



**Submission to the
Attorney-General's Department**

Religious Freedom Bills – Second Exposure Draft

**Prepared by
COTA Australia**

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About COTA Australia

COTA Australia is the national consumer peak body for older Australians. Its members include State and Territory COTAs (Councils on the Ageing) in each of the eight States and Territories of Australia. COTA Australia and the State and Territory COTAs have around 40,000 individual members and supporters and more than 1,000 seniors' organisation members, which jointly directly represent over 500,000 older Australians.

COTA Australia's focus is on national policy issues from the perspective of all older Australians as citizens and consumers and we seek to promote, improve and protect the circumstances and wellbeing of older people in Australia. Information about, and the views of, our constituents and members are gathered through a wide variety of consultative and engagement mechanisms and processes.

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Table of Contents

About COTA Australia	2
Introduction	4
Balancing freedom of religion with other rights.....	4
Substantive concerns with the proposed legislation	5
Protecting religious freedoms should not override existing anti-discrimination protections.....	5
The Bill creates an inconsistency in protections for consumers in residential aged care compared to those receiving home-based aged care.....	6
The Bill creates uncertainty between an aged care provider’s freedom of religion and the Charter of Aged Care Rights protecting an ageing consumer.....	8
Patient-centred care must be paramount in the delivery of healthcare.....	8
Conscientious objections provisions should be accompanied by requirements to refer individuals to appropriate alternative service providers in order to ensure safe outcomes for healthcare consumers.....	9
Healthcare practitioner conduct should not have any adverse impact on the health of healthcare consumers.....	9
Spoken or written words should not override existing state and territory non-discrimination protections just because it’s a ‘statement of belief’	10
The intended scope of Accommodation, tenancy and housing provisions are unclear.....	10
Discrimination laws should protect individuals, not corporations	11
The Bill’s definition of vilification must be revisited.....	11
Concluding Statement	12
Appendix A: COTA Tasmania submission to first exposure draft of Religious Discrimination Bill 2019	13
Appendix B: COTA SA LGBTI Reference Group letter.....	15
Appendix C: COTA Victoria’s submission to second exposure draft of Religious Discrimination Bill 2019	16

Introduction

COTA Australia welcomes the opportunity to respond to the second exposure draft of the *Religious Discrimination Bill 2019*, *Religious Discrimination (Consequential Amendments) Bill 2019* and the *Human Rights Legislation Amendment (Freedom of Religion) Bill 2019* (the Bills). Collectively the Bills give effect to three recommendations of the *Report of the Expert Panel on Religious Freedom*¹ (recommendations 3, 15 and 19).

COTA is deeply concerned that the proposed legislation overrides existing Commonwealth and State/Territory anti-discrimination legislation. This legislation should not be drafted for the purpose of overriding existing anti-discrimination legislation. In particular our substantive concerns relate to access to health care and delivery of aged care services in a manner which protects older consumers from discrimination. Accordingly, we will focus our comments on the *Religious Discrimination Bill 2019* (the Bill).

In summary our concerns regarding the Bill are:

1. Federal anti-discrimination legislation should not automatically override long standing protections contained within state and territory legislation.
2. Drafting of the legislation should be consistent with existing federal protections and exemptions to those protections.
3. Provision of services in healthcare and aged care should maintain the principle of person-centred care with the rights of the consumer paramount.

We do not believe the Bill currently strikes the right balance and would suggest further consultations with affected persons, in particular health care and aged care consumers, before introducing the Bill into Parliament.

COTA Australia reaffirms the comments of COTA Tasmania (*Appendix A*) made on the first exposure draft of the Bills, which remain relevant to the second exposure draft. Further, included in our submission is a letter of concern from COTA South Australia's LGBTI Advisory Group (*Appendix B*), and an additional submission from COTA Victoria (*Appendix C*) elevating the concerns from our state and territory members about the impact of the Bills on the operation of their current state and territory laws.

Balancing freedom of religion with other rights

All human rights are equal and indivisible. Indeed Article 18 of the Universal Declaration provides that 'everyone has the right to freedom of thought, conscience and religion'. Further, rights to religious freedom are given formal legal effect in Articles 2 and 18 of the International Covenant on Civil and Political Rights (ICCPR). Despite this, civil and political rights provided for in the ICCPR remain poorly protected in Australian legislation.

