and other groups in ensuring compliance with the law while reducing the accessibility of the law to individuals.

A more straightforward way to include religious discrimination as a ground of discrimination under federal law would be to amend the *Racial Discrimination Act 1975* (Cth) to include religion as a ground of discrimination. This would have the advantage of ensuring greater consistency across legal tests and would limit the purview of the legislation to the issues traditionally contained in discrimination law. It would allow the increased protection for groups vulnerable to religious discrimination to be dealt with immediately and potentially allow greater consultation on new, wide ranging proposals contained in the Religious Discrimination Bill that would impact on access to health care and would erode the role of state based discrimination law remedies.

³ KLC supports the definition of discrimination proposed by The National Association of Community Legal Centres 'Access to justice and systemic issues' March 2011 <http://www.klc.unsw.edu.au/sites/klc.unsw.edu.au/files/12%20sub%20NACLC%20-%20AGD%20-%20Discrimination%20Consolidation%20Project.pdf> and Discrimination Law Experts' Group, *Submission: Consolidation of Commonwealth Anti-Discrimination Law*, 13 December 2011, at 18, and Discrimination Law Experts Roundtable, *Report on recommendations for a consolidated federal anti-discrimination law in Australia*, 31 March 2011 and notes that there is a precedent for this type of test in the *Racial Discrimination Act 1975* (Cth).

⁴ Clauses 8(5) and 8(6); Clause 8(3); Clause 8(6).

Recommendations:

4. **Australia adopt an Equality Act, with harmonised tests across attributes;**
5. **In the alternative, clause 8 (2)(d) of the Bill be removed to ensure consistency with the SDA**

Definition of Religious Bodies – Clause 10

KLC is very concerned by how broad clause 10 of the Bill is, as this clause operates as an exemption to a finding of discrimination. It is here that the Bill moves beyond simply protecting people of religion from discrimination to permit discrimination against other groups if it satisfies the test of clause 10. Our starting point is that this provision should not remain in the legislation but if there is to be an exemption this must be drafted more narrowly to ensure that it does not unnecessarily impinge on the human rights of other groups.

Clause 10 is much broader than existing exemptions, such as those in the SDA.⁵ KLC is of the view that definition of 'religious bodies' at clause 10(2) is too broad and moves too far away from the current exemptions in the SDA by including educational institutions, registered charities or 'other bodies' conducted in accordance with the doctrines and beliefs of the religious organisation. As this provision acts to limit the applicability of discrimination law for other groups this does not strike the right balance. It is also unclear how broad the scope of clause 10(2) could be, providing a lack of clarity about the operation of the law.

KLC is also of the view that the use of the words "may reasonably be regarded"⁶ is too broad and draws the exemption too widely. This definition also is wider than that in the SDA,⁷ and therefore broadens the scope of conduct that will not be captured by discrimination law. As a result a practice may be exempt from discrimination law if it 'may reasonably be regarded' as being in accordance with doctrines, tenets, beliefs or teachings, rather than needing to be in accordance with these. This does not draw a close connection between the conduct and the religious belief. The legal test is also uncertain and could present real difficulties in individuals understanding whether the conduct falls within the definition.

As outlined above, there are already significant permanent exemptions in Commonwealth discrimination law for religious organisations around the protected

⁵ *Sex Discrimination Act 1984* (Cth), s 37.

⁶ Clause 10(1).

⁷ *Sex Discrimination Act 1984* (Cth), s 37.

attributes of age, sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding or family responsibilities. The exemptions permit religious organisations to discriminate against individuals where it is necessary to avoid injury to the sensitivities or susceptibilities of the adherents of a religion.⁸

The Bill widens the scope of the SDA exemption to include a range of 'other bodies' beyond those established for a religious purpose. Many religious organisations, including schools, receive public funding for performing a service on behalf of government. Religious organisations providing services in education, adoption, employment assistance and child welfare services are free to discriminate against prospective employees, employees and people accessing these services under the Bill.

