

## POSITION SUMMARY

# Reforming the *Equal Opportunity Act 2010 (Vic)*

### THORNE HARBOUR HEALTH'S POSITION

The *Equal Opportunity Act 2010 (Vic)* (EOA) protects Victorians from discrimination in the workplace, education, accommodation, clubs, sport, and the provision of goods and services, but it needs to be reformed and modernised to respond to discrimination experienced by LGBTIQ+ Victorians.

### RECOMMENDATIONS

1. Repeal sections 82, 83 and 84 of the EOA.
2. Failing the repeal of section 82, repeal section 82(2) and narrow section 82(1) to strictly qualify and limit exceptions for religious bodies and individuals to the following:
  - a. the ordination or appointment of priests, ministers or members of any religious order;
  - b. the training or education of people seeking ordination or appointment as priests, ministers or members of a religious order; or
  - c. the employment of people to positions that inherently require conformity with the doctrines of the religion.
3. Include 'HIV or AIDS status' and 'irrelevant criminal history' as protected attributes in section 6 of the EOA.
4. Extend discrimination protections to people working in the sex work industry.
5. Reform section 42 of the EOA so that the exception for standards of dress and behaviour does not apply to gender identity or sex.
6. Restore the powers of the Victorian Equal Opportunity and Human Rights Council to investigate systemic discrimination, conduct public inquiries, issue compliance notices and enter into enforceable undertakings.

### IMPACT

- Establishes and increases the legal protections for individuals that experience discrimination.
- Increases awareness and transparency of discriminatory practices.

### BACKGROUND

- LGBTIQ+ Victorians experience significant and ongoing discrimination, which increases the risk of adverse health and wellbeing outcomes.
- Organisations operated by religious bodies, including schools, workplaces and social services, have exemptions under the EOA that allow them to discriminate against people based on what are otherwise protected attributes.
- The Victorian Equal Opportunity and Human Rights Council's powers to enforce the EOA were removed, and now undue responsibility is placed on the individual to right discriminatory wrongs.

EVIDENCE BRIEF

## Reforming the *Equal Opportunity Act 2010 (Vic)*

### KEY POINTS

- LGBTIQ+ Victorians experience discrimination, which negatively impacts their health and wellbeing.
- The EOA currently fails to adequately protect LGBTIQ+ Victorians from discrimination.
- Exceptions for religious bodies under the EOA hide and entrench the discrimination experienced by LGBTIQ+ Victorians.
- The EOA places an undue burden on the individual to right discriminatory wrongs.

### BACKGROUND

It is well established that LGBTIQ+ people experience discrimination. La Trobe University's *Private Lives 3* and *Writing Themselves In 4* surveys,<sup>1</sup> numerous media articles,<sup>2</sup> peer-reviewed journals,<sup>3</sup> case-law,<sup>4</sup> and the Victorian Government<sup>5</sup> have documented LGBTIQ+ experiences of discrimination. These experiences of discrimination increase the risk of poor health and wellbeing.<sup>6</sup> For example, LGBTIQ+ people experience higher rates of depression, anxiety, self-harm and suicidal ideation than the general population.<sup>7</sup>

### CURRENT PRACTICE

#### **LGBTIQ+ Victorians are not adequately protected from religious discrimination**

Under sections 82, 83 and 84 of the EOA, religious bodies and religious individuals have broad exceptions that enable discrimination against people based on what would otherwise be protected attributes. Discrimination is allowed to occur where it either conforms with the doctrines, beliefs or principles of the religion,<sup>8</sup> or "is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion."<sup>9</sup> Examples of conduct that these exemptions permit include:

- schools and charities operated by religious bodies can terminate someone's employment because they are in a same-sex relationship;
- schools run by religious bodies can expel or refuse to enrol same-sex attracted or gender diverse young people, or students from rainbow families; and
- charitable entities operated by religious bodies, such as family violence and housing services, can discriminate against staff and clients based on their LGBTQ+ status.

<sup>1</sup> Adam Hill et al., *Private Lives 3: The health and wellbeing of LGBTIQ people in Australia* (Report, 2020) ARCSHS Monograph Series No. 122. Melbourne, Australia: Australian Research Centre in Sex, Health and Society, La Trobe University; Adam Hill et al, *Writing Themselves In 4: The health and wellbeing of LGBTQA+ young people in Australia* (Report 2021) National report, monograph series number 124. Melbourne: Australian Research Centre in Sex, Health and Society, La Trobe University.