The current approach primarily deals with anti-discrimination legislation, which has led to unacceptable gaps in the protection of freedom of religion, as per the findings of the *Report of the Expert Panel on Religious Freedom* and the interim reports of the Joint Standing Committee on

¹ Expert Panel (May 2018) 'Religious Freedom Review: Report of the Expert Panel', Canberra. Available from: <https://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/Freedom-of-Religion.aspx>

Foreign Affairs, Defence and Trade's *Inquiry into the Legal Foundations for Religious Freedoms in Australia*.²

Federal law should give full effect to all of Australia's international human rights obligations, including freedom of religion, in a full and comprehensive manner. Indeed, the UN's Human Rights Committee has called for the adoption of 'comprehensive federal legislation giving full legal effect to all Covenant provisions across all state and territory jurisdictions' to address the gaps in the application of Covenant rights³.

To achieve such an objective, COTA Australia believes the most appropriate response to the gaps in protections for religious freedoms would be to introduce a national charter of human rights or other such legislative mechanism of the Parliament. Such an approach would enable legislation to fairly balance competing human rights and ensure appropriate restrictions did not inadvertently restrict the rights of others.

COTA notes that, in enshrining the right to religious freedoms in domestic legislation, the Parliament must consider the nature and scope of the limitations, or else other rights may be erroneously discarded. To guide these limitations, the ICCPR appropriately provides that:

Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

COTA Australia notes the concerns of many organisations, legal groups and peak bodies which, in submissions to the first exposure draft of this Bill, raised significant concerns about the diminution of existing rights. COTA Australia does not have confidence that the second exposure draft of the Bill contains adequate limitations to protect the health and wellbeing of consumers. This is particularly true for older people accessing aged care, health care or disability services. Similarly, the Bill does not contain adequate limitations to protect individuals employed by, or seeking employment with, faith-based service providers.

Substantive concerns with the proposed legislation

Protecting religious freedoms should not override existing anti-discrimination protections

COTA does not support the provisions within the Bill that in practice override existing State and Territory level protections, nor that override or in practice could weaken or conflict existing rights and protections contained within the Federal *Age Discrimination Act 2004*, *Disability Discrimination Act 1992* and the *Sex Discrimination Act 1984*.

While we note that the definition of religious body for s11 is restricted to for the purpose of the Bill and thus has no interaction with existing federal anti-discrimination provisions. However, clause 42 of the Bill in relation to 'statement of belief' would create an environment where older Australians should receive non-discriminatory service under the existing Federal legislation, but could be subject to speech regarded as hateful or prejudiced towards them. COTA believes that all services should be

² Joint Standing Committee on Foreign Affairs, Defence and Trade 'Interim report' and 'Second Interim Report', Parliament of Australia. Available from: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/Freedomofreligion

³ United Nation's Human Rights Committee, Concluding Observations on the sixth periodic report of Australia, UN Doc CCPR/C/AUS/CO/6 (9 November 2017) 2 [5 & 6]

delivered in a non-discriminatory manner, including the speech provided during the delivery of that service.

COTA recommends better drafting notes are included in the legislation to better explain how the Government intends these issues to coexist.

COTA Australia supports protections which exist in state and territory law across a range of areas of public life beyond the protection of LGBTI Australians. Notably section 17(1) of the Tasmanian Anti-Discrimination Act 1998 prohibits any conduct that offends, humiliates, intimidates, insults or ridicules a person on the basis of certain attributes, including age, race, gender, disability and sexual orientation. Other states have similar protections. COTA Australia does not support any Federal discrimination law overriding existing measures in such state and territory laws. We note such concerns are shared by our state and territory member organisations, who have provided state specific submissions attached in appendix A, B & C of this submission.

The Bill creates an inconsistency in protections for consumers in residential aged care compared to those receiving home-based aged care

The explanatory memorandum to the Bill states that, as religious hospitals, aged care facilities and accommodation providers generally provide services to the public at large and most often they do so on a commercial basis, it is not appropriate for their conduct in all areas of public life to not be covered by the Bill. Accordingly, the Bill states that an “aged care facility” is not covered under the definition of religious body in subclause 11 (5) of the Bill. Instead, the Bill includes specific, more limited, exceptions to the prohibition of discrimination in employment and partnerships for religious hospitals, aged care facilities and accommodation providers in subclauses 32(8) and (10). Indeed the explanatory memorandum (page 56) makes it explicitly clear that clauses 32(8)-(10) **‘are not intended to capture aged care providers generally, where that provider does not establish, direct, control or administer an aged care facility, such as where aged care services are provided in the home.’**

COTA understands that the effect of the reference to aged care facilities means that a residential aged care facility could not depend on the definition of religious body under clause 8 for the purposes of service delivery. They could rely on the protections in regard to employment and partnerships afforded under clause 32.

