SCRUTINY OF ACTS AND REGULATIONS COMMITTEE

Inquiry into exceptions and exemptions in the Equal Opportunity Act

Melbourne — 4 August 2009

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Witnesses

Ms R. Ball, lawyer, Human Rights Law Resource Centre; and

Ms S. Cusack, public interest lawyer, Public Interest Law Clearing House.

The CHAIR — The next witnesses are Rachel Ball from the Human Rights Law Resource Centre and Simone Cusack from the Public Interest Law Clearing House. Thanks for attending these public hearings. The purpose of this committee is to report to the Parliament whether any amendments should be made to the exceptions and exemptions in the Equal Opportunity Act. Anything you say or publish before the committee today is protected by parliamentary privilege. Once you leave the hearing anything you say or publish outside the room is not so protected. I would like to invite you now to make a brief statement to the committee on the relevant issues you consider important to the organisations concerning this inquiry. At the end of it we will ask a few questions.

Ms CUSACK — May I begin by thanking the committee for allowing us to appear today on behalf of the Human Rights Law Resource Centre and the Public Interest Law Clearing House. I will commence the opening statement by very briefly summarising the key elements of our joint proposal. My colleague Rachel Ball, from the Human Rights Law Resource Centre, will then demonstrate how our proposal might actually work in practice, using one of the religious exceptions as an example.

The starting point of our submission and our proposal is that ensuring the rights to non-discrimination and equality are critical for all Victorians, especially marginalised and disadvantaged individuals. The harms that are caused by discrimination and the socioeconomic costs that result are immense in the community, whereas the benefits of ensuring the rights to non-discrimination and equality can have demonstrably positive impacts on society.

We have sought to put forward, in our proposal, a model that ascribes value to all human rights, whether the right to non-discrimination, the freedom of religion, the freedom of association or some other right or freedom. So our principal argument is that no single right or freedom should be automatically privileged over another right. Rather, in cases of competing interests, what is always going to be required is some kind of nuanced balancing of rights. If it can be shown that discrimination is in pursuit of a legitimate and reasonable aim and the means employed to achieve that aim are proportionate, as is now required under the Victorian Charter, then it is just to permit that discrimination. So, for example, the YWCA was recently granted an individual exemption to discriminate against men to allow it to conduct women-only swimming lessons. There was a high population of Muslim women in the community and it was discovered that they were not able to participate in swimming classes because of their particular religious beliefs, so this exemption was allowed.

The proposal that the Human Rights Law Resource Centre and the Public Interest Law Clearing House has put forward does not attempt to prohibit all instances of discrimination. For instance, we do not have a problem with the individual exemption that was granted to the YWCA, which I have just referred to, because that enables a disadvantaged group in the community to participate. Rather, we recognise that discrimination will sometimes be permissible. What our proposal seeks to do is to allow that limited discrimination by way of: a reformed individual exemptions regime in section 83 of the Act; temporary special measures; and, a regulatory guidelines scheme.

The Human Rights Law Resource Centre and the Public Interest Law Clearing House submit that key elements of the exemptions and exceptions regime, as it currently stands, need to be reformed. First, we suggest that all exceptions to the Act should be repealed and that they should be replaced with regulatory guidelines on permissible limitations to the rights of non-discrimination and equality. My colleague Ms Ball will discuss the guidelines shortly.

Second, the individual exemptions regime in section 83 should be reformed to include a provision based on section 7(2) of the Victorian Charter. This would require VCAT, when it exercises its discretion to grant an individual exemption, to balance competing rights; for instance, the freedom of association and the right to non-discrimination. It would also ensure that the rights to non-discrimination and equality are only limited where it is necessary, reasonable and proportionate to do so.

Third, and last, provisions on temporary special measures, sometimes called ‘affirmative action’, which are intended to enhance opportunities for historically disadvantaged groups, should be a core part of the Act. Such measures do not constitute discrimination and have been recognised widely as such; they are essential for achieving equality. We submit they should not be buried, as they currently are, amongst some kind of exceptions and exemptions regime.

