

SCRUTINY OF ACTS AND REGULATIONS
COMMITTEE

EXCEPTIONS AND EXCEPTIONS TO THE
EQUAL OPPORTUNITY ACT 1995

MINORITY REPORT

16 NOVEMBER 2009

Introduction

The Governor on the advice of the Executive Council, pursuant to section 33 of the Parliamentary Committees Act 2003, requested on 18 December 2008 that the Scrutiny of Acts and Regulations Committee (“the Committee”) inquire into, consider and report to Parliament on whether any amendments should be made to the exceptions and exemptions in the *Equal Opportunity Act 1995* (“the Inquiry”).

The Committee was requested to provide its final report to Parliament by 30 April, 2009, a completely unrealistic timeline.

The Committee tabled an Options Paper, including a Minority Report, in May, 2009.

The comments made in this Minority Report should be read in conjunction with the Minority Report tabled with the Options Paper and the Final Report by the Committee (“the Report”) tabled contemporaneously with this Minority Report.

The response to the Inquiry has been overwhelming, with approximately 1800 submissions considered and a significant level of public interest. The majority of the submissions made were in response to proposed changes to sections 75 and 76, the sections dealing with religious freedom. The overwhelming majority of those submissions sought the retention of those sections as they currently stand.

Process

The limited time provided by the government for the Committee to complete the Inquiry has meant that the Committee has not had the opportunity to explore all relevant issues in as much depth as would be desirable.

The various recommendations throughout the Report which call for additional work or research are reflective of both the limited time available and the complexity of many of the issues considered.

We note with disappointment that the Attorney-General has pre-empted the Committee’s report by his press release dated 27 September 2009 (the day after the Grand Final) announcing a decision of the Government regarding various changes that the Government intends to make to the *Equal Opportunity Act 1995* (“the Act”).

The decision of the Attorney-General to act without reference to the Committee’s Report calls into question the significant time and cost of conducting the Inquiry, including the time and effort of those who made written submissions and/or presented evidence to the Committee.

The Committee engaged an external consultant at significant expense, used the services of Hansard for two full days and incurred additional costs to conduct the inquiry.

It is usual for inquiries commissioned by either the Parliament or the Executive to be finalised and presented to Parliament so that their deliberations and

recommendations can be considered before changes to legislation or regulation are made. In failing to wait for the final report on this inquiry, the Government, and the Attorney-General specifically, have demonstrated a contempt for proper process and the Parliamentary system.

Structure and interpretation of the Act

The Report by the Committee recommends that:

- the objectives of the Act be amended to ensure protection from discrimination to the greatest extent possible consistently with the Charter (recommendation 1);
- exceptions and exemptions retained in the Act should be reviewed at least every ten years (recommendation 2);
- where there is doubt as to the meaning of a provision, the balancing test detailed in s. 7(2) of *the Charter of Human Rights and Responsibilities Act 2006* (“the Charter”) should be used as a guide to resolve the doubt¹ (recommendation 3);
- the onus of proof that an exemption is “justified” should be on the person seeking to rely on it (recommendation 3);
- the exemption in section 69 for things done in accordance with statutory authority be repealed (recommendation 42)
- where a temporary exemption is sought from VCAT, the exemption must be a reasonable limitation within s. 7(2) of the Charter (recommendation 56).

The focus on consistency with the Charter, including a competing rights analysis based on s.7(2), is likely create substantial uncertainty and have unforeseen consequences. S.7(2) of the Charter purports to create a legal test for resolving conflicting claims about rights, but in fact it requires courts to make decisions about policy issues that should be made by the community through public debate and through Parliament. A clear example of this is the issue of “reasonable adjustments” which we discuss below.

There is also a contradiction between the recommendation that discrimination be eliminated to the greatest extent possible consistent with the Charter and the numerous recommendations contained within the Report where the Committee has concluded that there are good public policy reasons for not eliminating discrimination to the greatest extent possible consistent with the Charter.