However, providers of Home Care Packages and other community-based service for older Australians (who inherently are not therefore an “aged care facility”) would be considered ‘religious bodies’ under the definition provided in subclause 11(5) of the Bill. This means that home care providers would not be restricted to the protections regarding an employment exception. Rather home care providers can claim the general religious body exception under clause 11, so long as they meet the definition of ‘religious body’. This requires that the service-provider be either a registered public benevolent institution conducted in accordance with beliefs of a particular religion, or be ‘conducted in accordance with the doctrine, tenets, beliefs or teachings of a particular religion (other than a body that engages solely or primarily in commercial activities)’. As such, a home care provider could lawfully refuse services to any patients who have different, or no, religious beliefs to those of the provider.

COTA is disturbed that this changes the existing provisions where Commonwealth-funded aged care providers may not discriminate in the delivery of any services (be it home care or residential care) but may exercise their religious body exception in relation to employment matters.

Section 37 (2)(a) and Sections 23(3)(b) of the *Sex Discrimination Act 1984* (SDA) carves out the general religious exemptions within the SDA where an organisation is a ‘Commonwealth-funded

aged care' body. The purpose of these sections was to increase protections for marginalised groups, with particular regard to the challenged faced by older members of the LGBTI community. It is also designed to facilitate access to services, particularly where no alternative service provider was available in that location such as in regional Australia. COTA heard from many older LGBTI people that they would not access aged care services as they understood them to often be delivered by charitable church-based organisations and they did not wish to suffer discrimination when being serviced by the aged care system. This included both residential accommodation services and the delivery of personal and nursing care services within an individuals' home.

COTA strongly supported these amendments from 2013 and continues to support these provisions today. COTA Australia does not support overriding any protections that ensure bodies in receipt of Commonwealth funding for the delivery of aged care services may refuse services to or discriminate in the delivery of those services to people of a certain sex, sexual orientation, religious affiliation, gender identity, intersex status or marital status.

COTA is concerned that in the scenario where an elderly consumer felt they were discriminated against in aged care on the basis of their homosexuality and an aged care provider felt they were providing services in accordance with their religious belief, we could have an unintended conflict between the two legislative provisions.

In the residential care setting, the definition of religious body does not apply from the Bill and as the scenario is service delivery the additional protections for aged care facilities in regard to employment and partnerships do not apply. Therefore, the existing protections in the SDA would continue to apply without complication or potential challenge.

However, in regard to the delivery of aged care services in a person's home, where the exclusion of 'aged care facility' does not apply, clause 11 of the Bill does apply. COTA is concerned that provider could claim services were delivered in accordance with their religious belief under s11 of the Bill, while the aged care consumer could claim they were guaranteed non-discrimination protections as the organisation is a Commonwealth-funded Aged Care service and under s37 of the SDA the general exceptions of religious bodies do not apply. It is very unclear to COTA what the outcome of this situation would be.

COTA strongly recommends the bill is amended so that all references in the Bill to 'aged care facility' is amended to 'the provision of aged care' and that 'aged care' be defined in clause 5(1) in similar terms to how 'Commonwealth-funded aged care' is defined in section 4 of the *Sex Discrimination Act 1984* (Cth), being:

(a) aged care, within the meaning of the Aged Care Act 1997:

*(i) that is provided by an approved provider, within the meaning of that Act; and
(ii) in relation to which the approved provider has responsibilities under that Act; or*

(b) care or services in relation to which a grant has been paid under Chapter 5 of the Aged Care Act 1997; or

(c) care or services of a class prescribed by the regulations for the purpose of this paragraph.

While COTA's preferred position is that non-discrimination protections should be extended to all aged care (and not just that which is Commonwealth funded) we recognise that this is the existing agreement of the Australian Parliament and that the proposed bill should align with that existing agreement. Accordingly, we note our understanding that 'Aged Care' under the *Aged Care Act 1997* is defined as including residential care, home care and flexible care and that such measures should be confirmed to include the delivery of Commonwealth funded aged care not regulated by the Aged

Care Act (namely Commonwealth Home Support Program). These two amendments would therefore mean that home care is captured by the 'provision of aged care' under clauses 32(8) to(10), such that home care cannot be the subject of clause 11 and therefore home care providers cannot discriminate against clients on the basis of religious belief or activity.