Ms BALL — As Simone said, we acknowledge that some of the permanent exemptions in the act constitute permissible limitations on the right to equality and have the benefit of increasing certainty and efficiency. With this in mind we propose the establishment of a set of regulatory guidelines which set out instances where it is permissible to discriminate. This regime would be similar to the existing permanent exceptions regime in the act, except that the exceptions would be contained in regulations rather than legislation. There are two key advantages to setting out the exceptions in regulations.

First, regulations are more flexible in that they can be easily amended to reflect shifts in community values. The fact that the current exceptions have remained the same throughout 15 years of significant social change highlights the problems with leaving the exceptions in the Act itself.

Second, the inclusion of the exceptions in regulations allows for judicial review in case there is a perceived incompatibility with the charter.

So, for example, section 77 currently permits discrimination that is necessary to enable a person to comply with his or her genuinely held religious belief. Section 77 has an extremely broad and potentially subjective application which means that while it allows for justifiable discrimination in some circumstances, it may also allow for unjustifiable discrimination. The right to freedom of religion is automatically prioritised over the right to equality and there is no scope for consideration of the merit or the effect of the discrimination. Such a broad exception would not find a place in the guidelines.

However, we recognise that some discrimination based on religious belief will be a reasonable limitation on the right to equality. Say, for example, that a Catholic school would like to discriminate on the basis of religion in hiring a teacher for its religious education class: if the guidelines contained an exception for the employment or selection of people charged with religious teaching or, more broadly, for discrimination on the basis of a legitimate occupational requirement, then the school would not have to apply for a temporary exemption; they could just go ahead and hire a Catholic teacher.

If, on the other hand, the school wanted to impose unequal pay conditions on married women compared to married men, then they would have to apply for a temporary exemption. They would be required to show that the proposed discrimination was reasonable, proportionate and in pursuit of a legitimate aim. If they could not, then the discrimination would not be allowed.

We are not saying that discrimination is never permissible, just that we need to be more careful about when we say it is okay. We therefore think that it is important to view with caution any claim that these proposed amendments would cripple business, religious practice, sporting activities or any other similarly vital element of Australian society.

The final point that I would like to make is that the human rights standards which we are applying here are not some novel sector-specific standards. They are standards to which the Victorian government has already committed through the enactment of the Charter of Human Rights and Responsibilities.

Thanks once again for this opportunity to speak about these changes which we believe are necessary to ensure that the Equal Opportunity Act is a robust instrument which promotes the human rights of all Victorians.

The CHAIR — Thank you. My first question is really about whether these guidelines and this balancing test are actually specific enough and provide enough guidance to organisations. I am involved a lot in organised sport. The issue around when you divide girls from boys in competitive sport, at what age and all that, is quite important in terms of the way a mass of organisations work. I am just wondering whether the guidelines cannot be a bit vague to them. I do not quite sense how it works in practice.

Ms BALL — We envisage that the guidelines would be as specific as whatever permanent exceptions would be contained in the act. The difference is not what they say; the difference is where they sit, in terms of their legislative status. So if they are in the act as permanent exceptions, they could equally be in the guidelines in some sort of quasi-legislative regime which we just believe is more flexible and easier to change if community values shift or if they are subject to challenge.

The CHAIR — You are suggesting that there is a balancing test beforehand. I am just wondering whether that provides enough guidance. If it is like the charter, we as a committee have to deal with the issue of the 7(2)

test in the charter all the time. It is often quite complex for us to deal with. I am just wondering if the guidelines are enough for organisations and ordinary individuals in the street.

Ms CUSACK — I guess the section 7(2) analysis comes in in two parts, in terms of our proposal. The first thing we are saying is that the individual exemptions regime in section 83 should be reformed to include a section 7(2) based provision. That would formalise any requirements that VCAT has to take into account when it exercises its discretion. We have seen that it has already started to do that in its decisions at the moment, so that would just formalise the process.