<sup>2</sup> James Elton-Pym, 'Gay teachers at Muslim, Catholic schools describe pressure to stay quiet', *SBS News* (online), 16 October 2018. <<https://www.sbs.com.au/news/gay-teachers-at-muslim-catholic-schools-describe-pressure-to-stay-quiet>>; Lisa Martin, 'Christian teacher says school forced her to quit for supporting marriage equality', *The Guardian* (online), 16 September 2019. <<https://www.theguardian.com/world/2019/sep/16/christian-teacher-says-school-forced-her-to-quit-for-supporting-marriage-equality>>

<sup>3</sup> Tonya D Callaghan and Lisa van Leent, 'Homophobia in Catholic Schools: An Exploration of Teachers' Rights and Experiences in Canada and Australia.' (2019) 22(3) *Journal of Catholic Education* 36; Tania Ferfolja, 'Institutional Silence: Experiences of Australian Lesbian Teachers Working in Catholic High Schools' (2005) 2(3) *Journal of Gay & Lesbian Issues in Education* 51.

<sup>4</sup> *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 308 ALR 615.

<sup>5</sup> Victorian Agency for Health Information, *The health and wellbeing of the lesbian, gay, bisexual, transgender, intersex and queer population in Victoria: Findings from the Victorian Population Health Survey 2017* (Report, 2020) <<https://www.bettersafecare.vic.gov.au/publications/vphs2017-lgbtiq>>.

<sup>6</sup> Jed Horner, 'Expanding the Gaze: LGBTI People, Discrimination and Disadvantage in Australia' in Andrea Durbach, Brendan Edgeworth and Vicki Sentas, *Law and Poverty in Australia: 40 Years after the Poverty Commission* (Federation Press, 2017) 92; Perales, Francisco, 'The Health and Wellbeing of Australian Lesbian, Gay and Bisexual People: A Systematic Assessment Using a Longitudinal National Sample' (2019) 43(3) *Australian and New Zealand Journal of Public Health* 281.

<sup>7</sup> National LGBTI Health Alliance, *Snapshot of mental health and suicide prevention statistics for LGBTI people*, (Report, 2020) <[https://d3n8a8pro7vnm.cloudfront.net/lgbtihealth/pages/240/attachments/original/1595492235/2020-Snapshot\\_mental\\_health\\_%281%29.pdf?1595492235](https://d3n8a8pro7vnm.cloudfront.net/lgbtihealth/pages/240/attachments/original/1595492235/2020-Snapshot_mental_health_%281%29.pdf?1595492235)>; Victorian Agency for Health Information, *The health and wellbeing of the lesbian, gay, bisexual, transgender, intersex and queer population in Victoria: Findings from the Victorian Population Health Survey 2017* (Report, 2020) <<https://www.bettersafecare.vic.gov.au/publications/vphs2017-lgbtiq>>.

<sup>8</sup> *Equal Opportunity Act 2010 (Vic)* ss 82(2)(a), 83(2)(a), 84.

<sup>9</sup> *Equal Opportunity Act 2010 (Vic)* ss 82(2)(b), 83(2)(b).

Discrimination is unlawful because it is harmful, and it is no less harmful when done by a religious body or individual. In the school setting, religious exceptions create an environment that teaches students that homophobia, biphobia and transphobia are legal and socially acceptable. Removing these exceptions is about creating a society in which tolerance and equality are prioritised.<sup>10</sup>

### **Religious exceptionalism is unjustifiable**

Religious exceptions are contrary to the objectives outlined in the EOA,<sup>11</sup> and are inconsistent with the principle of non-discrimination in the *Convention on the Rights of the Child*.<sup>12</sup>

Automatic exceptions for religious bodies and individuals entrench and hide discrimination from public scrutiny. Like all other bodies, religious bodies are able to apply for an exception to the EOA through the Victorian Civil and Administrative Tribunal.<sup>13</sup> This process would increase transparency, identify those who do not use the exceptions and allow individuals to make informed decisions.<sup>14</sup>

As governments increasingly outsource social service provision to the private sector, including religious bodies,<sup>15</sup> this increases the likelihood of discrimination occurring. At a minimum, any religious body that receives public funding, which includes money from LGBTIQ+ tax-payers, should be subject to the same laws as everyone else.