Finally, it should also be noted that there is a reputational risk for faith-based service providers. Giving faith-based providers the ability to 'discriminate' through this Bill, may be misunderstood by members of the LGBTI community as giving the entire organisation a blanket license to discriminate. It is unlikely that the above discussed distinction between a residential care setting and a potential lack of protection if services are delivered in your own home will be well understood. Delivering a clear non-discriminatory message for the aged care sector will continue to ensure that older Australians do not delay accessing a vital service such as aged care supports.

The Bill creates uncertainty between an aged care provider's freedom of religion and the Charter of Aged Care Rights protecting an ageing consumer

COTA notes the Bill is silent on balancing the aged care provider's religious freedoms and the statutory obligations they must comply with under The Charter of Aged Care Rights and The Aged Care Act.

We are concerned this could have unintended consequences in the monitoring of a religious aged care providers' compliance with the Aged Care Quality Standards. Under this Bill, a religious body providing aged care services to an older Australian could maintain policies and procedures that excluded LGBTI individuals. At the same time, the providers would be expected to demonstrate inclusive person-centred policies for all their clients.

The double standard may lead to consumer confusion about what rights and protections they can expect to receive while accessing aged care services. Greater clarity about the interaction between the Bill and aged care regulations would be needed. COTA Australia notes that to its knowledge no consumers of aged care have been invited to participate in any roundtable discussions convened to explore the exposure drafts. We suggest that greater consumer consultation specifically on the impact in regard to aged care is warranted given the concerning changes to the non-discriminatory practices of aged care facilities under the act.

Patient-centred care must be paramount in the delivery of healthcare

As a principle, COTA believes that the needs and rights of consumers must be prioritised in the delivery of health care. The Bill has some concerning implications for patient-centred care, and for the rights of consumers to have choice and control over their treatment. COTA Australia is concerned that the Bill prioritises the religious preferences of the practitioner over the needs of the consumer, and this may lead to adverse health outcomes.

The principle which absolves hospitals from anti-discrimination legislation on the assumption that the service or procedure could be attained at an alternative medical facility fails to meet the needs of seeking emergency treatment, or those who wish to be treated close to home. One such example was listed in the ACT LGBTIQ Legislative Assembly Advisory Committee's submission of the *Religious Freedoms Review*. In this example, a same-sex couple attended the Emergency Department of a public hospital run by a Catholic organisation. The receptionist refused to allow the partner to be listed as the next of kin.

“The receptionist then said ‘Let me be clear, you cannot be put down as his next of kin, who else can we put down instead?’ This was not a discreet conversation”⁴

Conscientious objections provisions should be accompanied by requirements to refer individuals to appropriate alternative service providers in order to ensure safe outcomes for healthcare consumers

COTA Australia understands that there are conditions under which health practitioners conscientiously object to particular treatments. We note with appreciation the Government’s improvements to the Bill which makes expressly clear that an objection must be to a procedure, not to a person; and that the issue of conscientious objection only applies to doctors, nurses, midwives, pharmacists and psychologists. As noted by the Australian Medical Association, the Bill does not contain any requirement for timely notification of their conscientious objection, information on their options, an offer of a timely and effective referral to an appropriate alternative health practitioner. Nor does it require the conscientious objection to be reported to the health service provider.

There are concerns that the proposed law will create barriers for hospitals, health clinics and pharmacies to require staff who have a conscientious objection to refer patients to another service. Such a requirement was the subject of the recent case *Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario* [2019] ONCA 393⁵ which considered whether mandatory referral policies infringe the right to freedom of religion, and whether they could be considered discriminatory. In this instance, practitioners with a conscientious objection on the basis of religion were required to provide patients with an "effective referral", in good faith, to a non-objecting, available and accessible alternative health care provider.

It was noted in the deliberations as part of this case that a self-referral model, unreasonably places the burden on the patient to know, find and access appropriate alternative medical care. This provides particular barriers for people with generally low levels of health literacy, those in regional/remote areas, and those for whom timeliness is essential to good clinical outcomes. This is particularly true for individuals with life-limiting illnesses, where delivery of care is time sensitive and any delay can inhibit access entirely.

Healthcare practitioner conduct should not have any adverse impact on the health of healthcare consumers

COTA notes that the Bill attempts to restrict professional bodies regulating the conduct of healthcare professionals from imposing ‘unreasonable’ ‘healthcare practitioner conduct rules’. We note with appreciation the proposals that a healthcare practitioners’ refusal to conduct a particular procedure or service must not be a refusal of individuals or a class of individuals.

