

# **Submission**

on the

## **Exceptions Review of the Equal Opportunity Act 1995**

to the

### **Department of Justice**

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## 1. Introduction

The purpose of the Exceptions Review is to identify whether any of the exceptions and exemptions in the Equal Opportunity Act 1995 (Vic) limit the enjoyment of human rights protected and promoted by the Charter of Rights and Responsibilities Act 2006 (Vic).

A consultation paper was issued in February 2008 by the Department of Justice. Public submissions have been sought and are due by 18 April 2008.

## 2. Religious exemptions

The Equal Opportunity Act 1995 provides significant exceptions for certain acts of religious bodies (Section 75) and religious schools (Section 76) from the prohibitions on discrimination set out in Part 3 of the Act.

Section 77 provides an exception for all persons from the prohibitions in Part 3 “if the discrimination is necessary” for a “person to comply with the person's genuine religious beliefs or principles.”

The question being considered is whether these exceptions are compatible with the Charter of Rights and Responsibilities Act 2006.

The Charter provides (Section 8) that: (2) Every person has the right to enjoy his or her human rights without discrimination; and (3) Every person ... has the right to equal and effective protection against discrimination.

Section 8 (3) could be violated if an exception singled out a class of persons and allowed discrimination against that class specifically while protecting other classes of persons from discrimination. It is not necessarily violated if, for well-founded reasons, discrimination is allowed against all classes of persons equally.

The exceptions in Sections 75, 76 and 77 of the Equal Opportunity Act 1995 are well-founded as they are firmly grounded in the right to freedom of thought, conscience, religion and belief of the person or persons discriminating. They are not targeted unequally at any person or class of persons that could be the subject of such discrimination.

Therefore nothing in Sections 75, 76 and 77 of the Equal Opportunity Act 1995 provides for unequal protection of persons against discrimination. Each of these sections exempt, in certain circumstances, the body or person discriminating from the operation of Part 3 of the Act. This exemption allows the body or person, in the relevant circumstances, to discriminate with complete freedom against any person or class of persons.

For example, one church may refuse, in accordance with its doctrine, not to ordain homosexuals to its ministry. Another church, with a different doctrine on homosexual behaviour, may refuse to ordain anyone who disapproves of homosexual behaviour. Nothing in the Act favours one of these churches over the other, rightly leaving each church free to act in accordance with its doctrine.

Any suggestion that religious bodies or religious schools should be forced to act against their own religious beliefs or principles should be rejected as an unwarranted attack on the right to freedom of religion.

Similarly, individual persons must remain free to act in accord with their own “genuine religious beliefs or principles” as provided for by Section 77 of the Equal Opportunity Act 1995.

Indeed the right to freedom of thought, conscience, religion and belief is guaranteed by Section 14 of the Charter of Rights and Responsibilities Act 2006.

The terms of this right are very broad, and rightly so.

“(1) Every person has the right to freedom of thought, conscience, religion and belief, including— (a) the freedom to have or to adopt a religion or belief of his or her choice; and (b) the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private.

“(2) A person must not be coerced or restrained in a way that limits his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.”

The right to freedom of thought, conscience, religion and belief is not limited to acts of worship as part of a community. It includes “observance” and “practice”. For Christianity, as for all major world religions, religion involves extensive beliefs about ethical behaviour – how to behave towards others in all aspects of life. This naturally includes the behaviour of individual believers not just the activities of religious bodies.

Any suppression or limitation of the current exceptions in Sections 75, 76 or 77 of the Equal Opportunity Act 1995 would necessarily involve a violation of the right to freedom of thought, conscience, religion and belief guaranteed by the Charter.

Section 38 of the Charter of Rights and Responsibilities Act 2006 specifically addresses the issue of a possible conflict in the duties of a public authority – such as the Victorian Equal Opportunity and Human Rights Commission – towards upholding human rights in general and the rights of religious bodies to act in accordance with its religious doctrines, beliefs or principles.