For example, the Report recommends that Section 18 be retained without amendment. This section states:

“An employer may discriminate on the basis of political belief or activity in the offering of employment to another person as a ministerial adviser, member of staff of a

¹ Section 7(2) of the Charter states:

A human 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-

- (a) the nature of the right; and
- (b) the importance of the purpose of the limitation; and
- (c) the nature and extent of the limitation; and
- (d) the relationship between the limitation and its purpose; and
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

political party, member of the electorate staff or any person or any similar employment'.

It is highly likely that this instance of discrimination could be prohibited consistently with the Charter, yet the Committee has formed the policy view, for obvious and sound reasons, that the exemption should be retained. The fact that allowing this instance of discrimination may be capable of justification under s.7(2) of the Charter does not alter the fact the Charter does not *require* this discrimination to be allowed, thus demonstrating that the retention of this exemption is inconsistent with recommendation 1.

There are numerous other recommendations in the report that also show that recommendation 1 is not appropriate as an objective of the Act. For example:

- Recommendation 21 (section 38) – allowing educational institutions to limit admissions to particular groups;
- Recommendation 24 (section 41) – allowing age based admission schemes and age quotas
- Recommendation 54 (section 81) – allowing age based concessions.

If recommendation 1 were to be fully put into effect, all of these exemptions and exceptions would have to be scrapped.

We are also concerned that recommendation 3 proposes that on all occasions the respondent should bear the onus of proof of establishing that an exception is "justified"². We consider that whilst such an onus may be appropriate on many occasions, there may be occasions when the onus would better lie with the applicant; particularly where the applicant is in possession of relevant facts and knowledge relating to an allegation of discrimination.

An example might be where a tenant claims the need to have a companion animal for mental health reasons (see recommendation 31). It would be reasonable to expect the tenant to demonstrate the existence of those mental health reasons, rather than require a landlord to prove that a tenant did not have mental health reasons for requiring a companion animal.

Recommendation 56 proposes a vague and open-ended test for making what is in reality a policy decision about whether a temporary exemption should be granted. The same recommendation proposes that highly prescriptive and complex procedural requirements should be imposed on both applicants and on VCAT. It would be far better for the legislation to give more guidance as to the policy criteria that should be applied, and be less prescriptive as to administrative detail. That would be much more in accord with both common sense and the government's own red tape reduction policy.

In relation to acts done in accordance with statutory authority, citizens are entitled to be protected from being required to do two inconsistent things by two different laws. If in such cases a citizen does what one law requires, he or she should not be

² In referring to "establishing that an exception is justified" it seems the Report intends to refer to the respondent justifying the availability of the exception, rather than having to justify the policy merits of the exemption.

penalised for not complying with the other law. We support a front end review of legislation and a decision by Parliament as to which laws should prevail in which circumstances. However, if an inconsistency escapes that review, or if future legislation creates a new inconsistency, that should not be the citizen's problem.

We note that when it comes to inconsistency between a court or tribunal order and the Act, the Report considers "there are self-evident sound policy reasons" why the citizen should not be in breach of the Act for obeying the order of the court or tribunal (recommendation 43). We consider the same "self-evidence sound policy reasons" mean a citizen should not be in breach of the Act for obeying the requirements of another Act of Parliament.

Furthermore, we do not agree with the Report's implicit assumption that the Act should generally prevail over other inconsistent legislation. The Report itself concedes that occupational health and safety legislation should prevail over the Act in an employment context, and by logical extension many other safety laws should also prevail. We believe that priorities between the Act and other legislation in instances of inconsistency should be decided by Parliament on the merits of each instance.

Finally, we observe that if the current review of exemptions and exceptions by the Committee and the government is done properly, the changes made should be expected to last a lot longer than a mere 10 years. It is appropriate to review regulations and other subordinate legislation every 10 years, but the community is entitled to expect far greater stability when it comes to broad policy issues such as the subject of this review.