The Bill proposes in Section 8(7)(b) that rules will be allowed if it is necessary to avoid an ‘unjustifiable adverse impact’ on the health of the person receiving the health service. No definition of ‘unjustifiable adverse impact’ is provided, and while we do not purport to be legal experts in interpreting legislation, it would seem to be worded in such a way as to provide a fairly high bar in order to meet the requirements of the clause. In addition, Section 8(8) places the burden to proof on the organisation or ‘person’ seeking to impose the rules.

⁴ PMC. 14 February 2018. ACT LGBTIQ Ministerial Advisory Council submission to the Religious Freedom Review. Submission number 11631.

⁵ *Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario*, 2019 ONCA 393 (CanLII), <<http://canlii.ca/t/j08wq>>, retrieved on 2020-01-21

Without a clear or agreed definition of unjustifiable adverse impact, COTA notes that it will be difficult for individual healthcare businesses to provide the necessary guidance to their staff about compliance with the law. Further we would suggest that the burden of proof tips the balance of protections away from any future protections for the individual health care consumer that may be sought in a particular healthcare professional body in the future. COTA does not support measures that weaken consumer protections in healthcare.

Spoken or written words should not override existing state and territory non-discrimination protections just because it's a 'statement of belief'

Section 42 of the Bill states that statements of belief to not constitute discrimination for the purposes of anti-discrimination legislation under the Fair Work Act, the Tasmanian Anti-Discrimination Act and any other law prescribed by regulations. The definition of statement of belief is defined in section 5 of the Bill as a statement made in good faith, in writing or spoken words, either a statement made by a person about their religious belief (consistent with the doctrines, tenets, belief or teachings of a religion) or a statement of a person without a religious belief related to the fact of not holding a religious belief.

COTA notes improvements in this area between the exposure draft 1 and exposure draft 2, in particular we note that this section does not relate to refusals of service nor statements that is malicious or is likely to, *"harass, threaten, seriously intimidate or vilify another person or group of persons"*. Nevertheless, COTA does not support the Bill overriding existing protections in state and territory law around what constitutes the definition of discrimination.

The intended scope of accommodation, tenancy and housing provisions is unclear

The Bill, and the accompanying explanatory memorandum, detail protections for people of faith who are seeking accommodation, including private rental accommodation. The Bill does not place any limitations or responsibilities on religious real estate agency or agent, effectively allowing this bill to override existing protections currently available to protected groups provided it is based on religion and provided in good faith.

This could include refusal to rent, or deferring the other person's application for accommodation to a lower order of precedence in any list of applicants for that accommodation. In the case of *Kozak v Poland* [2010] ECHR 28⁶, the European Court of Human Rights found that Kozak, a polish national, should not be denied tenancy on the basis of his same-sex relationship.

Under the current Bill, a Christian-owned real estate agent could refuse to lease a property to an unmarried woman, or to a same-sex couple, provided the refusal was on the basis of religion and in good faith. This would unfairly balance the right of the real estate agent to exercise religious freedom, with the right of a tenant to be treated fairly under the relevant jurisdiction's tenancy laws. COTA Australia notes that older women are increasingly at-risk of homelessness and are an over-represented demographic in seeking assistance from homelessness services. The absence of stable accommodation has significant impact on other areas of life – including the ability to maintain employment, seek health care and enjoy private life.

COTA Australia is concerned about the denial of tenants' rights broadly, and to specific groups (including women, people with disability, and the LGBTI community) who are at particular risk of being systemically denied accommodation. Tenants are currently protected in a range of state and

⁶ KOZAK v. POLAND - 13102/02 [2010] ECHR 280 (2 March 2010). Accessed at: <http://www.bailii.org/eu/cases/ECHR/2010/280.html>

territory-based tenancy legislations. The interaction between the Bill and tenancy protections for other groups is inadequately addressed in its current form.

Discrimination laws should protect individuals, not corporations

Section 9 of the Bill is intent to protect individuals associated with a person or belief, such as relatives or spouses. COTA Australia is concerned that the use of the word 'person' in this section has inadvertently extended protections to corporations. As the noted in the explanatory memorandum, the *Acts Interpretation Act 1901* denotes that 'persons' is inclusive body politic or corporate entities as well as natural persons. To extend protections under the act deviates from the historical intent of discrimination law, namely the protection of individuals, not entities such as corporations.

COTA recommends a definition of person be inserted into the Bill that stipulates that, for the purpose this Act, a natural person is the sole party intended to be afforded protections under this law. To not do so would elevate the rights of all business's religious protections over any other attribute of their business (e.g. providing services for a single sex, or to a particular cultural/racial group).