It provides as follows:

“(1) Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.

“(4) Sub-section (1) does not require a public authority to act in a way, or make a decision, that has the effect of impeding or preventing a religious body (including itself in the case of a public authority that is a religious body) from acting in conformity with the religious doctrines, beliefs or principles in accordance with which the religious body operates.

“(5) In this section "religious body" means— (a) a body established for a religious purpose; or (b) an entity that establishes, or directs, controls or administers, an educational or other charitable entity that is intended to be, and is, conducted in accordance with religious doctrines, beliefs or principles.”

In the light of these provisions it would be a violation of the Charter for the Department of Justice to recommend any removal or limitation of the exceptions for religious bodies and religious schools contained in Section 76 and 77 of the Equal Opportunity Act 1995.

***Recommendation 1:***

***The exemptions in the Victorian Equal Opportunity Act 1995***

***(a) for religious bodies (s 75),***

***(b) for religious schools (s 76) and***

*(c) for all persons to act in accordance with their own “genuine religious beliefs or principles” (s 77)*

*should be retained without amendment, since they are each necessary to ensure that the Act complies with the right to freedom of thought, conscience, religion and belief guaranteed by the Charter of Rights and Responsibilities 2006.*

### **3. Other exceptions and exemptions**

Several of the other exceptions and exemptions contained in the Equal Opportunity Act 1995 also engage and protect certain rights guaranteed by the Charter of Rights and Responsibilities. In particular, Section 16 (2) of the Charter of Rights and Responsibilities Act 2006 provides that “Every person has the right to freedom of association with others”.

The right to freedom of association includes the right not to associate with others.

This was made explicit in the Universal Declaration of Human Rights<sup>1</sup> in which Article 20 (2) provides that “No one may be compelled to belong to an association”. The International Covenant on Civil and Political Rights, on which Victoria’s Charter of Rights and Responsibilities is based, provides (Article 22(1)) that “Everyone shall have the right to freedom of association with others”. Commentators have noted that “this implies the right to decide whether to associate and also the freedom not to associate”.<sup>2</sup>

The Equal Opportunity Act 1995 by prohibiting persons from discriminating against others in relation to employment, the establishment of a firm, industrial organisations, the provision of goods and services, the disposal of land, the provision of accommodation and the establishment and conduct of clubs places substantive limits on the right to freedom of association. In all these cases where discrimination is prohibited, persons are being denied the right to decide not to associate in some particular way with certain other persons.

As the right to freedom of association is a fundamental human right guaranteed by the Charter of Rights and Responsibilities the onus is on proponents of anti-discrimination law to justify any violation of this right.

Conversely, all the existing exceptions and exemptions to the discrimination provisions of the Equal Opportunity Act 1995 clearly, as far as they reach, serve to protect the right to freedom of association.

For example, Section 30 of the Act provides that “A person who intends to establish a firm comprising 5 or more partners must not discriminate against another person in the terms on which the other person is invited to become a partner.” This provision has a built-in exception for persons establishing a firm with 4 or fewer partners.

Establishing a firm with other persons clearly involves association with those persons. It is not apparent why the State should be derogating from the right to freedom of association of persons who intend to establish firms with 5 or more partners by limiting their right to choose whom to invite to associate with them as a partner in the firm. Abolishing or narrowing the built-in exception for firms with 4 or fewer partners would clearly further impede the right to freedom of association.

Similar observations could be made about all the exceptions and exemptions which apply to employment, industrial organisations, the provision of goods and services, the disposal of land, the provision of accommodation and the establishment and conduct of clubs.

***Recommendation 2:***

***The various exceptions and exemptions to the prohibitions on discrimination in relation to:***

***(a) employment,***

***(b) the establishment of a firm,***

***(c) industrial organisations,***

***(d) the provision of goods and services,***

***(e) the disposal of land,***

***(f) the provision of accommodation and***

***(g) the establishment and conduct of clubs***

***should be retained, because they operate to limit the impeding of the right to freedom of association guaranteed by the Charter of Rights and Responsibilities Act 2006.***

## **4. Care of children**

Section 17 (2) of the Charter of Rights and Responsibilities Act 2006 provides that: “Every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child.”

