

# ANGLICAN DIOCESE OF MELBOURNE

## REVIEW OF EXCEPTIONS AND EXEMPTIONS IN THE EQUAL OPPORTUNITY ACT 1995

### SUBMISSIONS

#### General comments

1. The Diocese of Melbourne is grateful for the opportunity to make the following submissions to the Exceptions Review. The Diocese supports the introduction of the *Charter of Human Rights and Responsibilities* (the Charter) and all efforts by Parliament and government to protect and promote human rights.
2. A review of the exemptions and exceptions contained in the *Equal Opportunity Act 1995* (the Act) is timely in light of the passage of the Charter.
3. This submission is confined to those exemptions and exceptions relating to religious bodies, beliefs and practices. They are contained in the following sections of the Act - sections 38 (and indirectly, in the definition of “employment” in section 4), 55, 56, 75, 76 and 77.
4. It is submitted that the exemptions and exceptions in the Act with which the Church is concerned have an important part to play in the protection of human rights in that they reflect the same principles as those that have led to the enshrining of certain human rights in the Charter. They affirm the right to freedom of thought, conscience, religion and belief, expressed in s14 of the Charter.
5. Section 14 provides –
  - (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.

6. The exemptions and exceptions in the Act currently available to bodies such as the Church are wholly consistent with the protection of freedom of thought, conscience, religion and belief contained in section 14 of the Charter. They give content to the rights recognized in s14.
7. The human rights that the Charter expressly recognizes will not in every instance sit comfortably, one with another or with the dictates of particular circumstances. There is an evitable tension, for example, between the right to equal protection of the law without discrimination and the right to freedom of religion and belief. The exemptions and exceptions in the Act represent a working through of the reasonable boundaries of each. The Charter seeks to delineate in broad principles of proportionality the limits on rights and by implication how one right may be reconciled with another to strike a fair balance.
8. Section 7(2) provides that a right may be subject under law “only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including...”.
9. Each of the above exemptions and exceptions can be seen to be a reasonable limit on the right to equal and effective protection of the law against discrimination:
  - (a) The right to freedom of thought, conscience, religion and belief is regarded as an absolute right in international law (*International Covenant for Civil and Political Rights*, Art 4(2)); as such, the protection of that right affords a sound basis for any reasonable limit on the enjoyment of another right;
  - (b) The exemptions and exceptions therefore serve an important purpose; they reflect societal concerns that are “pressing and substantial” in a free and democratic society; Cf *R v Oakes* [1986] 1 SCR 103 at 138 – 139 discussed in Pound and Evans, *An Annotated Guide to the Charter of Human Rights and Responsibilities* at [910] and [950]; and
  - (c) Each achieves their purpose in the least restrictive way possible.

### **The Anglican Church in Victoria**

10. The Anglican Church is a significant provider of welfare services, including aged care, childcare and social support services, through agencies such as Anglicare, the Brotherhood of St Laurence and Benetas. It is also a major provider of education through a network of childcare facilities, and primary, secondary and tertiary schools and colleges.
11. In addition, the Anglican Church is a diverse community of Christian believers representing the breadth of the Victorian community.

### **Exception for voluntary and unpaid work**

12. Section 4 of the Act provides that 'employment' does not include unpaid or voluntary work. Whilst this significantly narrows the scope of the Act with respect to employment, it is a reasonable restriction.
13. Many community and charitable organisations, including those conducted under the auspices of religious organisations, rely on the dedicated work of volunteers. Imposing the full requirements of compliance with the Act on such organisations would place an unreasonable burden on them with potentially serious implications for their ability to continue the work that they do.
14. The definition of employment should remain unchanged.

### **Educational institutions for particular groups**

15. Section 38 of the Act provides that an educational authority operating an educational institution or program wholly or mainly for students with a particular attribute (including religious belief) may exclude students without that attribute.
16. This exemption ensures that education programs designed for the benefit of those with a particular attribute are not disrupted or disadvantaged by the presence of those without the attribute. In the context of religious belief the exemption is strongly underpinned by section 14(1)(b) of the Charter which expressly recognises the freedom to demonstrate a person's religion or belief in *worship, observance, practice and teaching*, either individually or *as part of a community* (emphasis added). Students

have the right to take advantage of educational programs offered for persons with a particular religious belief, and this exemption protects that right.