The Bill's definition of vilification must be revisited

The proposed Bill proposes that a statement of belief is not protected if it is "malicious"(undefined) or "would, or is likely to, harass, threaten, seriously intimidate or vilify another person or group of persons" [s8(5)(b)], where vilify is defined as "*in relation to a person or group of persons, means incite hatred or violence towards the person or group.*" COTA Australia has concerns about the narrowness of this definition. A more expanded, and in our view a more accurate definition, exists in a range of state and territory laws including:

- "*incites hatred, serious contempt, revulsion or severe ridicule*"- Victoria's *Racial and Religious Tolerance Act 2001*
- "*to incite hatred toward, revulsion of, serious contempt for, or severe ridicule of a person or group*" - ACT *Discrimination Act 1991*

With regards to Commonwealth law, COTA Australia notes the *Racial Discrimination Act 1975* (s18c(1)(a)) which makes illegal an act which is '*reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or group of people*'. COTA is disturbed that elements including "insult", "humiliate", have not been included in the Bill and that the benchmark for intimidate has been elevated to "seriously intimidate".

While not commenting on the previous public discourse around the appropriateness of 18C's inclusion of "offends", COTA remains concerned that the inconsistency between religious and racial discrimination may lead to an unfair and unequal treatment of similar cases of alleged discrimination. COTA does not believe that one class of protected attribute should be elevated to greater protection than another.

COTA Australia suggests the drafters should reconsider the definition of vilify, to include a definition that is more consistent with equivalent Acts in State and Territory legislation. Additionally, efforts should be undertaken to ensure equivalent and consistent protections from hate speech and vilification in the Bill as those afforded by the *Racial Discrimination Act 1975*.

Concluding Statement

COTA Australia does not oppose the introduction of greater protections against religious discrimination to Commonwealth legislation. Indeed, Australia has an obligation under international law to uphold and protect religious freedoms. Nonetheless, these freedoms must be balanced with the rights of other groups, in a manner that ensures rights are truly equal and indivisible.

COTA Australia recommends that the Bill **not proceed** in its current form, until a better balance is struck between religious freedom protections and existing anti-discrimination protections including in the provision of healthcare, aged care and in relation to state and territory protections. Any attempts to secure religious freedoms in federal legislation must that reflect and strengthen the diversity of Australian society.

Thank you for the opportunity to contribute to this consultation. Should you wish to discuss this submission further please contact Jill Moran, Senior Policy and Research Officer, via email at jmoran@cota.org.au or via phone 02 6154 9746.

Appendix A: COTA Tasmania submission to first exposure draft of Religious Discrimination Bill 2019

COTA Tasmania is very concerned that the Religious Discrimination Bill 2019 in its current form will limit the legislative protections that apply under the Tasmanian Anti-Discrimination Act 1998. This would be because the Federal Bill would override section 17(1) of the Tasmanian Act.

Section 17(1) of the Tasmanian Act prohibits any conduct that offends, humiliates, intimidates, insults or ridicules a person on the basis of certain attributes. These include age, race, gender, disability and sexual orientation. We believe strongly as an organisation representing older Tasmanians that the wide-ranging protections offered by section 17(1) must be safeguarded.

We note that while the Tasmanian Anti-Discrimination Act seeks to minimise discrimination on a range of grounds, the Religious Discrimination 2019 seeks to support discriminatory acts for specific groups on the basis of belief and would give these groups powers to discriminate that are available to no other group. This is of particular concern to us given the entrenched and pervasive ageism older Australians already experience.

Through the work of the Aged Care Royal Commission, multiple inquiries into aged care, the work of the Australian Law Reform Commission resulting in the report, Elder Abuse – A National Legal Response, and the work of the Age Discrimination Commissioner, we are reminded that the dignity, autonomy and rights of older Australians are frequently abused.

Under Tasmania's existing law, Tasmanians are protected and can seek remedies to discrimination on the basis of age simply and in a timely and cost effective way. COTA Tasmania is concerned that the proposed Religious Discrimination Bill 2019 would allow discrimination against older Tasmanians to be excused on the basis that a statement of religious belief will not amount to discrimination or unlawful offensive, humiliating, intimidating, insulting or ridiculing conduct.

We are concerned that these Bills appear to be the first and only example of a federal discrimination law explicitly overriding other discrimination laws.

Furthermore, the move of these matters from state jurisdiction to the federal sphere will potentially increase the complexity and cost of resolving these matters and will increase the time taken for a resolution to be reached. The process is likely to act as a disincentive for those wishing to raise issues of discrimination that relate to the provisions of the Religious Discrimination legislation.

