

SCRUTINY OF ACTS AND REGULATIONS COMMITTEE
Inquiry into exceptions and exemptions in the Equal Opportunity Act

Melbourne — 4 August 2009

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Mr I. Scott, lawyer, JobWatch Inc.

The CHAIR — The next witness is Ian Scott, who is a lawyer with JobWatch. Thank you for attending this public hearing. The purpose of these hearings is to report to the Parliament on whether any amendments should be made to the exceptions and exemptions of the Equal Opportunity Act. Anything you say or publish before the committee today is protected by parliamentary privilege. However, once you leave the hearing, anything you say or publish outside the room is not so protected. I would like to invite you to make a brief statement to the committee on the relevant issues that you consider important to your organisation concerning the inquiry, after which we will have a few questions and a bit of discussion.

Mr SCOTT — Thank you for inviting JobWatch to give evidence about its submission. I will try to summarise briefly. JobWatch is a community legal centre. It deals exclusively with employment rights. We are primarily funded by the state government. Our mandate is to assist and legally represent vulnerable and disadvantaged Victorian workers. JobWatch has been around since 1980.

In the last financial year we took approximately 20 000 telephone calls to our telephone information service. Approximately 2000 of those queries related to discrimination, and the JobWatch legal practice represented approximately 90 clients in discrimination matters. I understand that approximately 70 per cent of complaints to the Victorian Equal Opportunity and Human Rights Commission relate to discrimination in the area of employment, so JobWatch's submission and my evidence today relate only to the area of employment, which, as I pointed out, is a significant area in relation to the number of complaints received.

To summarise, the underlying principle of JobWatch's submission is that the right to work free from discrimination is a fundamental human right. This is supported arguably by the Universal Declaration of Human Rights and the Victorian Charter of Human Rights and Responsibilities. We say in an ideal world there should be no blanket exemptions in the Equal Opportunity Act. The main objective of the act is to eliminate discrimination as far as possible, and having blanket exemptions and exceptions in the act effectively authorises discrimination in certain circumstances. We say that goes against the sole objective of the act.

Like I said, that is an ideal position in an ideal world. Further, in that ideal world we would like a system at VCAT where if an employer has a genuine reason to be granted an exemption or an exception, whatever it may be called in this tribunal system, they are entitled to imply to VCAT for that exception or exemption in their particular circumstances. VCAT would be obligated to look at certain things such as the objectives of the act, as I said, to eliminate discrimination as far as possible, the Charter of Human Rights and Responsibilities, the public interest, whatever that may be in the particular circumstances, and any hardship for the employer of not being granted the exemption.

Jumping ahead a little bit, for example, it would put to the test I think circumstances such as the hot topic of religious schools where they might say, 'We need a cleaner or a clerical staffer to follow the tenets of the religion'. Fine, okay, so put it to the test: you go and apply for an exemption. It is one thing now to have the exemption and therefore they can do it, but would they really do it if it was put to the test? At least that system would force employers to put their money where their mouths are, I guess.

But that is an ideal world, and we recognise that it would be inefficient for the tribunal system to have — presumably there would be lots of applications; presumably, maybe not, but obviously with more money thrown at the tribunal system that could be accommodated for. It would, I guess, disadvantage certain employers who did not have the means to make applications where there was a genuine need for the application. Due to the financial situation of the employer — be it a community organisation or a religious body — funding finances is always an issue.

That is JobWatch's ideal world position. I think it would be a good system. It could work, if it was done appropriately. But having said that, the remainder of JobWatch's submission looks at the options put forward in the options paper and talks about what its preferred option would be, given the choices of the options in the real world.

It is difficult to summarise those options because they are all specific to each exemption. But one of the things JobWatch feels strongly about is that a lot of the exemptions as they relate to employment could be replaced by an exception or exemption called an 'inherent requirements of the job' exemption. That would simplify the exemptions part of the act, where effectively three, four, five or six of them could be repealed and replaced with the inherent requirements of the job.