KLC remains opposed to religious exemptions that remove protections against discrimination for a large number of people who access or are employed by government funded services. We remain opposed to the scope of the exemptions already in the SDA, but these compared to those proposed in this Bill are more measured and a better balancing of rights. Clause 10 of the proposed Bill is much broader than SDA provisions and cannot be supported. We also do not accept that clause 10 is necessary to protection religious freedom as it draws the permitted conduct too widely. These provisions are broad, blanket exemptions which require no analysis of reasonableness, necessity, proportionality or legitimacy of aims. One fundamental right (freedom of religion) should not be automatically privileged above other fundamental rights (right to non-discrimination and equality) by the granting of a permanent blanket exception. The Bill does not achieve the appropriate balancing of rights in the broadening of exemptions beyond bodies established for a religious purpose.

Recommendation:

6. **Clause 10 should be removed**
7. **In the alternative, clause 10 be redrafted to align with the exemptions in section 37(1)(a) - (c) of the *Sex Discrimination Act 1984 (Cth)***
8. **The Bill should make it explicit that religious organisations that receive public funding or perform a service on behalf of government should not be exempt from anti-discrimination law and are not covered by Clause 10(2)(a)-(c).**

⁸ *Age Discrimination Act 2004 (Cth)* s 35; *Sex Discrimination Act 1984 (Cth)* ss 37, 38.

Statements of Belief – Clause 41

KLC believes that a starting point for addressing discrimination is that the Bill should not erode current discrimination law protections. However, the proposed Bill and clause 41 specifically outlines that it will override other State and Territory discrimination law protections. This is a very unwelcome and unnecessary move, which reduces the range of options for people who experience discrimination and will erode rather than increase discrimination protection overall. It has always been the case that individuals who have experienced discrimination have a range of state based and federal options, and this has been all the more important due to the lack of comprehensive discrimination law provisions at the federal level or Human Rights Act nationally. This Bill, in specifically overriding state discrimination laws, takes a new position that does not equate these multiple options as increasing human rights protections overall but sees these protections as incompatible with those in the Bill. It is a significant departure from the role of federal legislation in this area, and at the very least requires greater time to consult in relation to such a significant change. Once again this also creates greater complexity in the law, and makes it much harder for individuals to understand and know whether they have options under state or federal law, increasing the complexity of the law in this area.

The creation of legal protection for 'statements of belief' is extremely broad and creates a new way in which people could lawfully defend otherwise discriminatory conduct. For a 'statement of belief' to be not protected the Bill sets a very high bar, that in our view does not adequately balance the need to protect other vulnerable and marginalised groups from speech that is designed to offend, humiliate or intimidate. The necessity to show that the speech 'would or is likely to harass, vilify, or incite hatred or violence' sets the legal test extremely high.

Recommendation:

- 9. Clause 41 of the Bill be removed**

Conduct Rules and Large Employers

The creation of a new type of provision for large employers, with revenue exceeding \$50 million, further complicates the law and creates a lack of harmony in the applicability of discrimination law depending on the employer. In the creation of a new defence of 'unjustifiable financial hardship' for an employer who is impacted by an employee who speaks or acts contrary to conduct rules on the basis of religious belief, we have a new legal test that again adds complexity to discrimination law and has the potential to confuse the existing 'unjustifiable hardship' defence in other federal Acts. Furthermore, you would need to show a significant loss to satisfy an 'unjustifiable financial hardship'

for an employer exceeding \$50 million revenue. This is a high threshold for relevant employers to meet, and will restrict their ability to implement diversity and inclusion policies that prohibit statements of belief that would offend, insult, humiliate or intimidate, but fall short of 'harass, vilify or incite hatred or violence against'. This also sets the wrong message in relation to all employers about the importance of ensuring human rights protection through conduct rules and suggests that it is only acceptable to ensure vulnerable groups have protection when there is a huge financial impact for the employer.

