

18 April 2008

The Exceptions Review
Department of Justice
Level 24, 121 Exhibition Street
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Dear Sir/Madam

Thank you for the opportunity to make a submission in respect of the review of the exceptions and exemptions (*the Exceptions Review*) in the *Equal Opportunity Act 1995* (“the Act”), in particular to ensure their compatibility with the *Charter of Rights and Responsibilities Act 2006* (“the Charter”).

This response is made on behalf of the Catholic Church in Victoria, in my capacity as Archbishop of the Catholic Archdiocese of Melbourne and the Metropolitan of the Province of Melbourne (the State of Victoria) and on behalf of the Bishops of the Diocese of Ballarat, the Diocese of Sandhurst and the Diocese of Sale.

The mission of the Church in the Catholic Archdiocese of Melbourne and the Dioceses of Ballarat, Sandhurst and Sale encompasses a wide range of activities in areas such as education, health, aged care and social welfare including the following not-for-profit institutions:

- 482 schools (378 primary, 87 secondary, 15 combined and 2 special schools) in Victoria with 326 being in the Archdiocese (253 primary, 60 secondary, 11 combined and 2 special schools);
- 11 hospitals in Victoria with 8 being in the Archdiocese;
- 40 nursing and convalescence homes in Victoria, with 36 of these being in the Archdiocese;
- 12 children’s welfare institutions in Victoria all being in the Archdiocese;
- 345 parishes in Victoria, of which 226 are part of the Archdiocese.

In addition to the above, there is a range of organizations that are conducted by and operate under the direction or patronage of the Archdiocese, including the Australian Catholic University (Victorian Campuses), Catholic Theological College, Yarra Theological Union, St Vincent De Paul Society, various chaplaincies and local or networked support services.

The conduct of the various activities of the Church is subject to and in accordance with its universal constitution, the Code of Canon Law and the conventions and norms of the Archdiocese and the Dioceses in Victoria. Under this Code, activities conducted under the auspices of the Church can only be for Church purposes while observing at all times its beliefs, principles and doctrines. The Bishops and I have an unconditional and absolute obligation, both personally and on behalf of the Church, to ensure that the religious beliefs, doctrines and principles of the Church are observed in all Church activities. The same responsibilities apply also, according to their roles in education, health or welfare, to clerics and other practitioners who operate throughout the Archdiocese or Dioceses exercising their specific vocations under the Archbishop's or Bishop's authority, approval and direction.

Consequently, as Bishops we have an obligation to represent the Church in relation to any proposed legislative enactments which appear to be inconsistent with the basic right of freedom of expression and observance and holding of a religious belief.

In this submission, attention will be confined to the exceptions and exemptions in respect of the practice of religion and the conduct of religious bodies. As it stands at present, the Act includes: (a) exemptions in relation to religious bodies (s.75); (b) exemptions in relation to religious schools (s.76); and (c) exemptions for discrimination which is necessary to comply with a person's genuine religious beliefs or principles (s.77).

The exemptions in respect of religious bodies, schools, beliefs or principles were reviewed in 1995. In his second reading speech, the then Attorney-General (Mr Haddon Storey) said in respect of the exemption for discrimination which is necessary to comply with a person's religious beliefs or principles:

“It aims to strike a balance between two very important and sometimes conflicting rights – the right of freedom of religion and the right to be free from discrimination

Equal opportunity legislation may sometimes compel individuals to change their conduct and practices in order to ensure that discrimination which may be harmful to others does not occur. However, the government recognises that it is not acceptable to compel a person to act in such a way as would compromise his or her genuinely held religious beliefs. It should be emphasised that religious beliefs must be absolutely genuine in order to qualify for the exemption ...”

More recently, the Charter similarly emphasises the significance of freedom of thought, conscience, religion and belief; see s.14.

Section 38 of the Charter subjects the conduct of public authorities to the norms prescribed elsewhere in the Charter. In particular, the section makes it 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.

The section resolves any possible conflict with respect to the conduct of religious bodies. Section 38 relevantly provides:

- “(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.”

These provisions bring together the concepts and employ the wording used in ss.75-77 of the Act. However, by reason of the different drafting approaches in the Act and the Charter, the provisions of the Act might be construed as having a different operation to that intended by the Charter. It would be desirable if the Act and the Charter were to be harmonised to avoid that result. This is especially so in light of s.32 of the Charter, which requires all Victorian statutes, including ss.75-77, to be interpreted in a way that is compatible with human rights (and, it must follow, the Charter), so far as it is possible to do so consistently with the purpose of the relevant statute.

Accordingly, the exemptions in the Act should be brought into alignment with the provisions in the Charter. To that end, certain amendments to the Act set out below are proposed in order better to reflect s.38 of the Charter. In particular:

1. The Charter uses the clearly defined term “religious body” to describe a body established for religious purposes and a charitable entity connected with such a body and conducted in accordance with its religious doctrines, beliefs or principles. This definition is drawn from ss.75 and 76 of the Act. In contrast, the Act uses but does not define the term “religious bodies”. It would be desirable to include in the Act the definition of “religious body” used in the Charter.
2. Incorporation of the Charter definition of “religious body” into the Act would entail some consequential amendments in s.75, which is headed “Religious bodies” but uses the expression “body established for religious purposes” and refers also to

educational institutions under the direction, control or administration of such bodies. Similar concepts are used in s.76(1).