Accordingly, automatic religious exceptions should be fully repealed. However, if permanent statutory exceptions are to remain, then section 82(2) should be repealed, and section 82(1) narrowed such that the exceptions are strictly qualified and limited to:

- the ordination or appointment of priests, ministers or members of any religious order;
- the training or education of people seeking ordination or appointment as priests, ministers or members of a religious order; or
- the employment of people to positions that inherently require conformity with the doctrines of the religion.

If the EOA is merged with the *Racial and Religious Tolerance Act 2001* (Vic), the anti-vilification provisions should not be limited to certain areas of public life, as outlined in Thorne Harbour Health's submission to the Legislative Assembly's Legal and Social Issues Committee inquiry into anti-vilification protections.<sup>16</sup> The *Anti-Discrimination Act 1998* (Tas) is a well-worded example of anti-discrimination and anti-vilification provisions within the same statute.<sup>17</sup>

### **Clarify protected attributes to protect people with HIV or AIDS, and people with an irrelevant criminal record.**

People living with HIV or AIDS can experience stigma and discrimination in areas such as employment, education and social service provision. Therefore, consistent with the *Discrimination Act 1991* (ACT), 'HIV or AIDS status' should be a protected attribute in the EOA.

An irrelevant criminal record can unfairly disadvantage an individual during job recruitment and can have long-term consequences for career development.<sup>18</sup> Thus, 'irrelevant criminal record' should be included as a protected attribute in section 6 of the EOA, similar to the *Discrimination Act 1991* (ACT).

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<sup>10</sup> Joshua Badge, 'Religious freedom is not a zero-sum game', *Eureka Street* (online), 18 October 2018.

<<https://www.eurekastreet.com.au/article/religious-freedom-is-not-a-zero-sum-game>>.

<sup>11</sup> *Equal Opportunity Act 2010* (Vic) s 3(a).

<sup>12</sup> *Convention on the Rights of the Child* 1989 (United Nations) art 2.

<sup>13</sup> *Equal Opportunity Act 2010* (Vic) s 89.

<sup>14</sup> Renae Barker, 'Religions should be required to be transparent in their use of exemptions in anti-discrimination laws' (2019) 44(3) *Alternative Law Journal* 191-196.

<sup>15</sup> Gallet, Wilma, 'Marketized Employment Services The Impact on Christian-Based Service Providers and Their Clients' (2016) 29(5) *International Journal of Public Sector Management* 426; Greg Walsh, 'An opt-in approach to regulating the employment decisions of religious schools' (2014) 14 *Macquarie Law Journal*.

<sup>16</sup> Thorne Harbour Health, *Submission to the Victorian Parliament's Legal and Social Issues Committee: Inquiry into anti-vilification protections* (Submission, 2019) <[https://cdn.thorneharbour.org/media/documents/SUB\\_Thorne\\_Harbour\\_vilification\\_final\\_201219.pdf](https://cdn.thorneharbour.org/media/documents/SUB_Thorne_Harbour_vilification_final_201219.pdf)>.

<sup>17</sup> *Anti-Discrimination Act 1998* (Tas) s 17(1).

<sup>18</sup> Heydon, Georgina and Bronwyn Naylor, 'Criminal Record Checking and Employment: The Importance of Policy and Proximity' (2018) 51(3) *Australian & New Zealand Journal of Criminology* 372.

### ***Protect sex workers and related industry workers***

Many sex workers come from LGBTIQ+ communities.<sup>19</sup> People working in the sex work industry can experience stigma and discrimination based on their occupation.<sup>20</sup> Currently, the EOA protects sex workers that operate within Victoria's licensing system under the protected attribute of 'lawful sexual activity'.<sup>21</sup> However, this does not protect sex workers that operate outside of the licensing system. Sex work decriminalisation would broaden this protection. This includes sex workers and individuals that associate with sex workers, such as cleaners and affiliated staff.<sup>22</sup>

Section 62 of the EOA allows accommodation providers to refuse accommodation to a sex worker if they intend to use it for work.<sup>23</sup> While accommodation providers should be able to exercise control over their services, this blanket exception, in expressly permitting discrimination against sex workers, does not appropriately balance the rights of the sex worker with the rights of the accommodation provider. Instead, accommodation providers should be required to apply for an exception to VCAT and thus not punitively restrict sex workers.

