



Submission to the
'Exceptions Review' of the
Equal Opportunity Act 1995

April 2008

Victorian Office
PO Box 455 Flinders Lane
Melbourne VIC 8009

Telephone: (03) 9621 2663
Facsimile: (03) 9011 9731

Email: vicoffice@acl.org.au
www.acl.org.au
ABN 4007 512 0517

Contents

Executive Summary	3
Introduction	3
The Charter of Rights and Responsibilities	3
Comments on the Equal Opportunity Act & the need for exceptions	4
Which exceptions should be preserved?	6
Which exceptions should be amended?	7
Conclusion	8

Executive Summary

The Victorian Government has asked for public submissions on the exceptions in the Equal Opportunity Act with particular reference to the subsequently enacted Charter of Rights and Responsibilities and its recognition that 'every person has the right to equal and effective protection against discrimination.'

The Equal Opportunity Act contains exceptions that, for example, allow Christian schools and religious bodies to limit employment to people who share their commitment to faith and values. It is ACL's strong view that these exceptions should be retained and that amendments should make it clear that the exceptions are not restricted to incorporated denominations of a religion but also cover a range of groups (incorporated or unincorporated) that are formed for religious purposes.

These exceptions are vital to uphold rights to religious freedom, which have long been recognised by the law and pre-date the Victorian Charter of Rights and Responsibilities and were never in question until recently. These rights are given partial expression and protection in section 14 of the Charter but are otherwise fully preserved by section 5 of the Charter, so the retention and clarified application of these exceptions is consistent with the Charter.

Introduction

The questions posed in the consultation paper for this review revolve around the need for exceptions and exemptions in general and ask if they need to be reformed. Further questions ask if any exceptions should be repealed, if the VCAT process is appropriate and if the Statutory Authority exception should be repealed.

The ACL wishes to address the general questions as to the need for exceptions and exemptions. We note that the review has asked for input on many questions relating to the Equal Opportunity Act (the Act) but have chosen to concentrate our submission on the continued need for exceptions to protect the religious freedom of bodies such as churches and schools.

The Charter of Rights and Responsibilities

The Victorian Charter of Rights and Responsibilities provides the reference point for this review.

ACL opposed the introduction of the Charter, arguing that such an instrument would undermine democracy by transferring contentious political decisions away from the elected Parliament to an unaccountable judiciary. As the ACL stated in our 2005 submission regarding the planned establishment of a Charter of Human Rights, we

consider that a Charter has a basic flaw in that it assumes rights are given by governments, and therefore can be removed by governments.

Instead, our preference was that important human rights be protected by specific legislation relevant to the right in question rather than by a broad-brush Charter which, whilst identifying a range of important rights, cannot provide detailed guidance about what these rights mean in practice.

Nonetheless, accepting that this exceptions review is being conducted by reference to the Charter, ACL is disappointed that it is only the Charter's anti-discrimination provisions that are referenced, for the Charter also recognises other significant rights which are directly relevant to the review.

One such right is the inherent and inalienable right to religious freedom which long pre-dates the Charter. In Section 14, the Charter recognises that:

Every person has the right to freedom of thought, conscience, religion and belief including the freedom to demonstrate his or her religion and belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private.

The Charter further recognises 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 in worship, observance, practice or teaching.

Section 14 gives partial expression to the right to religious freedom. But section 5 of the Charter fully preserves the legal rights to religious freedom that pre-date the Charter.

Put simply, the Charter commits the Victorian Government to protecting the religious freedom of Victorian citizens. As a result, the religious exceptions in the Equal Opportunity Act must be maintained.

Comments on the Equal Opportunity Act & the need for exceptions

The ACL considers that anti-discrimination law is justifiable if it is directed against differential treatment of others which is unfair. In Australian society, organisations and individuals should not, when providing access to a benefit or resource, treat a person unfairly because of an attribute of the person which is irrelevant to the benefit or resource or the context of its provision.

The Act does not use the concept of unfair treatment, although it is used in other legislation such as the Fair Trading Act. Instead the Act prohibits certain "different and less favourable" treatment, assuming that such treatment is unfair and objectionable.

"Unfairness" is a much richer concept than "different and less favourable". To decide something is "unfair" requires a more nuanced judgment balancing the motivations, circumstances, rights and responsibilities of the provider of the benefit or resource with those of the person seeking access to the benefit of the resource and the expectations of society of each of them. For example a finance provider would be justified in refusing finance to a person underage, there is no inherent "right" to be able to borrow money.

Because "different and less favourable" is the Act's thin proxy for the richer standard of "unfairness", the Act will have an overbroad application to a range of "different and less favourable" treatment which is not in context unfair. This definitional over-breadth in the Act is one reason why the Act needs to have exceptions – to capture as many circumstances as possible where "different and less favourable" does not mean "unfair".

A second justification for exceptions is to accommodate some of the legitimate disagreement there will be in a pluralistic society such as Australia's as to:

- When different treatment is less favourable (or in the case of indirect discrimination when apparently neutral treatment does affect some people less favourably); and
- Which attributes should be irrelevant to the provision of different benefits and resources and in what context.

Even the Charter recognises that "Equality of treatment" is but one human right and responsibility among many and needs to be balanced with a range of other rights and responsibilities and reasonable limits – section 7(2).

Therefore unless the basis of the Act is to be reformed away from "different and less favourable treatment" to a richer concept of "unfair treatment", ACL considers that great care should be exercised in trying to do away with exceptions which provide the safety valves for deficiencies in the basic design of the Act's scope.

One of the underlying problems with the Act is that the list of attributes is arbitrary and reflects contemporary thought rather than historical and underlying basic rights.

