



The Hon Christian Porter MP
Attorney General

30 January 2020

Dear Attorney General,

I am making a submission on behalf of **Women's Electoral Lobby Australia (WEL)** in relation to the consultations on the second exposure draft of the Religious Discrimination Bill.

As we explain in the body of this submission, WEL is disappointed that the second exposure draft includes no substantial amendments in response to the submissions made by our organisation and many expert legal, medical and community groups.

Our second submission reiterates and elaborates on our concerns that the Bill's provisions will undermine advances made by Australian women since the passage of the Sex Discrimination Act in 1984, together with the other Anti-Discrimination Acts at Commonwealth and state level.

We highlight the risks for Australian women inherent in: licensing public speech and writing that can be denigrating, derogatory, humiliating and intimidating; introducing faith tests and conditions for employment in health, aged care and religious charities which will have an impact on services, and further confusing state law on abortion and the extent to which Australian women have a right to access reproductive health services.

WEL supports inclusion of religious discrimination into the protections that Australians enjoy, but not to the exclusion of other rights and protections. Please address any inquiries on this submission to Dr Mary O'Sullivan 0419444889, email maryosullivan@bigpond.com.

Yours sincerely,

Emma Davidson, National Convenor

WEL Australia



About Women's Electoral Lobby

Women's Electoral Lobby, established in 1972, is an independent, non-party political lobby group dedicated to creating a society where women's participation and their ability to fulfil their potential are unrestricted, acknowledged and respected and where women and men share equally in society's responsibilities and rewards.

WEL applies a feminist approach to all its work, from policy analysis and development to campaigning. WEL has developed a Feminist Policy Framework, which sets out the values which we use to measure fairness for women and fairness for society. WEL believes that good policies should address these indicators and work with governments at all levels to achieve better and fairer policy outcomes.

WEL believes that fair policies are those that:

1. Ensure the benefits and outcomes are fairly distributed between women and men, as well as between different groups of women,
2. Value and reward fairly people's different skills, experiences and contributions,
3. Recognise the value of caring and supporting roles, whether paid or unpaid,
4. Recognise and rectify past and current inequalities between men and women, and
5. Enhance opportunities for both women and men to take on equal rights and responsibilities in all aspects of society: politics, community, employment and social life.



Recommendations

1. **WEL recommends that the Religious Discrimination Bill be subject to a much broader public consultation before being considered by Parliament. The consultation should include women, rural and regional and migrant communities.**
2. **WEL recommends deletion of Clause 42 which potentially licenses disturbing, contemptuous, humiliating, hurtful and derogatory attacks on women based on religious belief.**
3. **WEL recommends deletion of clauses 8.6 and 8.7: 'Conditions that are not reasonable relating to conscientious objection by health practitioners'.**
4. **WEL recommends deletion of the clauses which potentially permit religious charities (part 2 section 9 clause 11.5), religious hospitals and aged care bodies (32.8) to prefer all employees to be employed on the basis of faith.**



Preliminary remarks

Women's Electoral Lobby is confident that Australia's current framework of Anti-Discrimination Law, with the addition of protections for religious belief and practice could continue to shape a more equitable future for Australian women.

We do not believe that the current Bill will achieve this goal. We warn that without major amendments it could undermine the protections already established for women and other groups.

We endorse the comments of the Law Council of Australia in its submission on the first draft of the Bill, as equally pertinent to the second draft.

'Some of [the Bill's] provisions are concerning because, contrary to well-established principles of international and domestic law, they prioritise the protection of freedom of religious expression over other well-recognised human rights, such as the right not to be discriminated against on the grounds of race, sex, sexual orientation, disability, or age, or the right to health, in a manner which disproportionately limits their enjoyment.

Other provisions extend too far the discrimination protections based on the ground of religious activity or belief'.¹

The Bill threatens the legacy of the 1984 Sex Discrimination Act

The 1984 Sex Discrimination Act was a watershed. The Act has had an immense practical and lasting symbolic impact on the lives of Australian women.

After 1984 it was no longer legal to discriminate against women because of their sex, marital status, pregnancy or potential to become pregnant, dismiss women from their jobs because of family responsibilities, or sexually harass them.