3. The proposed definition of “religious body”, which is derived from ss.75 and 76 of the Act, would make much of s.76 otiose. In order to preserve the remaining operation of s.76, the following changes are suggested:
 - (a) Section 75(3) makes it clear, for the avoidance of doubt, that s.75(2) has a particular operation in relation to educational institutions. The existing treatment of educational institutions in s.75(3) ought to be expanded to include the content of the current s.76, likewise for the avoidance of doubt.
 - (b) This also requires the use of additional words in s.75(3) to make it clear that it applies to natural persons acting on behalf of religious bodies, and not only to religious bodies themselves; this reflects the existing operation of s.76 and also makes express what is already implicit in the current legislation, namely that anything done on behalf of a body having the benefit of an exemption is likewise exempt.
 - (c) In order to correspond to the language of the definition of “religious body” in s.38(5) of the Charter, the clarifying operation of s.75(3) should extend to charitable institutions other than educational institutions.

These amendments would bring the treatment of religious schools under s.75 (whereas it is now spread incongruously across ss.75 and 76 even though s.76 is entitled “Religious schools”), and remove the need for s.76 altogether.

4. The Charter uses the compendious expression “religious doctrines, beliefs or principles” whereas the Act in s.75(2) refers only to “religious doctrines”, whereas s.77 is headed “Religious beliefs and principles” and uses that phrase. To avoid confusion, and consistently with the proposed definition of “religious body” to be used in s.75, the Act should also use the compendious expression in s.75(2). (The use of the word “doctrines” is, however, inapposite in s.77 which relates to the beliefs or principles of an individual.)

Two further amendments are proposed which are not directly related to the Charter.

5. First, the Church has, since the enactment of the Act, found it increasingly necessary to engage persons from outside the Church in senior management positions. Generally, it is not essential for the holders of those positions to conform to particular religious doctrines, beliefs or principles in order to perform their functions. However, the Church believes that, as in the past, its senior management overall (but not necessarily on an individual basis) ought to retain a close connection with Catholic doctrines, beliefs and principles. For that purpose, it is desirable that the Church be able to take account of the religious standing of

potential occupants of these positions. Proposed section 75(1)(d) addresses that issue.

6. Secondly, as explained in the Church's submission responding to the Equal Opportunity Review Discussion Paper of November 2007 (copy enclosed), pp.4-5, it is desirable to amend the definition of "religious belief or activity" to cover bodies other than natural persons and to reflect the recognition in s.38(4) of the Charter of the right of religious bodies to act in conformity with their religious doctrines, beliefs and principles. The attached schedule of suggested amendments proposes a form of words to achieve that result.

I ask that you give full consideration to these matters and that I be included in any further consultation process including stakeholder meetings. Please refer any follow up to this letter to my Business Manager, Mr Francis Moore (telephone 9926 5677).

Yours sincerely in Christ

ARCHBISHOP OF MELBOURNE

Suggested amendments to the Act

4. Definitions

(1) In this Act-

...

“religious belief or activity” means-

- (a) holding or not holding a lawful religious belief or view;
- (b) engaging in, not engaging in or refusing to engage in a lawful religious activity;
- (c) conduct by or on behalf of a religious body in accordance with a religious purpose for which the religious body was established or in accordance with religious doctrines, beliefs or principles in accordance with which the religious body is intended to be, and is, conducted;

“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;

...

75. Religious bodies

(1) Nothing in Part 3 applies to-

- (a) the ordination or appointment of priests, ministers of religion or members of a religious order;
- (b) the training or education of people seeking ordination or appointment as priests, ministers of religion or members of a religious order;
- (c) the selection or appointment of people to perform functions in relation to, or otherwise participate in, any religious observance or practice;
- (d) the selection or appointment of people to perform senior management functions of a religious body.

(2) Nothing in Part 3 applies to anything done by or on behalf of a religious body established for religious purposes that-

- (a) conforms with the doctrines ~~of the religion~~, beliefs or principles of the religion; or
 - (b) is necessary to avoid injury to the religious sensitivities of people of the religion.
- (3) Without limiting the generality of its application, subsection (2) includes:
- (a) anything done in relation to the employment of people in any educational or charitable institution under the direction, control or administration of a religious body established for religious purposes; and
 - (b) anything done in the course of establishing, directing, controlling or administering an educational or charitable institution (including the employment of people in the institution) that is in accordance with the doctrines, beliefs or principles of the religion.

76. Religious schools

- (1) ~~This section applies to a person or body (other than a body established for religious purposes) that —~~
- (a) ~~establishes an educational institution to be conducted in accordance with religious beliefs or principles; or~~
 - (b) ~~directs, controls or administers an educational institution conducted in accordance with religious beliefs or principles.~~
- (2) ~~Nothing in Part 3 applies to anything done by a person or body to which this section applies in the course of establishing, directing, controlling or administering the educational institution (including the employment of people in the institution) that is in accordance with the relevant religious beliefs or principles.~~

77. Religious beliefs or principles

Nothing in Part 3 applies to discrimination by a person against another person if the discrimination is necessary for the first person to comply with the person's genuine religious beliefs or principles.