If a need for a particular change arises, that should be debated on its merits at the time, but the Committee and the Government will not have done their work properly if the entirety of the changes arising from the current review is pre-programmed to have a shelf life of only 10 years.

Genuine occupational requirements – section 17

The Report recommends that the current authorisation of "genuine occupational requirements" be replaced with an authorisation of "inherent requirements of the position".

On one view, this change may seem minimal, but we would be concerned if it operated so that an employer's genuine and bona fide assessment of the requirements of a job could be second-guessed by a tribunal or court.

For example, to pick up the current exemption in s.17(2)(d) of the Act, if a shopping centre manager concluded that it was necessary in the circumstances of his or her shopping centre that the cleaner of female lavatories should be a female employee, would that employer be at risk of being held to have discriminated because the manager of another similar shopping centre did not impose such a requirement, and therefore the requirement could not be considered to be an "inherent requirement" of the position?

We are also concerned at the Report's suggestion that the employers should not be entitled to refuse to employ people with various criminal records. We support encouraging the reintegration into the community of people who have served their sentence and genuinely seek a crime-free future life. However, ultimately, an employer is responsible for the safety of his or her employees, customers and suppliers and the security of the assets of the business. Employers should be entitled to seek information from job applicants about past criminal convictions if they see fit to do so, and an employer's decision not to employ an applicant after taking into account that applicant's criminal convictions should not be subject to second-guessing by the VEOHRC or VCAT.

Employment

Family businesses (s. 20), small businesses (s.21) and youth wages (s.27)

The Report recommends that the family business and small business exemptions be repealed (ss. 20 and 21 – recommendations 8 and 9) and that the youth wages exemption be removed and replaced with an exemption allowing trainee wages based on the level of experience or training of a person without reference to their age (s27 – recommendation 15). We disagree.

The Victorian Automobile Chamber of Commerce (VACC) gave evidence to the Committee relating to small businesses and the concerns they have about the impact of additional regulation, such as removing the small business exception, on the decisions of their members to employ additional staff.³

The VACC also gave evidence about the benefits of youth wages:

*“So from that perspective the view of our members is that these young people are coming in, they just want to get a bit of a feel for the industry, they are not productive, they do not really have skills, but the fact that it is a junior rate is the incentive to give them the opportunity to come in and actually do some work and learn about the type of opportunities in that business because, like I said earlier, it is a highly regulated industry, it is a very technical industry, it is potentially a dangerous industry, so there is a fair bit of supervision required and that means taking what we deem to be productive people off the tools to supervise these young people, and all of this is down time”.*⁴

We note that unemployment for 15-24 year olds in Victoria who are actively looking for work has increased from 8% in December 2008 to 11.9% in September 2009, or by over 20,000 young people.⁵

We further note the findings from The Victorian Skills Commission Annual Report which states that the overall number of apprentices and trainees in 2008-09 was 120,004, compared to 122,243 the year prior – a decrease of 2,239.

³ Yilmaz, L. General Manager, Industrial Relations, OHS and Training, VACC and Ms G Marton, Workplace Lawyer, VACC in evidence to the Committee on 4 August, 2009

⁴ Ibid

⁵ Australian Bureau of Statistics, Labour Force Status by sex, age and marital status, October, 2009.

Furthermore, recommendation 15 is contrary to Federal Labor's workplace relations policy, which supports the retention of youth wages. As Deputy Prime Minister, Julia Gillard, has said:

*People of course do support youth wages regimes and we've kept the youth wages regime.*⁶

From the evidence presented, it would appear that the recommendations relating to family employment, small business and youth wages may have a detrimental impact on employment, particularly youth employment, at a time of economic uncertainty and labour force insecurity. Our focus, unlike the Labor members of the Committee, is on job protection and job creation, particularly for our young people.

We recommend no change be made to these sections.