Since its introduction, the Sex Discrimination Act has helped thousands of people who have suffered sex discrimination seek redress.

The 2013 addition of clauses outlawing discrimination on the basis of sexual orientation, gender identity and intersex status has broadened the protections of the Act.

¹ Law Council of Australia Religious Freedom Bills October 2019
<https://www.ag.gov.au/Consultations/Documents/religious-freedom-bills/submissions/Law%20Council%20of%20Australia.pdf>



Again, these amendments carried great symbolic value both for the broader range of gender communities protected and as an educational vehicle for the wider community.

The Sex Discrimination Act has long served as a major vehicle to educate Australians on equality between women and men.

Since 2013 the Act has served as one touchstone for the Australian community's recognition of the rights and dignity of LGBTI+ people.

Together with the Racial Discrimination Act, the Disabilities Discrimination Act and the Age Discrimination Act, plus the state and territory acts and the Workplace Gender Equality Act, the Sex Discrimination Act has built strong public understanding and broad acceptance of the need to recognize and encourage equal inclusion of women and diverse groups who have previously been subject to discrimination and exclusion.

The terrain of sex and gender discrimination is still highly contested in Australia. This Bill will only intensify the conflict on these issues.

WEL notes that the Religious Discrimination Bill is perceived by some powerful religious denominations and lobby groups as 'righting the balance' following the passage of the Marriage Equality referendum and then the Marriage Equality Act, which many of them strongly opposed.

Similarly, the recent reform of abortion law in Queensland and NSW was a win for women's right to have access to health services, but strongly opposed by most religious denominations, with some exceptions.

WEL does not believe these perceived 'defeats' in the public realm provide any justification for the elements of this proposed legislation which would enable religious believers and religious organisations to discriminate at the expense of the rights of others. This applies especially to women, LGBTI+ people, people with a disability and those of diverse racial, ethnic and religious backgrounds. Women of course inhabit each of these categories.

Alarming, the Bill would allow people of one religious background to make derogatory statements about other faith communities, in the name of their religious belief. This has serious implications for Jewish and Muslim communities who have suffered a rise in attacks in Australia.

The Report of the Expert Panel for the Religious Freedom Review found that 'by and large Australians enjoy a high degree of religious freedom and that basic protections are in place in Australian Law'.²

² Religious freedom Review: Report of the Expert Panel, May 2018 see <https://www.pmc.gov.au/domestic-policy/religious-freedom-review>



Established religious organisations are amongst the most powerful and wealthy institutions in Australia, with responsibility for significant public funding for education, health, aged care and social security services.

By imposing a new, unorthodox and intricate layer of complaints, defences and exemptions on existing Commonwealth, state and territory legislation, the Bill will further discourage complainants.

This complexity will also lengthen the time and costs of complaints and appeals and lead to very uncertain outcomes in terms of redress.

WEL knows that Australia's Anti-Discrimination Laws already present many difficulties for complainants, who must bear the burden of initiating cases, undergoing conciliation procedures and pursuing further legal avenues.

Most complaints are made through state tribunals.

Under the Religious Discrimination Bill however, a person defending a complaint of discrimination based on religious belief under Clause 42 will now need to do so under Federal jurisdiction, while the complaint will most likely be heard in state tribunals.

This will add to an already complex and daunting system and is likely to further diminish victims' opportunities for redress. Many women will have neither the confidence nor the resources to seek redress.

WEL's submission on the first exposure draft

WEL is very disappointed that, following the consultation and submissions on the first exposure draft, the Attorney General has ignored our concerns and those of Australia's peak legal, medical and community organisations.

Our first submission centred on the exemptions granted to religious statements of belief, the Bill's implications for the large number of women employed by religious charities and the confusing and potentially dangerous clauses on conscientious objection.

In response, the second draft of the Bill 'doubles down'. It:

- *increases* the leeway given to religious statements of belief to override all other anti-discrimination laws,
- *strengthens* powers allowed to religious charities, hospitals and aged care facilities to discriminate in employment and services, and



- *retains* clauses which will make access to reproductive health services even more subject to the luck of the draw and geography and further scramble Australia's unwieldy patchwork of abortion legislation.