COTA Tasmania frequently speaks with older Tasmanians on a range of issues and it is clear that the ability to speak to someone locally and face to face to resolve issues is highly valued by this cohort.

COTA Tasmania agrees that discrimination on the basis of faith, or no faith, is unacceptable. However, we strongly believe that any new laws to protect religious freedom should not come at the expense of existing protections for older people, LGBTI people, women, people with disabilities and those from diverse racial and cultural backgrounds.

Our organisation strongly supports the human rights of all Australians as we age. As a nation we should be legislating to promote respect for minorities and increase inclusivity in our community. Unfortunately, the Religious Discrimination Bill 2019 takes the opposite approach that will allow discrimination to occur.

Given the broad definition of a religion contained in this Bill, the effect of the Bill, if passed, would give express permission for certain categories of people to undertake discriminatory actions which would otherwise not be permitted for others in our community. Such an approach turns the basis of

all existing anti-discrimination law in Australia on its head, and represents a substantial encroachment by the Commonwealth into areas which have been to date a state jurisdiction.

It is our considered view that this Bill should be amended to ensure that it matches the scope of other federal discrimination laws and does not override existing protections for other groups under state laws.

Appendix B: COTA SA LGBTI Reference Group letter



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Re – Religious Freedom Bills – second exposure draft

I am writing to express the concern of COTA SA about the *Religious Freedom Bills 2019*.

COTA SA was formed in 1957 with a mission to advance the rights, interests and futures of South Australians as we age. An important part of our work has been to support and reflect the wide diversity of older South Australians, including across differences in income, health, geography, gender, sexual orientation and culture. The COTA SA Rainbow Hub, which is supported by its own Advisory Committee, offers support, policy advice, advocacy, information and assistance to LGBTI elders.

Older people must have certainty about their access to safe, non-discriminatory services whether aged care, health, housing or any other. Older workers must have access to redress where they experience discrimination in finding or undertaking employment.

We have had many representations in relation to the *Religious Discrimination Bill 2019* including from older people identifying as LGBTI. They do not believe that the protection of religious freedoms should ever be allowed to override their right to protection against discrimination.

The concerns raised with us include the risk that the bill, as law, will threaten –

- the certainty of hard-fought protections relating to both opportunities for employment and for access to services
- access to existing affordable and well understood redress including through state-based equal opportunity legislation
- access to a guarantee of non-judgemental, respectful health, aged care and other services particularly in country South Australia.

There is also considerable concern that people may miss out on (or be uncertain about their right to access) publicly funded services because that funding is channelled through charities and for-profit providers which may invoke religious freedom protections.

By imposing complex new legal requirements including new avenues to settle potential conflict between anti-discrimination and religious freedom legislation, people are very concerned that ordinary people will lose fundamental and affordable avenues of protection which are currently relied upon for personal safety.

COTA SA supports the submission made by COTA Australia.

Yours sincerely

Dr Cris Davis
Chair, Rainbow Hub Advisory Group

Jane Mussared
Chief Executive

Appendix C: COTA Victoria's submission to second exposure draft of Religious Discrimination Bill 2019

Protections for Victoria's diverse and ageing population

COTA Victoria supports the promotion and protection of all fundamental rights and freedoms, including freedom of religion. As an organisation that values diversity and respect, we are deeply concerned that the second exposure draft of the Religious Discrimination Bill undermines the fabric of inclusion and respect. In particular, as a state based organisation, we believe the scope and intention of the proposed Act threatens to override existing state protections for Victoria's diverse and ageing population. In its submission on the initial exposure draft provided in October 2019, the Victorian Equal Opportunity and Human Rights Commission stated:

*"...we are concerned that the exposure draft unjustly privileges religious belief and activity over other rights and does not appropriately balance rights. The effects are that it risks undermining some rights in practice – including access to safe and inclusive workplaces and health services – as well as undermining existing federal and state and territory anti-discrimination laws."*⁷

We do not believe these concerns have been adequately addressed in the second exposure draft. Under international human rights law, there are only a small number of rights that are considered to be "absolute" and cannot be limited or restricted for any reason. The majority of rights, including the right to freedom of religion are subject to limitations "on grounds such as public order and the protection of the rights and freedoms of others."⁸ This means the legal right to religious freedom should not permit forms of discrimination that would otherwise be prohibited under anti-discrimination law. On this basis, we are concerned that the provisions set out in the exposure draft may give rise to actions that lead to discrimination, vilification and harassment against diverse groups of older people seeking to access public services and facilities.