Standards of dress, appearance and behaviour In employment (s. 24) and schools (s. 40)

The Committee have recommended that the reference to "behaviour" in both s.24 (recommendation 12) and s.40 (recommendation 23) be removed, but that references to standards of dress and appearance be retained, subject to a Charter s.7(2) analysis.

In relation to schools, the Committee has also recommended that in assessing the reasonableness of a school's dress or appearance policy, it must be considered whether the views of the school community have been taken into account in adopting the standards of dress or appearance and whether the standards are subject to any review.

We note the argument made in the Report that the issue of behaviour in employment is better dealt with under industrial relations law, now a matter for the Commonwealth. However, if it is intended that Commonwealth workplace relations law should regulate the setting of behaviour standards by employers, Victorian law should make clear that an employer cannot be subjected to a claim of discrimination for acting in accordance with Commonwealth law.

Schools today are facing increasing problems of anti-social and other inappropriate behaviour by students, such as bullying and school ground violence. At the same time, the authority of school principals and school communities to impose standards and disciplinary sanctions is being challenged and undermined.

The purpose of the section 40 exemption is to ensure that a reasonable standard of behaviour set by a school cannot be subject to challenge on the grounds that it is discriminatory. There was no evidence put before the committee that this exemption has caused any difficulties in its present form, and to remove standards of behaviour from this exemption would send completely the wrong message about restoring standards and respect amongst young people.

⁶ http://www.deewr.gov.au/Ministers/Gillard/Media/Transcripts/Pages/Article_090421_141430.aspx

The Report correctly points out that if the behaviour exemption is removed, schools would be liable to claims not only of direct discrimination, but also potentially to claims that in some way a behaviour standard amounted to indirect discrimination on the grounds of “disproportionate effect” on persons with a protected attribute. This simply magnifies the uncertainty that removal of the exemption would create for schools trying to set appropriate standards of behaviour for their students.

The existing exemption is subject to the clear and straightforward protection that any standard must be “reasonable”. Any standard that unfairly imposes an unreasonable burden on students having a protected attribute will almost always be able to be dealt with under this existing provision.

In relation to schools’ standards of dress and appearance, the existing exemption already encourages consultation with the school community over those standards by deeming them to be reasonable if the views of the school community have been taken into account. Recommendation 23 seeks to micro-manage the school by taking into account whether they have “review” arrangements in place, even if their dress code is well established and accepted.

Even worse, the majority’s recommendation allows the wishes of the school community to be overridden if the person sitting in judgement forms the view that the standard is “unreasonable” having regard to the vague and open-ended terms of section 7(2) of the Charter.

Violence, truancy and bullying have become serious problems in many schools. Instead of restoring authority to school principals and school communities to set and uphold standards, as the government should be doing, if the government accepts this recommendation it will be placing yet another complication and obstacle in the way of school principals and school communities restoring and maintaining the discipline and respect in schools which parents, students and the community are entitled to expect..

We support the right of both schools and employers to set not only reasonable standards of dress and appearance, but also of behaviour in their school or workplace, without being exposed to an allegation of discrimination.

The current sections 24 and section 40 have worked well and we do not support the changes recommended in the majority Report.

Care of Children – section 25

We acknowledge the importance of protecting children from harm. We are pleased that some Government members also recognise this and the importance of respecting the rights of parents when caring for their children. We are pleased that it is recommended that s25, care of children, be retained unamended in the Act.

Adjustments to accommodate impairment or a physical feature

- **section 22 – special services or facilities in employment (recommendation 10)**
- **section 32 – special services and facilities in firms and partnership (recommendation 10)**
- **section 39 – special services or facilities in education (recommendations 10, 22)**
- **section 46 – special manner in providing a service (recommendations 10, 28)**
- **section 51 – accommodation (recommendation 30)**
- **section 80 – safety requirements (recommendation 53)**

We support the general principle that people should be prepared to make reasonable adjustments to meet the needs of others with impairments or disabilities. However, the concept of “reasonable” on its own is open to many different interpretations. It is neither appropriate nor fair to require or empower a court or tribunal to make decisions applying such a broad term in such an open-ended context.