Attributes which are listed include: age; physical features; breastfeeding; political belief or activity; gender identity; pregnancy; impairment; race; industrial activity; religious belief or activity; lawful sexual activity; sex; marital status; sexual orientation; parental status or status as a carer; and personal association.

This list seems to be growing as political correctness exerts its power over individual expression and rights. Exceptions are required to help balance competing rights and worldviews within our pluralistic society.

Which exceptions should be preserved?

ACL is particularly interested in preserving exceptions that give space for the personal and organisational expression of freedom to believe, observe, teach and live out religious beliefs. As noted above, this is in keeping with the Charter's important provisions for religious freedom in both belief and practice.

ACL particularly supports retention of:

- *Section 16 – domestic or personal services:*
Here the right to determine who works in one's home is protected.
- *Section 25 – care of children:*
The possible impact of having a carer who did not share a values system in alignment with the parents is significant. This exception provides some protection here.
- *Section 38 – educational institutions for particular groups:*
This section is an important one as it allows for groups to provide educational support along faith lines.
- *Section 48 – disposal by will or gift:*
The law should not impose limits on the disposal of personal assets.
- *Section 55 – welfare measures:*
Provision of accommodation to groups of elderly or disadvantaged person requires special protection due to the increased vulnerability of such persons.
- *Section 56 – accommodation for students:*
As per section 38.
- *Section 57 – accommodation for commercial sexual services:*
The fact that something is legal (e.g. prostitution) does not mean approval by individuals or communities. Landlords should retain the right to ensure that properties they own are only used in ways that are consistent with their own moral or religious viewpoints. This protection should stay.
- *Section 74 – charities:*
Charities are often set up by groups wishing to support the disadvantaged amongst their own community, race or faith. This exception should remain to protect the integrity of purpose of such groups.
- *Section 75 – religious bodies & Section 76 – religious schools:*
Of particular interest to the Christian community are the exceptions provided that allow for Christian schools to foster an educational environment that reflects the choices made by families to have their relational framework, values and beliefs supported.

Teachers are more than simply conduits for passing on knowledge from one

generation to another. They are also role models, perhaps even more so in a religious school where they are not only teaching the particulars of their subject but also demonstrating the value and relevance of the religion itself. For these reasons, it is directly relevant to their employment that they share and faithfully practice the religious beliefs of the school and can model these to students.

The exceptions provided here are central to the argument for the need to protect religious freedom. Indeed ACL believes there is a case for expanding some of these provisions as outlined in the next section.

○ *Section 77 – religious beliefs or principles:*

The protections found in section 77 are appropriately broad, recognising that religious beliefs affect public as well as private behaviour.

The practice and teaching of religious belief, protected by the Charter, extends beyond obviously religious acts such as prayer, worship, fasting and meditation. Taken seriously, religion affects all aspects of one's public and private life and therefore the protections for religious belief and practice need to encompass all areas where one's religious beliefs may influence one's actions. For example, the protection of religious freedom needs to include religiously influenced actions in matters as diverse as employing a nanny or leasing property.

ACL strongly endorses section 77 in its current form and believes that its retention is consistent with the spirit of section 14 of the Charter. To water down section 77 would permit the State to compel observance of one value - non-discrimination in relation to certain listed attributes - in violation of a person's genuine religious beliefs or principles. The current exception strikes the balance required by Charter section 7.

Which exceptions should be amended?

ACL believes the exception for religious bodies in section 75(2) needs to be expanded.

The relevant section reads:

(2) Nothing in Part 3 applies to anything done by a body established for religious purposes that—

- (a) Conforms with the doctrines 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 anything done in relation to the employment of people in any educational institution under the direction, control or administration of a body established for religious purposes.

There are many para-church organisations whose work is religiously motivated and which share the needs of churches and Christian schools to be legally allowed to discriminate in employment in favour of those who share and practice their religious beliefs. ACL is deeply concerned that the term "body established for a religious purpose" may be narrowly construed to mean only an organised (and possibly incorporated) Christian or Jewish or Muslim or other religious denomination and will not cover other organisations formed for religious purposes.

ACL believes the law needs to be clarified to ensure that the definition of a 'body established for religious purposes' covers not only churches but also bodies such as inter-church groups, ministry organisations, associations, clubs and societies (whether incorporated or unincorporated) which are formed for religious purposes including the advancement or propagation or teaching of a religion.

For example, an unincorporated inter-church group or para-church organisation formed to develop and disseminate Christian teaching material for the public ought to be able to refuse to employ or accredit persons who do not have a Christian faith without breaching the Equal Opportunity Act. But because it is not a church or an incorporated body, there may be some doubt as to whether such a group is covered as a 'body established for religious purposes' by the exception in section 75, including sub-sections 75(2) and (3). ACL believes the Act should be amended so that such groups clearly enjoy the religious bodies exemption.

Conclusion

The current religious exceptions in the Act are consistent with the long recognised right to religious freedom in both personal and organisational settings which is given partial expression in section 14 of the Charter and is preserved by section 5 of the Charter. Again, ACL reiterates that these rights and freedoms pre-date the advent of bills and charters of rights in Western Civilisation and are only now needing to be defended in the context of political correctness and a rights-based agenda. Rather than winding back the exceptions that protect the historical rights which the Charter recognises, there is, in fact, a case for making them stronger so that the religious freedom protections apply not only to churches and religious schools but also to inter-church and para-church organisations.

UNSW law professor, George Williams, a keen proponent of bills of rights, has told *The Australian* newspaper (16/4/08) that religious groups need not be concerned about rights legislation, citing the example of the Victorian Charter which, in his view, protects the rights of religious schools. ACL very much hopes that this continues to be the case, and that this review recognises that anti-discrimination should not trample religious freedom.

Rob Ward
ACL Victoria State Director
April 2008