What we are saying about the second stage, where section 7(2) would come in if the guidelines were established, is that it would be very similar to the way things work at the moment, but the exceptions would be in regulations. Only those current permanent exceptions in the Act that pass the section 7(2) analysis would be included in those guidelines, so that analysis would already be done.

Our suggestion — perhaps Rachel would like to elaborate on this — would be that the act would delegate that power and that analysis would be undertaken perhaps in consultation with the Victorian Equal Opportunity and Human Rights Commission and through broader community consultation. As Rachel said, I do not think there would be any less specificity; it would just be of a different nature. It would be regulations, as opposed to the act itself, where those exceptions are.

Ms BALL — The exercise of conducting that 7(2) analysis in relation to each of the existing permanent exceptions has to a large extent already been undertaken in the course of this review by the Department of Justice, especially in the submissions put forward by the Victorian Equal Opportunity and Human Rights Commission, which does look at the individual exceptions through a charter or section 7(2) framework.

Mr SMITH — You make the comment that you think the exceptions and exemptions would be better in regulation because they would be easier to change, and certainly that is true. Can you expand on why you think that having these exceptions changed at the whim of the Attorney-General of the day would be better than having them subject to an open and public debate in Parliament?

Ms CUSACK — I guess one thing is that, as we have seen with the Act since it has been introduced, there have been very minimal changes to the permanent exceptions and yet, as we are all aware, there have been massive changes to society over those last 15 years. So the permanent exceptions have not been able to keep up. I would suggest that one of those reasons is a lack of political support to enact legislative reform; it is particularly cumbersome to go through that process. I certainly do not think the Attorney-General would just change something on a whim without considering or consulting the community.

I do think that it is a process that allows for more flexibility. If you consider the exception in section 27B on gender identity, that particular exception has never been used and yet it still sits there. Nothing has been done about it, despite the fact that evidence suggests that 85 per cent of Australians support legislation prohibiting discrimination on the ground of gender identity and despite the fact that gender identity discrimination in employment has huge repercussions in costs for society, from sick leave days through to stress and anxiety, depression and so on. Had that particular exception been in guidelines, there would have been much more scope and flexibility to change that and to keep up with the changing values and norms of society.

Mrs PEULICH — It may be a surprise to you, but there are vast numbers of people out there in the community who would probably be experiencing enormous stress at the thought that these regulations would somehow be subject to the Attorney-General's control, without that sort of parliamentary oversight. These things go to the core of our everyone's belief systems, yours as well as those who perhaps do not share the view that those exemptions should be removed, so to suggest that somehow these decisions ought to be relegated to regulations and guidelines rather than primary legislation and parliamentary debate is just not politically realistic.

Ms BALL — We are not suggesting that the Attorney-General be given blanket power to introduce whatever exception he or she wishes. I think the power of making that legislation would also have to be delegated within the context of the charter, so the exceptions that were permissible in the regulations would have to be exceptions that were compliant with section 7(2) and the human rights in the charter.

So that significantly narrows the scope of the sort of exceptions that any Attorney-General could make in the regulations. It would also open up the opportunity, if the Attorney-General did introduce a particularly objectionable exception which people in the community had opposition to, that could be challenged as an ultra vires act of the Attorney-General.

Mrs PEULICH — So why would the Parliament put itself into that position?

Ms BALL — Because we think that it is important that the pursuit of equality in society not be stifled by having these sorts of permanent exceptions which we say in some circumstances can act as a block on the achievement of equality in our society. We think that actually the place for these sorts of permanent exceptions is in an instrument that is somewhat more flexible and capable of adapting and changing.

Mr SMITH — But by the definition, regulation is administered by just the Attorney-General. I can tell you that a large number of regulations go under the radar where the public does not see them, whereas if you put them in the public debate in the forum of Parliament, then they do not fly under the radar as much. I am not sure it would be workable.