In this submission we must therefore reiterate the serious effect the Bill will have on:

- the norms of respect for women's equality and dignity in workplaces and public life established through anti-discrimination legislation and the Workplace Gender Equality Act;
- employment security in the female dominated care and health industries; and
- access to reproductive health care.

Women comprise a significant proportion of Australian faith communities but are not in key leadership roles and most current leaders do not represent their views

Few women from faith communities would have had the opportunity to contribute to the high-level consultations the Government appears to have conducted on this Bill.

WEL knows that that women contribute to faith communities disproportionately, as volunteers and active participants.

We are delighted to see volunteers and interns included in the Bill's definitions of employment and who will therefore come within the scope of the Bill's protections.

With some exceptions, women do not occupy top leadership roles in most established religious organisations and bodies.

In many faith traditions, theological and other discriminatory arguments are advanced to support this exclusion.

The heads of Christian denominations in Australia are overwhelmingly (but not exclusively) male and this is also the case with Muslim, Hindu and Buddhist communities.

Few Australian businesses of equivalent size to some of our major religious organisations retain such a blatant lack of diversity in their management hierarchies.

Religious bodies are exempted from the Sex Discrimination Act and other legislation designed to foster women's participation in the workforce and in management and leadership positions.

Unsurprisingly heads of religious denominations do not always represent the beliefs and practices of their communities, especially on everyday matters like family planning, marriage and divorce and sexuality.



Data from the Pew Centre in the United States suggests that there can be wide disparities between the beliefs and practices of many ordinary faith community members and those propagated by their leaders, especially in relation to reproductive health.³

Few women from faith communities would have had the opportunity to contribute to the high-level consultations with the most influential and politically powerful religious organisations that the Government has conducted on this Bill.

It is hard to understand the Government's haste with this Bill. The Sex Discrimination Act took almost a decade to become law, following Australia's signature of the Convention for the Elimination of all Forms of Discrimination Against Women (CEDAW). Almost all anti-discrimination legislation has been hard fought over a long period.

The Religious Discrimination Bill has been in the public arena for only five months - since 29 August 2019. Both consultation periods have been brief, with the consultation on the second draft taking place over an especially challenging Christmas/ New Year period.

There is a consensus amongst peak legal bodies that this is an extremely complex and, in many ways, unorthodox piece of legislation.

The possibility of serious unforeseen consequences for ordinary members of our community, particularly women workers and those seeking reproductive healthcare, women in isolated communities and migrant women, should give the Australian Government pause on this Bill.

Much more scrutiny is required from a legal perspective, from ordinary members of faith groups and from civil society organisations, who have been largely excluded from formal consultations other than through submissions.

WEL also agrees with the Independent Teachers Union's call to delay introduction of the Bill. A high proportion of teachers are women. The ITU submission details members' experiences of discrimination in religious schools, which are exempt from the provisions of the Sex Discrimination Act. Women and LGBTI+ people's experiences detailed are particularly disturbing, with common stories of divorce, IVF and de facto relationships being given as grounds for dismissal.

We also support the advice to the Government from many organisations that the Bill should not be introduced prior to the December 2020 finalisation of the Australian

³ Pew research Centre August 29 2019 'US Public continues to support legal abortion: Opposes overturning Roe vs Wade'. See <https://www.people-press.org/2019/08/29/u-s-public-continues-to-favor-legal-abortion-oppose-overturning-roe-v-wade/>



Law Reform Commission's (ALRC) Inquiry into the Framework of Religious Exemptions in Anti-Discrimination Legislation.

That the Attorney General and Government have excluded the issue of religion as a protected attribute and the Bill itself from the scope of that Inquiry suggests an unwillingness to ensure the Bill's integrity and workability.

Enacting the Bill in its current form will, as a consequence of that exclusion, significantly compromise the capacity of the ALRC to recommend reforms to existing legislation which would effectively remove unnecessary religious exemptions to prohibitions on discrimination.

Recommendation 1

WEL recommends that the Religious Discrimination Bill be subject to a much broader public consultation before being considered by Parliament. The consultation should include women, rural and regional and migrant communities.

The promise of better protection for religious women betrayed

WEL believes that sections of the draft Bill hold the promise of better protecting those religious women who suffer debilitating discrimination.

