

Thursday, 18th March, 2010

The Hon Carlo Carli MLA
Chair
Scrutiny of Acts and regulations Committee
Parliament of Victoria
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Dear Mr Carli,

Re: Equal Opportunity Bill 2010

I am writing as a concerned member of the public about the proposed Equal Opportunity Bill 2010.

When making paid or volunteer appointments, religious groups in Victoria at present will typically take into account an individual's religious beliefs and personal ethics — sometimes including sexual ethics and practices. The extent to which this happens varies from religion to religion, from denomination to denomination, from congregation to congregation, and also according to the kinds of positions involved.

In the context of the diversity in appointment practices among religious groups, it is disappointing that the proposed Equal Opportunity Bill does not make clear which practices of selection of staff and volunteers by religious bodies will have to change in future. We will all be none the wiser once the Bill is enacted.

However, many in the community have high hopes that religious groups will make extensive changes to their employment practices, so churches can expect legal action to commence soon after the Bill is in place. At the same time, religious groups which resist change will argue from deep conviction, and in defence of what they consider to be their fundamental human rights, that their past freedoms should be preserved.

In reality, it will take years of litigation to determine which of the existing selection practices of religious groups are to be considered lawful. Until that process is concluded a great uncertainty will exist for people of faith in Victoria. We can expect that the pathway to achieving ultimate legal clarity on key issues will be fiercely contested, and the

process will incite new levels of disharmony and acrimony in the State of Victoria. There will be considerable political fallout.

There are three main reasons why the Equal Opportunity Bill 2010 imposes significant ambiguities in relation to appointment of employees and volunteers to religious groups.

1. The Inherent Requirements Test (Sections 82 and 83)

There is a good deal of law on 'inherent requirements'. This concept was developed to protect people with disabilities. The idea is that employers should use accurate and fair criteria to work out what is actually needed to get a job done.

This disabilities test is ill suited for religion-linked employment tests. It requires treating the lack of spiritual attributes as if they were disabilities, but staff selection on the basis of spiritual attributes cannot easily be reframed in terms of such disabilities thinking.

One of the key ideas of 'inherent requirements' is that it is not **how** you do the job, but **what** you do that matters. However, for religious people, **how** you do the job is often just as important as **what** you do. For example, such activities as caring for the dying, feeding the poor, caring for the church's gardens, or welcoming visitors to a church service are widely understood by Christians as acts of worship, done in response to God's love. A question people of faith will ask about such tasks is 'Was God worshipped in the **way** this is done?'

This is why a Catholic priest will usually wish to employ a devout Catholic Christian as his receptionist. The act of answering the phone or dealing with inquiries is meant to communicate the love of Christ and be a witness to the Christian faith. This is regarded as a manifestation of God's presence in the church, expressed through the worker. This perspective cannot be easily reduced to a grid of competencies.

The Victorian Independent Education Union in their 2009 submission to SARC cited the example of a mathematics teacher in a church school. They anticipate that a necessary requirements test will force church schools to select maths teachers purely on their ability to teach maths. However, those schools which currently require **all** their staff to adhere to a religious and ethical covenant will find this approach very threatening. They regard all the tasks done in the school as an expression of the Christian faith. The intention of Christians in establishing such schools is to form an association of like-minded teachers and students, producing a Christian community in which students will develop as Christians. This cannot be about a narrow competency-based understanding of each work role.

The dispute between an essentially secularist competencies-based view of teaching, and a religious understanding of education as formation in a life-style of worship will not be easy to resolve in the courts, and the outcome will be highly unpredictable.

Much depends upon whether religious groups will be able to convince the courts to respect their theological understanding of the nature of life and work as worship. This will not be easy, but such groups will be loath to surrender their fundamental *raison d'être*. They will not accept that Christian faith and values can be effectively nurtured in children if the maths teacher is hostile to Christianity, and does not live in accordance with Christian ethics, however good he or she might be at teaching maths.

A similar issue arose with the Racial and Religious Tolerance Act, which took up tried-and-tested distinctions from anti-racism law, and tried to extend them to religion, but with confusing results. It took years of litigation to clarify some quite basic principles of how anti-discrimination principles should be extended to religious disputes.

In terms of Victoria's Charter of Rights and Responsibilities, a key problem with the 'inherent requirements' test is its impacts upon the Right to Freedom of Association. The right of religious people to band together and work to achieve a shared, corporate spiritual goals is placed in jeopardy by this test.

Critics of the Bill will point out that a Labor member of parliament will be allowed to select a Labor party member as a receptionist without applying an 'inherent requirements' test (Section 27), but a Baptist pastor may not be able to select a Baptist receptionist (the question will be subject to the unknown and unpredictable outcome of future litigation). To be consistent why not redraft Section 27 as follows:

“Nothing in Part 4 applies to anything done in relation to the employment of a person as a ministerial adviser, member of staff of a political party, member of the electorate staff of any person or any similar employment, where

- (a) conformity with the political doctrines, beliefs or principles of the political party is an inherent requirement of the particular position, and
- (b) the person's political belief or activity means that he or she does not meet the inherent requirement.”

Why does the Act treat religious rights less generously than political rights?

2. The meaning of 'the religion' (Sections 82 and 83)

In the past the meaning of this apparently innocuous phrase 'the religion' has remained untested, because, truth be told, protections for religious groups were so broad. The changes to the Act will bring the definition of 'the religion' out of the shadows into the spotlight.

Affected groups will fall into two main categories.

a) Denominations like the Catholic Church with centrally defined doctrinal positions on almost everything will insist that these be taken into account by the courts. For example

issues to do with extramarital sex will have to be judged on the basis of the Catholic church's official 'doctrines, beliefs or principles'.