This is particularly important where one party may, depending on the interpretation of the term, be required to incur considerable expense for the benefit of the other party.

The Report gives little elaboration of what should be considered in assessing what is “reasonable”.

The clearest example of the problem is the proposed requirement to make of “reasonable adjustments” in the case of rental accommodation.

What is reasonable could, on some interpretations, extend to requiring any rental accommodation to be made compliant with disability access standards, such as fitting ramps, widening passageways and installing wheelchair accessible toilets. Many private sector rental property owners have invested their life savings into buying a rental property to provide for their retirement, and would have the returns on their investment slashed by such a requirement.

Conversely, some tenants may have disabilities which could be readily accommodated by making relatively minor alterations, such as fitting a handrail to a set of steps.

Whether, and to what extent, it would be appropriate to require private landlords to incur potentially very large expenditures to make some or all such alterations is primarily a question of public policy which should be decided by the community through Parliament.

Similarly, the term “reasonable adjustments” if interpreted in a particular way may lead to significant cost implications for employers, schools or service providers, whilst a contrary interpretation may result in unsatisfactory outcomes for people with an impairment.

Imposing vague and open-ended requirements is of particular concern in the context of the protection of health, safety and property. Section 80 of the Act currently

permits discrimination on the basis of impairment or physical features if reasonably necessary to protect health, safety or property, and discrimination on the basis of pregnancy if reasonably necessary to protect health or safety.

The Report recommends that such discrimination only be permitted if, amongst other things, it is subject to a reasonable adjustments requirement and meets the reasonable limitations test in s.7(2). Imposing a s.7(2) test means that people seeking to protect health, safety and property will be forced to make judgements as to whether any exclusions or limitations they believe should be imposed are “demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors”.

If an employer or business person wrongly fails to exclude someone, loss of life or serious injury may result and they could face heavy fines or gaol. If they do exclude someone, and a tribunal judges that human dignity means a person with a disability has the right to participate despite the risk, the employer or business person could be liable to pay substantial compensation.

We also note that the Report seeks to avoid this dilemma in the case of employment by arguing that section 69 of the Act (acts done in accordance with statutory authority) would prevail over section 80 in its recommended form. This, of course, does nothing to help service providers who would still be forced to decide between safety and the uncertain demands of s.7(2). Furthermore, a separate recommendation of the Report is that s.69 be repealed (recommendation 42). However, the Report claims that even if s.69 were repealed, “It is expected that the operation of occupational health and safety laws would be preserved as prevailing over the Act...” (footnote 115). This shows that the Report recognises the difficulties that recommendations 42 and 53 would create if implemented, but does not have a satisfactory solution to those difficulties.

Our view is that policy decisions on these issues should be made by Parliament, and that where the application of those policy decisions to particular facts requires the involvement of concepts such as “reasonableness”, the legislation must give as much guidance as possible as to how that concept is to be interpreted and applied.

Reasonable terms of employment and reasonable terms of partnership – sections 23 and 33.

For similar reasons, we are concerned that without clarity the duty to make reasonable adjustments leaves employers and those in a partnership with considerable uncertainty.

We note the submission of the Association of Independent Schools Victoria “(AISV)” and believe these issues were not sufficiently explored by the Committee.

Without clarity and in line with our conclusions on recommendation 10, we consider that sections 23 and 33 should be retained.

Insurance – section 43

The Report recommends that the insurance exemption should apply only to the attributes of sex, impairment and age and only where permitted by Commonwealth law, and that the insurer should be required to give reasons for their decision if asked to do so (recommendation 25).