### **Welfare measures**

17. Section 55 provides that a person may refuse to provide accommodation to another person in a hostel or similar institution established wholly or mainly for the welfare of persons of a particular sex, age, race or religious belief if the other person is not of that sex, age, race or religious belief.
18. Again the exemption and exception here serves a person's freedom to *demonstrate* his or her religion or belief in *worship, observance, practice and teaching*, either individually or *as part of a community*. Anglican homes have available to them chaplains or visiting ministers and regularly conduct religious services for residents.

### **Student accommodation**

19. Section 56 authorises an educational institution which is wholly or mainly for students with a particular attribute (including religious belief) to provide accommodation wholly or mainly to students with that attribute.
20. Our comments above apply here with equal force.

### **Religious bodies**

21. Section 75(1) provides a broad exception for matters relating to the training and ordination of priests and ministers of religion and the selection of people to participate in religious observances and practices. It is self-evidently a reasonable limitation on the right of equality. It would not be feasible or appropriate for discrimination laws to apply to the question of whether a person was fit to be ordained or to celebrate the sacraments of a religion.
22. The exception should be regarded as a recognition that the way in which religious observances are conducted, including how ministers are educated and ordained, is a matter not proper for regulation by the state. This is because it would involve restrictions on the religious freedom protected by section 14 of the Charter.

23. Section 75(2) excludes any action by a body established for religious purposes that conforms with the doctrines of the religion or is necessary to avoid injury to religious sensitivities. The inclusion of a test of conformity or necessity renders this a reasonable limitation on the right to equality. As in the case of section 75(1), the provision is consistent with section 14 of the Charter.
24. Section 75(3) confirms that section 75(2) extends to matters connected with the employment of persons in educational institutions which are under the direction, control or administration of a body established for religious purposes. The conduct to which section 75(3) extends the operation of s75(2) must still satisfy one or other of the tests of conformity or necessity referred to above. For the reasons already advanced, this constitutes a reasonable limitation on any right to equality.
25. This exception should be maintained.

### **Religious schools**

26. Section 76 provides a general exception for educational institutions which are established and conducted in accordance with religious principles (other than those established or conducted by bodies established for religious purposes).
27. There are a number of Anglican schools in Victoria which, although not directly established or conducted by the Anglican Church, were established and are conducted in accordance with the beliefs and principles of the Anglican Church. There are many schools similarly established and conducted by other Christian denominations.
28. Schools have regard to religious beliefs and principles in response to individuals exercising their freedom to demonstrate their religion or belief *in worship, observance, practice and teaching*. The decision to send a child to a school which is affiliated with a religion is a choice made by parents who wish their child to receive the benefits of an education that has regard to religious beliefs and principles. Parents who do not wish their child to attend such a school are free to make a different choice.
29. The exception is appropriately confined by the requirement that the acts done by a person or body in directing, controlling or administering the

school be in accordance with the relevant religious beliefs or principles. The exception will not permit practices or decisions which are not properly founded in a genuine religious tradition. It is a reasonable limitation on the right to equality.

30. This exception should be maintained.

**Religious beliefs or principles**

31. Section 77 provides a general exception for discrimination which is necessary for a person to comply with genuine religious beliefs or principles. This exception is broad and covers discrimination in any area on the basis of any protected attribute.
32. The inclusion of the test of necessity and the reference to 'genuine' religious beliefs render this exception a reasonable limitation on the right to equality. Discriminatory conduct which could not be shown to be necessary for compliance with genuinely held religious principles would not be exempt.
33. Section 77 is also an exception which promotes and protects the right to freedom of thought, conscience, religion and belief in section 14(1) of the Charter by ensuring that acts necessary for compliance with religious beliefs and principles will not be unlawful even if they are discriminatory. It is in accordance with section 14(2) which provides that 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.
34. This exemption should be maintained.

If there is any aspect of these submissions which you would like to discuss, please do not hesitate to contact me or the Chancellor of the Diocese, Michael Shand QC (9225 7650).

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