Schools and parachurch agencies with clearly defined doctrinal statements, even if they are non-denominational, will most likely be in the same position as the Catholic church. 'The religion' will be what the organization defines it to be.

Such groups, with a clearly defined theological conformity, could enjoy a measure of protection under the Equal Opportunity Act 2010.

b) On the other hand, denominations like the Uniting Church or the Anglican Church which have leave a lot to the consciences of individuals could be in real trouble. Congregations in such denominations tend to have their own theological distinctives. For example, one Anglican congregation may happily deploy sexually active gays and lesbians as in their programs, while another Anglican congregation will not allow this. The difference in practice will be related to local differences in theological outlook.

The question is: what will the courts decide are the 'doctrines, beliefs or principles' of 'the religion' in such cases. Will they follow the denomination, the Archbishop, the creeds, the Bible, or the local beliefs of the congregation?

The Wesley Mission case in NSW is a recent example of the difficulties in defining 'the religion'. Gay partners sought to be trained as foster carers but an agency of the Wesley Mission rejected their application. At first the trial judge said that as the Uniting Church did not object to same sex practice, so the Wesley Mission could not take advantage of the exemption. On appeal, the appellate tribunal overturned this and sent it back to the trial judge to determine the beliefs of "Wesleyanism" rather than the "Uniting Church". (Members of the Board of the Wesley Mission Council v OV and OW (No 2) [2009] NSWADTAP 57 (1 October 2009).

There is almost unlimited potential for litigation like the Wesleyan Mission case in Victoria, splitting 'the religion' down to very fine distinctions.

In the United States, the Episcopal Church is dividing over the doctrinal issue of same-sex relationships. When or if issues of Anglican discrimination against same-sex oriented people comes to the Victorian courts, how will the courts rule on 'the religion' of the Anglican church? Does the Government expect that the legal process will be able to assist the Anglican church to gain greater theological clarity on whether it does or does not accept same-sex practice?

Ambiguity surrounding the meaning of 'the religion' means that the new Act is likely to privilege the denomination over the theological consciences of those who are making the employment decisions. In this respect the Bill is anti-human rights, privileging hierarchy over conscience.

The Act, if passed, could, in the interests of harm-minimization, even be used as a stick to enforce theological conformity. To gain the maximum protection from the religious exemptions, denominations could instruct all congregations to act consistently and strictly in accordance with particular doctrinal principles, e.g. on same sexual practices. This will invariably impact negatively on the religious liberties of the congregations and their members.

These dynamics could increase incentives for denominations to split. The NSW Wesley Mission case illustrates that legal insecurity could dog the footsteps of a body which has a different doctrine from its denomination: to gain greater legal security and freedom to act in accordance with its beliefs, the Wesley Mission should probably leave the Uniting Church of Australia.

Because of all this, this new Bill may well come to be regarded as an anti religious diversity law.

A way to avoid this problem could be use a test in terms of whether those making an appointment are acting in good faith in accordance with their genuinely held religious convictions. A genuineness test could easily be tested by the courts, and will reduce the risk of turning our courts into theological circuses.

3. The Objective Test (Sections 82, 83 and 84)

The third and final major point of ambiguity in the Act about religion is the introduction of an objective test. I refer to the phrase ‘reasonably necessary’ in sections 82, 83, and 84.

This test requires a judge to ask how a ‘reasonable person’ would act in this situation. It is one thing to apply this test to an issue of work safety, but quite another to apply it to someone who claims to be acting on their religious convictions.

Some would say that religion is inherently unreasonable. I do not agree with this view, but it is very firmly held by many, and this underscores the difficulty of asking the ‘reasonable person’ to make theological judgements. The “Australian reasonable person” is probably an avowed secularist anyway. It is certainly the case that theological judgements must be made if one is to evaluate whether a religious person has acted in ‘reasonably necessary’ way to manifest their beliefs.

We have already seen the difficulties caused by a religion-related objective test in the case of *The Islamic Council of Victoria vs Catch the Fire*. The Racial and Religious Tolerance Act 2001 allowed an exemption for conduct done ‘reasonably and in good faith’ for a religious purpose. In his findings Judge Higgins was repeatedly led to make theological judgments in contexts where an objective test was called for, and these were key aspects of his findings which had to be overturned on appeal.

An objective test, applied to religious observance, is likely to be a source of confusion and drawn-out litigation for years to come.

To rule on this issue, judges will need to consider what action would be taken by a 'reasonable Pentecostal', a 'reasonable Catholic', a 'reasonable Copt', a 'reasonable creationist', a 'reasonable Satanist', a 'reasonable Hindu' or a 'reasonable Salafist Muslim'.

It is unreasonable to ask this of secular judges. The better test is to ask whether a body, acting in good faith, genuinely believes that their action was necessary in order to comply with their religious beliefs.

Conclusion

The Equal Opportunity Bill 2010 introduces two new sources of ambiguity in law regulating religious exemptions; a) the 'inherent requirements' test and b) the 'reasonably necessary' test – and c) it brings into the light of day the pre-existing ambiguities of the term 'the religion'. The combined effect of these three sources of ambiguity will be to produce years of litigation, with a highly unpredictable outcomes. The litigation process will damage community harmony, and do little to improve equality.

I strongly urge SARC and the Government, to reconsider these ambiguous aspects of the new Equal Opportunity Bill. My earnest hope is that the people of Victoria have a new Equal Opportunity law which has a clearly defined impact on religious liberties in our state.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Mark Durie'.

The Revd Dr Mark Durie, FAHA