We consider it is reasonable to require an insurer to provide an explanation as to why the particular attribute concerned has led them to refuse insurance or to offer it only on less favourable terms. Insurers should be required to provide sufficient detail to demonstrate that their decision is supported by reasonable evidence. We do not consider it reasonable to require insurers to provide detailed actuarial calculations or modelling simply in response to a request for the reasons for their decision.

In relation to the attributes on the basis of which discrimination is permitted, the principle should be that insurers should be able to set terms and conditions based on a bona fide and reasonable business practice having regard to the risks and any other relevant factors involved. This is, in effect, what the existing section provides. If insurers are not permitted reasonably to take into account actuarial and statistical data and other relevant factors, the result will be that one group of insurance consumers (ie., the lower risk group) is forced to cross-subsidise another group of consumers (ie, the higher risk group that the insurers are not permitted to charge a higher premium).

It may well be that the principal attributes taken into account by insurers for the most common forms of policy are those of sex, impairment and age. However, insurance policies can be issued to cover a wide variety of risks, and there is no reason in principle to limit the attributes that may be taken into account. There was no evidence put before the Committee that the existing section has been misused so that those seeking insurance have been treated unfairly because of a protected attribute.

Clearly, if a relevant Commonwealth law imposes a more restrictive obligation on an insurer, the insurer will be required to comply with the Commonwealth obligation. However, that is no justification for imposing an unreasonable restriction under Victorian law. If it is considered that Commonwealth law “covers the field” in relation to discrimination in insurance, the logical course would be for the Victorian Act not to have any application at all to insurance matters.

Accommodation for children – section 53

The Report recommends that section 53 be repealed (recommendation 32). Section 53 permits a person to 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.

As the Report acknowledges, this provision is in similar terms to s.30(2)(c) of the Residential Tenancies Act 1997. If section 53 were repealed, s.30(2)(c) would also need to be repealed, because otherwise a person relying on that provision could nonetheless find themselves in breach of the Act (and it would be debatable whether s.69 would apply, even if s.69 is retained in its current form).

This recommendation is an instance of what is in fact a wide-ranging policy issue purportedly being made on the grounds of equal opportunity.

It is well established that Victoria currently has a crisis of accommodation, and that crisis is resulting in both children and adults having little choice but to live in unsuitable accommodation. A central policy issue is whether the circumstances in which children may be forced to live in unsuitable accommodation should be broadened by removing the right of a landlord to refuse to allow a child to live in unsuitable accommodation. This is a multi-faceted issue involving important considerations of consumer protection, housing and child welfare policy. Any such decision should be made following consideration and input by all disciplines and perspectives involved. A change of policy should not be slipped into force as a purported issue of equal opportunity alone.

There is a further and largely separate aspect to this recommendation, namely, where the presence of children in accommodation could impose unreasonable risk of loss or damage to the landlord's property, or unreasonably intrude on other users of the accommodation or adjoining premises. For example, bed and breakfast establishments are a key part of Victoria's tourism industry. Many of those establishments advertise as being "unsuitable for children". If a decision is to be made that Victoria should ban bed and breakfast premises that offer child-free accommodation, that decision also should be subject to a wide-ranging policy debate.

Welfare measures in accommodation – section 55

The Report recommends (recommendation 34) that the current exemption for welfare measures in accommodation be narrowed to apply only where the hostel or similar institution is established wholly for the welfare of people of a particular sex, age, race or religious belief.

We are concerned that this is unduly prescriptive and may adversely affect some organisations which currently provide welfare accommodation mainly but not exclusively for people of a particular sex, age, race or religious belief.

In particular, the recommendation will prevent an institution established to assist one group from ever taking in anyone from outside that group in special circumstances. If the institution were to do so, they would be forced to abandon their primary purpose.

We recommend that the current provision be retained without amendment.