Such protections would only be secure if other proposed sections of the Bill endangering women's rights are repealed.

Muslim women are amongst the most exposed to abuse and exclusion, based on dress and assumptions about Islam and women. Charles Sturt University's *Islamophobia in Australia* report, released last November, cites 349 incidents of Islamophobia over 2016 and 2017 involving 'the perpetration of verbal and physical anti-Muslim abuse together with denigration of Muslim identity'.

Almost three-quarters of the incidents were carried out against women, with 96 per cent of non-online female victims wearing a hijab at the time.⁴

Muslim women also have a much lower employment rate than other Australian women, which must partly be attributed to discrimination and its effects.⁵

⁴ Iner, D et al 'Islamophobia in Australia 11 2016-2017' Charles Sturt University [https://www.isra.org.au/site/user-assets/Islamophobia%20in%20Australia%20II%20-%202016-2017%20\(2019%20Publication\)20191126073923.pdf](https://www.isra.org.au/site/user-assets/Islamophobia%20in%20Australia%20II%20-%202016-2017%20(2019%20Publication)20191126073923.pdf)

⁵ 'Fact check: Are more than half of Australia's working age Muslims not in the workforce? ABC ONLINE 6 September 2018 <https://www.abc.net.au/news/2018-06-04/fact-check-muslim-workforce/9800656>



The Bill's clauses which strengthen the capacity of religious charities, hospitals and aged care facilities to discriminate in employment on the basis of religious belief and practice will counter such positive impacts.

Moreover WEL understands that a recent Migrant Council of Australia survey of women from diverse religious backgrounds identified limited access to reproductive health care as their principal concern. Frequent reliance on family or community approved health practitioners can seriously limit choices in family planning and reproductive health care if the doctor is a conscientious objector for religious reasons.

Providing a license for religious belief statements in these professional situations will further exacerbate such difficulties in accessing equal health care for migrant women.

In these respects the Bill is especially cruel. It gives protections to the religious women currently most susceptible to discrimination with one hand, then takes these away with the other.

Recommendation 2

WEL recommends deletion of Clause 42 which potentially licenses disturbing, contemptuous, humiliating, hurtful and derogatory attacks on women based on religious belief.

I permit no woman to teach or to have authority over men; she is to keep silent' (1 Timothy 2:12).

'Men are the maintainers (or in charge) of women. So the good women are obedient.' (Quran)

'A woman is the embodiment of rashness and a mine of vices.' Hindu text

'Blessed are you Lord our God, King of the Universe, who has not made me a woman.' (Orthodox Jewish Prayer)

'You know our religion teaches that abortion is murder'.

'Men can be provoked to violence by wives refusing their duty'.

WEL joins peak legal, medical and community bodies concerned that the Bill's Clause 42: 'Statements of belief do not constitute discrimination', would license discriminatory statements of religious belief against women and other groups.

Harmful, very intimidating, derogatory, contemptuous and humiliating statements made in the guise of religious belief to women employees, colleagues, fellow workers, patients, students in workplaces and the wider public sphere would be exempt.

We see no reason in the nature or origins of religious belief itself to privilege statements which express such beliefs about women and others over all other expressions.



In response to the first exposure draft, numerous submissions from expert legal groups argued that this clause is unprecedented in explicitly overriding state and territory anti-discrimination laws and the Commonwealth's own anti-discrimination legislation, including the Fair Work Act.

By privileging statements of religious belief above all others, Clause 42 disrupts the balance of shared rights and freedoms underpinning the public sphere in modern pluralist democracies, such as Australia.

In its submission to the first exposure draft the Law Council notes that:

'...while freedoms of religion and expression are fundamental human rights and should be protected by law, they should not be protected at the expense of other rights and freedoms. There is also a fundamental right of each individual to respect for their personhood and dignity on the basis of equality. Any limitation on that must be clearly shown to be necessary and proportionate'.⁶

Subsection 2 of Clause 42 is a timid attempt to qualify the extreme implications of Subsection 1. Under this section statements of religious belief that 'harass, threaten, seriously intimidate or vilify,' would still be classified as discriminatory. Degrees of intimidation would be exempt and pardonable.