Sections 25, 45 and 53 of the Equal Opportunity Act 1995 each provide exceptions from the prohibitions of discrimination in that Act that are aimed at protecting the best interest of the child.

Section 25 does so in relation to employment which “involves the care, instruction or supervision of children”. It allows employers to discriminate in order “to protect the physical, psychological or emotional well-being of the children”. The removal or limitation of this exception would undermine the right of the child to protection guaranteed by the Charter.

Section 45 provides that in relation to the provision of goods and services a person may require a child to be supervised by an adult if there “is a reasonable risk that, if unaccompanied or unsupervised, the child may— (a) cause a disruption; (b) endanger himself or herself or any other person.” Removing this provision could lead to obvious endangerment of children in contravention of their right to protection under the Charter.

Section 53 provides that: “A person may refuse to provide accommodation to a child or a person with a child if the premises, because of their design or location, are unsuitable or inappropriate for occupation by a child.” Removing the exception would require persons to provide unsuitable or inappropriate accommodation to a child or to a person with a child. This would clearly violate children’s right to the protection of their “physical, psychological or emotional well-being” guaranteed by the Charter.

***Recommendation 3:***

***As the exceptions contained in Section 25, 45 and 53 of the Equal Opportunity Act 1995 serve to protect the rights of children guaranteed by Section 17 (2) of the Charter of Rights and Responsibilities Act 2006, they should be retained.***

## 5. Commercial sexual activity

Section 57 of the Equal Opportunity Act 1995 provides that “A person may refuse to provide accommodation to another person if the other person intends to use the accommodation for, or in connection with, a lawful sexual activity on a commercial basis.”

It hardly seems necessary to defend this exception. To remove it would result in persons being forced to be collaborators in prostitution against their will.

However, this is the only explicit exception relating to commercial sexual activity in the Equal Opportunity Act.

The definition of “lawful sexual activity” in Section 4 of the Equal Opportunity Act is so broad as to include commercial sexual activity provided it is lawful. Prostitution is lawful in Victoria if carried out in accordance with the provisions of the Prostitution Control Act 1994.

Section 6 (d) of the Equal Opportunity Act specifies “lawful sexual activity” as one of “the attributes on the basis of which discrimination is prohibited in the areas of activity set out in Part 3” of the Act. This means that any discrimination based on a person’s involvement in prostitution is illegal in relation to employment, the establishment of a firm, industrial organisations, the provision of goods and services, the disposal of land and the establishment and conduct of clubs.

It seems unreasonable to deny persons the right to refuse to employ in another capacity a person who is currently working as a prostitute. It seems equally unreasonable to deny persons establishing a firm with more than 5 partners the right not to invite a brothel owner to be a partner.

Denying employers and persons establishing firms the freedom not to associate in these ways with a person engaged in commercial sexual activity is a particularly egregious violation of the right to freedom of association guaranteed under Section 16 (2) of the Charter of Rights and Responsibilities. The best way to ensure that the Equal Opportunity Act 1995 does not force people to associate with persons engaged in commercial sexual activity would be to amend the definition of “lawful sexual activity” to exclude “commercial sexual activity”.

### ***Recommendation 4:***

***The definition of “lawful sexual activity” in Section 4 of the Equal Opportunity Act 1995 should be amended by adding to the existing definition the words “but does not include sexual activity engaged in on a commercial basis”.***

## 6. Endnotes

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1. [www.un.org/Overview/rights.html](http://www.un.org/Overview/rights.html).
2. Detrick, S., *A commentary on the United Nations Convention on the Rights of the Child*, Martinus Nijhoff, 1999, p 261 citing Karl Joseph Partsch, “Freedom of Conscience and Expression, Political Freedoms,” in Louis Henkin (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981), p 235.