Ms CUSACK — I think the point that we would come back to in respect of that is that the current system is unworkable in the sense that the changes are just not being made, that the Act is not keeping up with the changes in society. I think it would not only be a great shame but would cause great harm to the achievement of substantive equality if we allowed another 15 years to pass before we had another review to work out what we did with the exceptions in the Act. I just think we need to keep that in mind when we consider what the best way is to move forward.

Mr SMITH — Do you think, though, if the Attorney-General had the wherewithal to want to change regulation, then he would also want to put it on the government agenda to debate in Parliament? I cannot understand why, if he made the moves to change regulation, he would not introduce it to the government business program to debate it in Parliament. If he wants the changes, then he wants the changes, and he will use the mechanism that is available to him to do so.

Ms BALL — Can I make another suggestion then, if that is the preferred method of the committee: the second advantage that I mentioned in respect of the regulatory guidelines is that they are subject to greater judicial oversight. If regulations are not the preferred place for the permanent exceptions for the committee and for Parliament, then at least the permanent exceptions, we believe, should have some sort of sunset clause on them so that there is some opportunity for this renewed and reviewed debate.

The CHAIR — So the suggestion would be that if we do not go down your path, the other alternative would be for us to review the exemptions every 10 years, which is what we do for regulations. They sunset at 10 years, so something like 10 years or 5 years — —

Mr SMITH — Less than that.

Ms CUSACK — Much less than that.

The CHAIR — Less than that, okay; just to get that clear.

Ms CUSACK — And review them for compatibility in accordance with section 7(2) of the Victorian Charter.

Ms BALL — I think the main concern is that the permanent exceptions do not stagnate, and there are a number of ways that you can go about ensuring that they do not.

Mr SMITH — Yes, I agree with that. That is fair.

The CHAIR — One of the concerns that we have had from the religious schools and organisations has been, I suppose, almost an accusation that we are trying to secularise the religious element of those schools. I am just wondering what reassurance we could give those organisations that we are considering the religious element of their education as distinct from other areas of employment or teaching. Have you had a bit of a think about the issue of secularism versus religion in terms of the religious schools?

Ms BALL — The right to religious freedom is protected in the Charter and also at international law, and part of the content of that right is the right for people to establish teaching institutions and to send their children to religious schools where they can be taught in an educational environment that conforms with their own values and religious beliefs. That sort of core element of what a religious school is there to do is protected in the charter, as is the right to equality.

What we are proposing is not the secularisation of education; it is just greater scope for discussion and debate about where the line should be drawn between when religious freedom is going to trump and when nondiscrimination and equality, or some other human right, is going to trump, because as it stands there is no space for that discussion or debate. There is a sort of blanket understanding that it is always going to be religious freedom that takes precedence over any other human right.

Mr BROOKS — With respect, we are having that discussion now. I suggest this is an example of the democratic process at work with the current exceptions set out in the act.

Ms BALL — I think this is obviously a really important process, but it provides very little benefit to those people who over the last 15 years have been discriminated against, and that discrimination has been protected by the permanent exceptions in this act. There needs to be greater scope for this discussion and debate to filter throughout society and not just take place in this room.

The CHAIR — Just following up on that point, I suppose part of our difficulty really is trying to work out the parameters around the issue of a religious organisation or religious school, what constitutes the religious component. We have tried in our discussion paper to talk about core and non-core activities as one way, and we have had a few hits on the head as a result of that. It was not universally greeted with great acclamation. I suppose what I am trying to work out is that there has to be scope for that discussion to occur, and is the equal opportunity and human rights commission the right scope? I think your model delegates that to it, or sets it as an advisory group to someone else. Or is it within Parliament? I am trying to find out who actually creates that. Obviously VCAT is the final point of appeal, but do we have a structure which allows us to have that discussion? I think it would reassure the religious schools if we could have that.