Religious belief can veil patriarchal and misogynistic attacks on women.

Women can be subjects of very intimidating, bullying and derogatory statements in workplaces and in public life. Under the veil of religious belief their perpetrators will be able to 'intimidate' with impunity.

Traditional Christianity and religious values in general continue to play a role in shaping gendered norms in Australia.

The canons of religious commentary harbour an arsenal of misogynistic statements regarding the subordinate roles of women.

They focus on the need for women to know their place as subordinate to their husbands, to control women's dangerous sexuality, their inferior intellectual and personal qualifications for leadership, and their god given destiny as mothers and carers, amongst other limitations.

They direct their hostility towards women perceived as breaking these boundaries.

⁶ Op cit Law Council of Australia Religious Freedom Bills October 2019
<https://www.ag.gov.au/Consultations/Documents/religious-freedom-bills/submissions/Law%20Council%20of%20Australia.pdf>



On the other hand, a growing number of religious people and faith communities have contemporary views on women's autonomy and equality with men and encourage women's leadership of their denominations.

It is unfortunate that this Bill could add authority to regressive and bigoted elements within some religious groups and undermine the efforts of the many ordinary people of faith who seek to make their communities more open and their leaders more responsive, measured and diverse.

In workplace settings, extreme statements of belief are never made out of context or without purpose. As the Human Rights Commission argued in its first submission, they are often evidence of more systematic discriminatory practices. Exempting such statements could make anti-discrimination cases even more difficult to substantiate.

It is particularly unjust that under the Bill's provisions, the author of such a statement can claim exemption from discrimination but the recipients are without redress where the expression is of a religious belief.

It is especially egregious that the Bill provides for a witness of the same religious belief as the person defending their statement against a complaint of discrimination to assess whether the statement is in fact religious.

The explanatory notes give the rationale that courts are not qualified to adjudicate on religious belief, a view that echoes some submissions from major religious groups.

WEL believes that justice should operate in a secular sphere and on principles and norms arrived at through the law and democratic legislative processes. Religious belief should be no more an exception to this tradition than any other form of belief.

Equally disturbing is the possibility suggested by Explanatory Note 549, that Clause 42 would cede immunity from professional codes and legislative constraints to a medical or health practitioner.

Note 549 gives the example of a statement by a doctor to a transgender patient of their religious belief that 'God made men and women in his image and that gender is therefore binary'. The Note says that this may be a statement of belief if it is made in good faith, but a refusal to provide a service by the doctor to that transgender person because of their belief may constitute discrimination.

The example fails to understand the possibly devastating impact on the patient and the likely impediment to treatment that would result from such an encounter.

Another example would be a doctor who made a statement to a woman seeking advice on abortion that abortion is murder, according to their belief, or that contraception contravenes god's natural law.



Currently such statements would clearly violate the Medical Board of Australia's 'Good Medical Practice: A Code of Conduct for Doctors in Australia'. The Code states that Good Patient Care includes insuring that your personal views do not adversely affect the care of your patient.

There is ample Australian evidence of doctors using statements loosely cast as religious belief to discourage women from seeking abortions.⁷

Similarly psychologists could introduce statements of religious belief into their consultations when patients are both trusting, possibly traumatised and potentially sensitive to suggestion.

Examples might include beliefs relating to the sanctity of marriage when counselling a woman troubled by a relationship separation or counselling on the need to constrain so called provocative sexual activity in the case of a client who has sought help following sexual assault.

Section 8 Clauses 3 and 5 (the 'Israel Folau' clauses)

The Bill will undermine the Government's and business efforts to lead improved participation of women in the workplace and to foster women's business and organisational leadership

Clauses 3 and 5 make it difficult for organisations with revenue of at least \$50 million per annum to impose codes of conduct that prevent an employee from making discriminatory comments outside their ordinary hours of employment.

The second exposure draft clarifies that this protects employees' conduct 'other than in the course of employment'. However, this still means that the efforts of many of Australia's leading companies to foster gender inclusion and a healthy, tolerant and diverse workplace culture could be undermined by employees making statements of faith demeaning to women and minorities via social media and public comment.