### ***Protect gender diverse students***

Section 42 of the EOA provides an exception for an educational authority to set and enforce reasonable standards of dress. Educational authorities can broadly interpret this section such that it disadvantages students who are gender diverse. For example, Victoria Legal Aid reported a case in which a young transgender student was not permitted to wear a school uniform that affirmed their gender.<sup>24</sup> This discrimination caused significant distress; however, the school relied on the exception under section 42. Students should be able to wear uniforms that affirm and are consistent with their gender identity. Section 42 should be reformed so that the exception for standards of dress and behaviour do not apply to gender identity or sex. This should be made clear within section 42 of the EOA.

### ***Ensure a systemic response to a systemic issue by empowering the VEOHRC***

In the same way that statutory entities enforce compliance with privacy, consumer protection and work practices,<sup>25</sup> so too should the Victorian Equal Opportunity and Human Rights Council (VEOHRC) be able to enforce anti-discrimination laws.

Evidence suggests that the mere existence of the powers to enforce anti-discrimination laws increases compliance.<sup>26</sup> Relying solely on individuals to drive enforcement is ineffective due to the many barriers they experience, such as being currently employed where discrimination occurs, psychological vulnerability, and legal costs. Restoring VEOHRC's powers would also protect witnesses who fear victimisation in giving evidence. Part 9 of the EOA, as originally enacted in 2010 should replace the current part 9 to restore the power of the VEOHRC to investigate systemic discrimination, conduct public inquiries, issue compliance notices and enter into enforceable undertakings.<sup>27</sup>

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<sup>19</sup> 64% of sex workers surveyed in NSW identified as other than "heterosexual/straight": Roberta Perkins, 'Working Girls: Prostitutes, Their Life and Social Control' Australian Institute of Criminology (1991). In research conducted by Vixen Collective in late 2017/early 2018, 72% of sex workers surveyed (in a national survey) identified as other than heterosexual, with 4.7% of participants being trans and 11% non-binary. Research in the United Kingdom has produced similar results, with 66% of those surveyed identified as other than straight: Nicola Smith and Sarah Kingston, 'Policy-Relevant Report: Statistics on Sex Work in the UK' University of Birmingham.

<sup>20</sup> Larissa Sandy, Joni Meenagh and Petrea Nes-ladicola, *Transitioning Programs for Sex Workers: Evidence Review* (Report, 2018) <[http://www.socialglobal.org.au/cms/wp-content/uploads/2019/05/Evidence%20Review%20Report%20Transitioning%20Programs%20\(1\).pdf](http://www.socialglobal.org.au/cms/wp-content/uploads/2019/05/Evidence%20Review%20Report%20Transitioning%20Programs%20(1).pdf)>.

<sup>21</sup> *Equal Opportunity Act 2010* (Vic) s 6.

<sup>22</sup> *Equal Opportunity Act 2010* (Vic) s 6(q).

<sup>23</sup> *Equal Opportunity Act 2010* (Vic) s 62.

<sup>24</sup> Victorian Legal Aid, *Proposed Amendments to the Equal Opportunity Act 2010* (Vic) (Report 10 April 2015) 6.

<sup>25</sup> For example, the Victorian WorkCover Authority prosecutes breaches of the *Occupational Health & Safety Act 2004* (Vic).

<sup>26</sup> Dominique Allen, 'Strategic Enforcement of Anti-Discrimination Law: A New Role for Australia's Equality Commissions' (2010) 36 *Monash University Law Review* 28.

<sup>27</sup> *Equal Opportunity Act 2010* (Vic) Part 9 Version 001 (as of 28/04/2010).

## CONCLUSION

A cohesive society recognises and seeks to change the systemic factors that result in discrimination. This requires understanding how some people are marginalised or disadvantaged and then allowing those people to seek an equal footing. A comprehensive, inclusive and modernised *Equal Opportunity Act 2010* (Vic) following the recommendations below would provide an equal footing.

## RECOMMENDATIONS

1. Repeal sections 82, 83 and 84 of the EOA.
2. Failing the repeal of section 82, repeal section 82(2) and narrow section 82(1) to strictly qualify and limit exceptions for religious bodies and individuals to the following:
  - a. the ordination or appointment of priests, ministers or members of any religious order;
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