Section 78 – Private Clubs

The right to freedom of association is enshrined in the Charter.⁷

Notwithstanding this, the Attorney-General has repeatedly stated that he believes that private clubs, (those that do not either occupy Crown land or receive a subsidy

⁷ Section 16.

from the State, and which do not operate for profit), should have to justify their right to exist before the Victorian Civil and Administrative Committee (“VCAT”). He is reported as saying:

*“if they want to live in the past, they should have to go to VCAT and make out a case for an exemption”.*⁸

The Lyceum Club stated their opposition to having to follow this course of action:

*“I think it would be an abrogation of our human rights and freedom of association... I do not believe, as private citizens, we should have to do it”.*⁹

The Victorian Employers Chamber of Commerce and Industry (“VECCI”) concurred, stating:

*“We would like to affirm the fundamental right of freedom of association... we also feel that such changes (such as removing the exemption) could have unintended consequences, such as consequences for single sex clubs that cater for women... in our view, market forces will really determine the future of single sex clubs...”*¹⁰

Much of the debate about private clubs would appear to revolve around the perception that they are bastions of power, influence and decision making. The Committee, however, did not receive any evidence to substantiate this perception. We again note the evidence of the Lyceum Club:

*“...the purpose of the (Lyceum) club, as with the purpose of the men’s clubs, is not for power and influence.... no business can be discussed, no business cards exchanged, no deals done in any of these clubs. It is against the charter of all the clubs.”*¹¹

We note the reported comments of a spokesperson for the Governor General, Her Excellency, Quentin Bryce AC, that *“The Governor General has no issue with men or women only clubs or organisations”.*¹²

We are pleased that Government members of the Committee have isolated the Attorney-General on this issue and have recognised the important human right of freedom of association in their recommendations relating to private clubs.

Religious bodies and schools – sections 75 and 76

The Human Rights Law Resource Centre (“HRLRC”) and the Public Law Interest Clearing House (“PILCH”) submitted that *“all exemptions and exceptions should be repealed and that they should be placed with regulatory guidelines on permissible*

⁸ Brown, N. QC, *The Spectator*, Membership Revoked, 8 July, 2009.

⁹ James, A., President, Lyceum Club, evidence to the Committee, 5 August, 2009.

¹⁰ Marriott, A., VECCI, evidence to the Committee, 4 August, 2009.

¹¹ Op. Cit, James.

¹² Stewart, C., *The Australian*, Quentin Bryce joins Lyceum Club in Melbourne, 29 August, 2009.

*limitations to the rights of non-discrimination and equity.*¹³ This general position is one also subscribed to by some of the other human rights organisations.

The logical extension of this proposition is that religious bodies and schools should no longer be afforded the protection they currently enjoy pursuant to sections 75 and 76. In its Options Paper, the Government members of the Committee put forward a number of proposals to limit and reduce the scope of the s.75 and s.76.

Much of the debate surrounding these issues has focused on the distinction between “core” and “non-core” activities of faith based schools and faith based organisations. Some contend that the current exemptions should be narrowed so that only those activities specifically related to religious practice should retain the exemption pursuant to the Act.

The religious organisations and independent schools peak bodies have rejected this artificial distinction and contend that such a narrowing would diminish their ability to foster the environment that they see as appropriate for their school or organisation. The AISV stated:

*“we are of the firm belief that the people at schools are in the best position to employ those people they feel are the best people to educate students attending those schools, based on the values and tenets of those schools, whether they be faith or not.”*¹⁴

We are pleased that the Government members of the Committee have abandoned their previous options canvassed in the Options Paper and have joined with us in rejecting this distinction.

In particular, the Government members of the Committee have not sought to require religious schools or other organisations to demonstrate that any employment decision is justified as “necessary” or due to an “inherent requirement” of the job. We fully agree with the Government members in this respect. We believe faith based schools and other organisations should be free to employ staff whom they believe will uphold the values and beliefs of the faith-based school or other organisation concerned, without being required to justify the need for this requirement to an external organisation or tribunal.

We urge the Attorney-General to reconsider his reported intention to impose an “inherent requirements” or similar test on faith based schools and other organisations in light of the unanimous recommendation of the Committee on this matter.