Statements of this type could be made by prominent employees in senior management and leadership and would be seen as comment on the policies and achievements of the company or organisation. There appears to be no prohibition on the employees using the company's social media or platforms to make such comment, even if the comment is made in their own time.

⁷ Keogh L, Gillam, L et al 'Conscientious objection to abortion, the law and its implementation in Victoria, Australia: perspectives of abortion service providers' *BMC Medical Ethics* volume 20, Article number: 11 (2019) View <https://bmcmethics.biomedcentral.com/articles/10.1186/s12910-019-0346-1>; See also the Recent report of the South Australian Law Reform Institute 'Abortion A Review of South Australian Law and Practice, Part 17.5 'Possible misuse of conscientious objection'<https://law.adelaide.edu.au/news/list/2019/12/05/decriminalisation-not-deregulation-for-sa-abortion-laws>



This latter point will undoubtedly be tested through the storm of litigation the Bill will ignite should it become law.

WEL understands that many in the Australian business community are very concerned about the possible implications of this clause for their businesses and workforces.

WEL supports the submission from the Australia Industry Group and the Diversity Council of Australia which outline the possible impacts of these and other clauses in the Bill.

The Australian Government has invested a great deal in supporting business leadership and programs that promote women's equality in the workplace. This is another legacy of the Sex Discrimination Act.

The *Workplace Gender Equality Act 2012* aims to improve and promote equality of both women and men in the workplace.

The principal objects of the Act are to:

- promote and improve gender equality (including equal remuneration between women and men) in employment and in the workplace,
- support employers to remove barriers to the full and equal participation of women in the workforce,
- promote, amongst employers, the elimination of discrimination on the basis of gender in relation to employment matters (including in relation to family and caring responsibilities),
- foster workplace consultation between employers and employees on issues concerning gender equality in employment and in the workplace, and
- improve the productivity and competitiveness of Australian business through the advancement of gender equality in employment and in the workplace.

The Workplace Gender Equality Agency is charged with leading programs to implement the Act. Many of its programs, designed to foster women in leadership, management and to promote gender equality, could be undermined by the consequences of these and other clauses in the Bill.

Business leadership is critical for advancing women's equality. The Religious Discrimination Bill will gradually undermine these efforts and set back the cause of normalising women's equal involvement in public and working life.



Recommendation 3

WEL recommends deletion of clauses 8.6 and 8.7: ‘Conditions that are not reasonable relating to conscientious objection by health practitioners.’

The Bill could undermine already tenuous abortion access and care across Australia, especially in rural and regional areas and could limit referrals and transfer of care.

Australia is one of a number of countries to allow health professionals a conscientious objection to a range of medical procedures, especially abortion, but also imposes conditions designed to reduce the impact of the objection on women’s equal right to access to services.

Other countries, like Poland, are closer to the ‘conscience absolutism’ end of the spectrum, meaning doctors neither have an obligation to provide care that conflicts with their conscience nor any obligation to facilitate access to care by another provider.

WEL remains seriously concerned about the potential for the Bill’s clauses on conscientious objection to fragment and undermine reproductive health and abortion access in Australia, particularly in rural and regional areas.

These provisions, if enacted, could potentially over-ride and constrain laws, regulations and policies limiting conscientious objection so that patients’ rights to treatment are protected.

Restriction of the obligation of conscientious objectors to refer patients to other non-objecting practitioners could have tragic consequences for women reliant on one health and medical practitioner, as is often the case in isolated and rural areas.

The obligations of health practitioners are set out in medical and health professional conduct rules, legislation, government policies and directives and in the policies of different health providers.

Peak regulatory and qualifying health bodies carefully develop and implement these codes and policies. They include The Medical Board of Australia, the AMA, The Aboriginal and Torres Strait Islander Health Practice Board of Australia, the Nursing and Midwifery Board of Australia, the Australian Nursing and Midwifery Federation, the Pharmaceutical Society of Australia and RANZCOG and other Colleges.

All respect the right of conscientiously objecting health practitioners to decline to take part in a non-emergency medical procedure (it is not confined to abortion) but balance this with the need for the practitioner to provide the patient with genuine referral to a willing practitioner or service.