Recommendation:

- 10. The employer conduct rule provisions that relate to relevant employers in clause 8(3) and clause 31(6) of the Bill be removed.**

Conscientious objections and Health Practitioners

KLC believes that the provisions around conscientious objections for health practitioners are particularly problematic and could impact negatively on the right to access health services. They allow another avenue for discriminatory conduct rather than increase protection from discrimination. This is particularly concerning for women, LGBTIQ+ people and those who live in remote and regional areas who have less choice and access to health services.

The Bill outlines that employer conduct rules that are inconsistent with State and Territory legislation on conscientious objection will be deemed not reasonable and constitute indirect discrimination. It is unclear how this will work in practice. State and Territory laws on conscientious objections are inconsistent, and often supplemented by policies and guidelines. For example, Queensland and the Northern Territory both require health practitioners to disclose their objection and provide referrals regarding abortions,⁹ and New South Wales will soon follow suit when the *Abortion Law Reform Act 2019* (NSW) is assented to,¹⁰ whereas the Australian Capital Territory is silent on these duties. The Bill will stop government policies and guidelines from reconciling these differences and protecting public health.

Where there is no State or Territory laws, a conduct rule will be deemed not reasonable if it has an 'unjustifiable adverse impact' on the ability to provide health services or on the health of a person being provided with these services. In the explanatory notes, unjustifiable adverse impact is described with the example of 'death or serious injury of

⁹ *Termination of Pregnancy Act 2018* (Qld) s 8; *Termination of Pregnancy Law Reform Act 2017* (NT) s 11.

¹⁰ *Abortion Law Reform Act 2019* (NSW) s 9.

the person seeking the health service'. This standard is too high. It removes protections for people seeking health services that will not result in death or serious injury, such as abortions or contraceptives, and leaves room for discriminatory conduct against vulnerable groups, particularly women and LGBTIQ+ people.

The Bill will override conduct rules and policies, yet does not provide any guidance around the minimum standard for conscientious objections. Under the Bill, a health practitioner will be able to tell a patient that they cannot help them without explaining that it is due to their conscientious objection, or that the service would otherwise be available. The Bill needs to include provisions that outline if a conscientious objection is reasonable, the health practitioner must disclose their objection and provide immediate referrals, in line with international standards.¹¹

Recommendation:

11. That clauses 8(5), 8(6) and 31(7) be removed from the Bill

Increased funding for Australian Human Rights Commission

KLC supports the work done by the Australian Human Rights Commission (AHRC). The core functions of complaint handling and education and public awareness raising are necessary in Australian society. They provide an avenue to address discrimination, improve public knowledge of human rights and help foster a societal culture that respects human rights. The AHRC already has a strained budget after facing numerous cuts.¹² The addition of a new Religious Freedom Commissioner must be met with additional funding from the Attorney General's Department. Their lack of funding hinders the AHRC from promoting human rights to its full ability as the national human rights institution. It also restricts their independence as they are forced to seek funding and partnerships from external bodies, which threatens their 'A Status' National Human

¹¹ For example: *Committee on the Elimination of Discrimination against Women, General Recommendation No. 24: Article 12 of the Convention (women and health)*, CEDAW/GEC/4738/E (1999) 11; *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover – Addendum – Mission to Poland, A/HRC/14/20/Add.3* (20 May 2010) 50.

¹² See Australian NGO Coalition Submission "Australia's compliance with the Convention on All forms of Discrimination against Women" June 2018 <http://www.klc.unsw.edu.au/sites/klc.unsw.edu.au/files/CEDAW%20Shadow%20report%20-%20Final%2014.6.18.pdf> at 3

Rights Institute standing.¹³ KLC notes that there are other significant areas of discrimination that do not have a standalone Commissioner function and we do not see the need within the context of current budgetary cuts to appoint a separate Religious Freedom Commissioner.

Recommendation:

- 12. That the Attorney-General's Department increase funding for the Australian Human Rights Commission**

Yours Sincerely,
KINGSFORD LEGAL CENTRE



Emma Golledge
Director



Eleanor Holden
Solicitor

¹³ *Committee on the Elimination of Discrimination against Women, Concluding observations on the eighth periodic report of Australia*, UN Doc CEDAW/C/AUS/CO/8 (25 July 2018) 17.