Conscientious objection provision

Whilst there is improvement in the conscientious objection provisions, i.e. narrowing the range of professions covered, the second draft still allows health practitioners to conscientiously object to providing or participating in a particular kind of health service on the grounds of religious belief. For those services commonly or exclusively used by people from particular groups – for example, types of hormone treatment that benefit trans and gender diverse people, these can be refused.

While some exemptions may apply, we remain concerned that there may be additional barriers to healthcare critically needed by older Victorians from diverse groups. This is particularly relevant in rural and remote areas where access to health services is already limited.

Balance of rights and freedoms - upholding the principles of the Aged Care Diversity Framework

⁷ Victorian Equal Opportunity and Human Rights Commission (2019) 'Submission regarding the exposure draft of the Religious Discrimination Bill', P1.

⁸ Australian Human Rights Commission (2013) 'Permissible limitations on rights', accessed 28 January 2020 <<https://www.humanrights.gov.au/our-work/rights-and-freedoms/permissible-limitations-rights>>.

We are also concerned about how the proposed legislation would encroach upon the rights and freedoms of LGBTI older people accessing aged care services, many of which are run by religious entities. The availability of home care and residential care providers is scarce in some areas, which means that older people do not always have a choice over which provider they use. Whilst LGBTI older people cannot be refused access to aged care, the expression of views and attitudes by staff employed can create significant harm and barriers to access.

The provisions outlined in the exposure draft appear to place a higher value on the right of workers to freedom of expression than the right of residents' to live in a safe environment where they are treated with dignity and respect. This is in direct conflict with the aspirations of the Aged Care Diversity Framework, which aims to ensure aged care services are safe and respectful of people's diverse backgrounds and life experiences.⁹

It is critical that all staff working for government-funded aged care services uphold the principles established within the Aged Care Diversity Framework at all times.

Victorian protections and rights

We ultimately believe that existing state-based legislation already provides adequate protection for religious freedoms while balancing this with the rights of diverse population groups. For example:

- The Equal Opportunity Act 2010 makes it unlawful to discriminate against an individual in certain areas of public life based on their religious beliefs or activities.
- The exemptions included under the Equal Opportunity Act allow religious bodies or schools to discriminate in circumstances where "...such discrimination is required to conform to religious belief or principles of the religion or is reasonably necessary to avoid injury to the religious sensitivities of followers of the religion."¹⁰
- Under the Racial and Religious Tolerance Act 2001, it is unlawful to engage in behaviour that seeks to incite hatred, contempt or ridicule against another individual or group of individuals because of their religion.¹¹
- The Charter of Human Rights and Responsibilities Act 2006 protects religious freedom by recognising the right to demonstrate a religion or belief through worship, observance, practice and teaching.¹²

Affordable and accessible complaints mechanisms

Importantly, existing Victorian laws also provide remedies that are more accessible to older Victorians. The Victorian Human Rights and Equal Opportunity Commission investigates complaints that arise under Victorian anti-discrimination law. Complaints that cannot be resolved through

⁹ Commonwealth Department of Health (2019) 'Aged Care Diversity Framework initiative', accessed 30 January 2020 <<https://www.health.gov.au/initiatives-and-programs/aged-care-diversity-framework-initiative>>.

¹⁰ Victorian Equal Opportunity and Human Rights Commission (2019) 'Religious belief or activity', accessed 28 January 2019 <<https://www.humanrightscommission.vic.gov.au/discrimination/discrimination/types-of-discrimination/religious-belief-or-activity>>.

¹¹ Victorian Human Rights and Equal Opportunity Commission (2020) 'The Racial and Religious Tolerance Act', accessed 28 January 2020 <<https://www.humanrightscommission.vic.gov.au/home/the-law/racial-and-religious-tolerance-act>>.

¹² The Religious Discrimination Bill', P1.

conciliation can then be lodged with the Victorian Civil and Administrative Tribunal, which is a no cost jurisdiction.¹³ Conversely, complaints lodged under federal anti-discrimination law which are unable to be conciliated by the Australian Human Rights Commission can only be progressed to the Federal Court of Australia or the Federal Circuit Court, which can come at a significant cost to the individual.¹⁴ Passing legislation that would override no-cost remedies that already exist at a state level would severely restrict the ability of older people to uphold their rights in a range of different areas.

¹³ Under the Equal Opportunity Act 2010, it is unlawful to discriminate against someone in some areas of public life based on their religious beliefs or activities.

¹⁴ Australian Human Rights Commission (2019) 'Conciliation – how it works', accessed 30 January 2020 <<https://www.humanrights.gov.au/complaints/complaint-guides/conciliation-how-it-works>>.