The position of professional bodies, including the World Medical Association, the International Federation of Gynaecology and Obstetrics and the Royal Australian and New Zealand College of Obstetricians and Gynaecologists is that conscientious objection is only legitimate in circumstances where it does not impose an unreasonable burden on the patient (in terms of delay or distress or health consequences).

When this condition is met, a professional may declare their conscientious objection and decline to provide a service. They must inform the patient that abortion is an available service and refer the patient to another professional who is able to provide the service.

The United Nations Convention on the Elimination of Discrimination Against Women (CEDAW) - to which Australia is a signatory - has also stated that governments must introduce measures which ensure that women are referred to alternative health services where a health provider conscientiously objects to providing the service.

Clauses 8.6 and 8.7 of the draft Bill could serve to undermine these professional codes and policies. They could instigate contestation of NSW, Victorian, Tasmanian, Queensland and Northern Territory laws and directions stating the obligation of medical / health practitioners with a conscientious objection to abortion to refer patients on to a non-objecting practitioner.

They would also create uncertainty in the ACT, WA and SA which have no legislative provision requiring objecting health practitioners to refer patients to non-objecting practitioners.

If the legislation passes before South Australia concludes reform of its abortion laws, they could restrain inclusion in that law of an obligation to refer, contrary to the recommendation of the South Australian Law Reform Institute.

Any code of conduct, provider policy or directive relating to the obligation to refer could be discriminatory under these clauses, as well as under the provisions of Clause 42 as we discussed earlier.

The Victorian Abortion Law Reform Act (Clause 8), requires medical and health professionals who conscientiously object to abortion to refer their patients to a non-objecting practitioner. Recent research found that while most doctors would not let moral or religious beliefs impact on their patients, all could detail negative experiences related to the prevarications on the obligation to refer, such as is proposed in Section 8 of this Bill.

Negative experiences arose because doctors reported that they knew of colleagues who had:

- directly contravened the law by not referring,
- attempted to make women feel guilty,



- attempted to delay women's access, or
- claimed an objection for reasons other than conscience.

Use or misuse of conscientious objection by Government telephone staff, pharmacists, institutions and political groups was also reported.⁸

The South Australian Institute of Law Reform's recent report on *Abortion: A Review of South Australian Law and Practice* found that:

'There was considerable unease expressed in SALRI's consultation as to the possible misuse of conscientious objection by some medical practitioners and its implications for safe and affordable access to abortion related services or treatment. This proved a consistent theme. A number of medical and health practitioners described to SALRI examples of other medical practitioners seeking to influence or impede treatment and to dissuade a woman, sometimes in strong terms, from undertaking an abortion. This can have particular implications in a regional, rural or remote context'.⁹

Further curtailment of the rights of women to access reproductive health services in favour of the rights of health and medical practitioners to conscientiously object would have very serious implications for access to termination and reproductive health services, especially in rural and regional Australia.

Providing a window where unrestricted conscientious objection prevails over women's right to treatment could lead to a situation such as prevails in Italy, where abortion has been legal since 1978 but where opponents of abortion have exploited loopholes in the regulations so that:

'...objection has become the norm and abortion provision the exception. Interviewees from all sides of the debate noted that abortion providers in Italy experience discrimination, increased workloads, and limited career trajectories. Many said that some clinicians registered as conscientious objectors in order to avoid these burdens, rather than for moral or religious reasons, and referred to this as "convenient" objection'.¹⁰

The text of the Bill also sets a very low bar for conscientious objectors' obligations in an emergency and/ or where the life of the women may be at risk. The Bill states that 'unjustifiable adverse impacts on the health of a person who would otherwise be

⁸ Op cit Keogh, L, Gillam L et al see footnote 6

⁹ Op cit footnote 6

¹⁰ Wendy Chavkin, MD, MPH, Laurel Swerdlow, MPH, and Jocelyn Fifield, 'Regulation of Conscientious Objection to Abortion: An International Comparative Multiple-Case Study' Health and Human Rights. 2017 Jun; 19(1): 55–68.



provided by the health practitioner' would be the basis for a conduct rule being 'non-discriminatory'.