Religious belief – section 77

We are concerned that the recommendation to apply a s.7(2) test to section 77 will undermine this exemption and create uncertainty.

As previously discussed, section 7(2) is highly subjective and open to individual interpretation. For example, how would s.7(2) apply if a devotedly Christian printer

¹³ Cusack, S., public interest lawyer, PILCH, evidence to the Committee, 4 August, 2009.

¹⁴ Pountney, M., communications officer, AISV, evidence to the Committee, 5 August, 2009.

were to refuse to print anti-Christian literature, or a devoutly Muslim carpenter were to refuse to carry out repairs to a church or synagogue, because of their religious beliefs? Such services are almost always readily obtainable from other sources, so no real difficulty is caused to the other party involved. To coerce people to associate themselves with issues and activities to which they have sincere and deeply held religious objections undermines not only the right to freedom of association, but also the open and tolerant multicultural environment of which Australians are rightly proud.

Experience shows that sooner or later some group intent on making a point will mount a complaint and bring legal proceedings based on provisions such as those in recommendation 50, even though the services the group claims it is seeking to obtain can readily be obtained from other sources.

Impact on VCAT

It is likely that the existence of the Charter and its impact on judicial interpretation, coupled with some of the recommendations contained in the Report, will cause the number of matters at VCAT to increase.

We already have a stretched legal system. Timelines between the issuing of proceedings and a hearing at VCAT or before the courts are constantly under pressure from the combined impacts of increased case loads and inadequate resourcing.

The President of VCAT, his Honour Justice Kevin Ball, is currently completing a review of VCAT. His Honour has identified a number of areas for improvement. The Age made the following observation:

*“The Victorian Civil and Administrative Tribunal is to be overhauled as waiting times for hearings blow out and its president confronts serious issues with its operation”.*¹⁵

As part of any changes made to the Act, the Government must provide the resources required to handle all aspects of the additional work load and case load generated in a timely and efficient manner. We subscribe to the maxim that justice delayed in justice denied.

Conclusion

The Report recommends several changes to the Act that are reasonable and sensible, such as some of the recommendations providing for better harmonisation with existing Commonwealth legislation or to make changes that reflect the changed legislative and jurisdictional context that exists now compared to 1995.

Unfortunately, a number of recommendations of the majority Report would have a seriously adverse effect in creating injustice and uncertainty, and in imposing unnecessary and reasonable burdens on members of the community, as we have

¹⁵ Dobbin, M., *The Age*, VCAT chief admits faults, calls for overhaul, 12 August, 2009

highlighted in this minority report. We also have reservations and concerns about various other recommendations as well.

We are pleased, however, that the Government members of the Committee have agreed with us in recommending only minor changes to some of the most contentious and important exemptions.

It is a credit to the former Attorney-General, the Hon. Jan Wade, and those associated with the drafting of the Act, that despite the effluxion of time, it continues to be a contemporary document that largely strikes the appropriate balance between eliminating discrimination and protecting freedom.

As was stated by Victorian Human Rights and Equal Opportunity Commission (“VEOHRC”):

“The Act itself has worked very well. It has certainly enabled Victoria to have a very good environment in which discrimination issues can be raised and addressed.”¹⁶

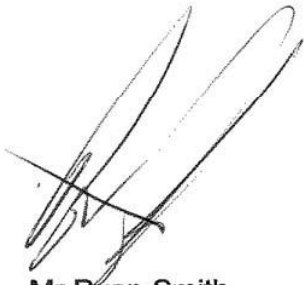
¹⁶ Gorton, M., AM, Chairperson, VEOHRC, in evidence to the Committee, 4 August, 2009.



Mr Ken Jasper
Deputy Chair



Ms Inga Peulich
Committee Member



Mr Ryan Smith
Committee Member



Mr Edward O'Donohue
Committee Member