Ms BALL — It would depend on whether it was in the context of a permanent exception, in which case it would be contained in the legislation, it would be in Parliament and go through whatever consultative processes Parliament undertook. Otherwise it might be in VCAT, or if a review was taking place upon the advice of the commission it could be any of these bodies. Maybe I will also make a point about this debate, about core and non-core religious functions, because I have spoken to a number of different groups about it and tried to understand the objection, and I think I do sort of understand it to an extent.

What people have often said to me — and I am sure to you as well — is that there is a very strong belief that being religious involves the manifestation of your religious belief. And that is not just about worship; it is about how you live your life and what you do in your work. To some religions — some more so than others — the distinction between core and non-core functions is almost incomprehensible in the context of their religious belief. The other thing to take into account when you are considering a sort of spectrum of manifestation of religious belief, say, is the point at which that manifestation impacts on other people in the community. The line is not drawn necessarily on the basis of what is considered vital or not vital to that person's religious life. It is also drawn at the point where that person manifesting their religion actually affects other people and the way that they live their lives. When it does get to a point where it is affecting other people through discrimination or anything else, then the government starts to have a greater role in regulating or perhaps imposing standards on how that religion is manifested or practised in the society.

Mrs PEULICH — Further to that, if the allegation were that there was systemic discrimination in all organisations, I think you would have a very valid point. But we have a mixed economy of education between public and private or independent and faith based, so that person may not be discriminated against in 90 per cent or 80 per cent or whatever number of organisations or activities in society. So trying to enforce these distinctions and delineations, which clearly is going to be almost impossible to do in some religions — that is, making the distinction between core and non-core and trying to somehow impose a different standard on all religious institutions — is in fact an attack on those religious beliefs.

Ms BALL — But we already live in a society where religious beliefs are infringed upon and regulated through other civil and criminal laws. We are talking about antidiscrimination law here and where we draw the line at which the government should infringe upon religious belief in that sphere. I think the standards that we have set for ourselves in terms of the charter and just more generally say that there is a point at which religious belief can be restricted in order to promote equality. In the discussion about where that line should be drawn a whole lot of things will be taken into account, and one of them might be the extent to which people have the opportunity to go and live their life in another pocket, as you suggest — —

Mrs PEULICH — Or get a gardening job in a school that may be not embracive of whatever attribute that person feels is being discriminated against.

Ms BALL — And courts in other jurisdictions, when they have performed this sort of balancing exercise in respect of religious freedom as opposed to other rights, have considered what other options are available to the people whose rights are at issue. I can give you some examples of where that has happened. But I would be very wary of making the argument that just because a person can go elsewhere it is okay to condone discrimination against them in a certain place. I think what is required is a really nuanced analysis that does look at the particular facts of the case, rather than just some blanket rule.

Mrs PEULICH — Why should I not be able to start a club, which is not funded or supported by public funds, which brings together left-handed European women and excludes right-handed European or Aussie men? It is a freedom of association that you are now attempting to sort of bring under strict state rules. Why should we not, in a free society, be able to do that if it is not in breach of a criminal code or something like that?

Ms CUSACK — I guess that at the heart of our submission we are saying that we are not attempting to prohibit all instances of discrimination. If you want to establish that club and you can justify that in accordance with section 7(2) of the charter, then by all means that sort of differential treatment may exclude any other people.

Mrs PEULICH — Why should I have to justify it? If it is not in breach of a criminal code, why should I have to justify it?

Ms BALL — You should have to justify it because equality is an important part of our society. We live in a community and we set standards for ourselves, and equality is one of those standards.

Ms CUSACK — And it is also a founding principle of the Charter, so it is something that we consider to be at the very core of society. We are not saying, 'Don't do it'; we are just saying, 'Be able to justify why it is, in a democratic society that does respect equality, that that is an acceptable course of action'.

The CHAIR — Simone and Rachel, thanks a lot for that very thoughtful contribution and for making your time available.

Ms CUSACK — Thank you.

Witnesses withdrew.