Such vague terminology will fortify extreme opponents of abortion who advocate removal of referral obligations for abortion care from conscientious objectors, even in an emergency, leaving it for the practitioner to decide.

Abortion law is a state responsibility in Australia. States are gradually reforming their laws to reflect modern medical approaches and women's needs. WEL supports national harmonisation of abortion law through a Council of Australian Governments process. Medical regulation is governed under Commonwealth and state legislation and by professional bodies.

In this context WEL believes that the Bill's introduction of new and untested provisions in relation to conscientious objection and qualifying body conduct rules is both dangerous for women and unnecessary. It will further burden reproductive health providers with additional risk and uncertain compliance obligations (Part 2 Section 8 Clause 4 and Section 16).

Recommendation 4

WEL recommends deletion of the clauses which potentially permit religious charities (part 2 section 9 clause 11.5), religious hospitals and aged care bodies (32.8) to prefer all employees to be employed on the basis of faith.

The Bill allows Religious Charities, Health and Aged Care providers to actively discriminate on the basis of faith through employment.

It is ironic that the Bill's clauses which strengthen exemptions from anti-discrimination law for religious charities, hospitals and aged care facilities could rebound on the already precarious employment security of women whose religious backgrounds differ from the religious charity, hospital or aged care facility which employs them.

Over 90% of aged care workers are women and at least thirty five percent from diverse religious and cultural backgrounds.

Nurses and other health professions with a high proportion of women will also be profoundly affected by these increased powers.

We know unions covering employees in these sectors are concerned about the potential impact of these clauses on thousands of casual, part time, low paid and some professional employees.

They would greatly strengthen 'exceptions' from discrimination law permitted for religious charities, religious hospitals and aged care facilities.



Some religious charities, such as St Vincent de Paul quickly dissociated themselves from these proposals in the second draft of the Bill.

Taken as a whole, most employees in the health and aged care industries are women.

Aged care charities employ around 171,863 paid staff.

The high proportion of female aged care staff from culturally and religiously diverse backgrounds in the industry will be increasing as the new visa granted to Aged Care operators to recruit overseas workers with diverse language backgrounds comes into effect.

Taken to an extreme, these clauses could exempt potentially discriminatory covert or overt faith tests as conditions of employment for these women.

Largely female applicants in the charity, health and aged care sectors will be asked to disclose their religious beliefs and practices and regularly reaffirm these.

Employees' private lives are likely to be monitored, especially in small and closed religious communities, where rumours spread quickly.

Women who contravene religious codes of sexual conduct by living in de facto and /or lesbian relationships, seeking IVF, seeking reproductive health care from a local pharmacist or doctor, being single mothers and other such fodder for local scandals could be especially susceptible to interrogation and dismissal. Even immodest dress that may offend religious sensibilities could provoke reprimand or dismissal.

Some religious hospitals in the US already use faith tests.

Nurses, midwives, pharmacists and ordinary care workers living in de facto relationships, single women pregnant and with children and of course LGBTI+ people are all vulnerable as employees who may infringe '*conduct that a person of the same religion could reasonably consider to be in accordance with the doctrines, tenets, beliefs or teachings of that religion*'¹¹ (Religious Discrimination Bill 2019, Exposure Draft 2 Part 2, Section 9, Clause 11).

We note that the AHRC'S observations in their submission on the first exposure draft still apply:

'Charities and other religious organisations have a significant role in public life in Australia... They employ a very large number of people. Many receive a significant amount of funding to support them in carrying out their activities. The extent to which such organisations are permitted to engage in conduct that would otherwise be unlawful discrimination has an impact on the lives of many Australians' (Australian

¹¹ Religious Discrimination Bill 2019, Exposure Draft 2 Part 2, Section 9, Clause 11



Human Rights Commission, Religious Freedom Bills, September 2019 paragraph 74, page 20).¹²

WEL supports the submissions from the Australian Nurses and Midwives Federation and the ACTU which we understand elaborate on our concerns in more detail.

¹² 'Human Rights Commission Submission to the Attorney General's Department' 27 September 2019 <https://www.ag.gov.au/Consultations/Documents/religious-freedom-bills/submissions/Australian%20Human%20Rights%20Commission.pdf> : p 20 Para 74.