This would cover, for example, the working-with-children exemption. Is it an inherent requirement of the job that you have to have these skills, qualifications, capacities and experience to do the job? If not, then you are exempt. If you do, then it is discrimination, if you are discriminated against because of one of the attributes. This ‘inherent requirements of the job’ exemption is currently used in the new Fair Work Act federally and JobWatch believes it effectively balances the competing rights and interests with a fair exemption.

Interestingly, today when I was coming in on the train I was looking at the Fair Work Australia legislation; as I am sure you all know, Fair Work Australia came in on 1 July. This topic of exceptions and exemptions is an even more hot topic at the moment.

Because the Fair Work Act, in addition to the ‘inherent requirements of the job’ exception to discrimination — and I think it does talk about religious bodies and sensitivities — it also, as an exemption, says that anything that is authorised or is not discrimination in a state antidiscrimination law is also a defence federally. As it stands right now, these exceptions and exemptions are providing a defence to employers to discriminate against employees in the federal system as well as the state system.

That was not the case prior to 1 July. An employee who may have been unlawfully discriminated against in Victoria, but the employer had an exemption or an exception, still had the option to go federally and make a claim of discrimination. Now that is blocked off. I am just highlighting that this discussion about these exceptions and exemptions has probably become even more important since 1 July. Thank you.

Mrs PEULICH — So it is more discriminatory as a result of those changes?

Mr SCOTT — Yes.

The CHAIR — In terms of your ‘inherent requirements’, I wonder how workable it would be as a test when we deal with religious schools or religious organisations, given that we have a really broad idea from different religions about what is necessary in terms of role models and the behaviour of people within the school system. I wonder if you could talk a bit about inherent requirements and how it might apply to the issue of religious schools?

Mr SCOTT — I will try. I heard the end of the Law Institute of Victoria’s evidence. It is never ideal having to go off to an independent or arbitrary decision-maker for a decision on these issues. As I said before, it is more efficient and maybe more clear sometimes about what the law is. The courts and tribunals system has been around for a very long time and, at the end of the day, if it cannot be sorted out, that is what has to happen.

On the ‘inherent requirements’ exception it would look at — ‘Okay, a teacher; what is required to be a teacher?’. You have to have a degree — forgive me if I forget anything; you have to pass a working-with-children check; you have to have your licence from VIT (Victorian Institute of Teaching). These are the inherent requirements of the job: have you got the qualifications? Have you got the skills? Have you got the experience? Can you turn up to work? Can you teach the subject? It is different to a minister or someone else who might be ordained in some capacity. That, I would say, is a self-policing exemption anyway. Why would someone become a minister for something they do not believe in?

Mrs PEULICH — Very briefly could you just tell us about the governance and administrative structure of your organisation? Does it have a board? How are appointments made?

Mr SCOTT — JobWatch is an incorporated association. It has a board of volunteers made up of community organisations and law firms. Then we have an executive director who deals with the day-to-day running of JobWatch. We have a small legal practice. I am the only full-time lawyer. We have a telephone information service, but unfortunately we have recently had to downsize it due to funding issues — which is a perennial issue. We advise and represent vulnerable and disadvantaged workers.

Mr SMITH — I would like you to make some comments with regard to JobWatch’s recommendation on political employment. You say that we should remove the exception in that as a Liberal Party member I should not discriminate against a Labor Party member coming to work in my office?

Mrs PEULICH — And vice versa.

Mr SMITH — And vice versa. You say the provision is self-regulating; that a person with those particular political convictions would not want to come to work with me? Can I put it to you that it would be very beneficial for the Labor Party, for instance, to put a Labor member into my office?

Mr SCOTT — I understand what you are saying.

Mr SMITH — Could you talk to your recommendation in those terms?

Mr SCOTT — In some respects maybe that recommendation was a little naive in a sense. It goes on to talk about the inherent requirements of a job. We are getting into the vexed issue of where the inherent requirements of a job stops — —

Mr SMITH — Confidentiality and that sort of thing.

Mr SCOTT — Of course. The inherent requirements of the job are to be loyal — —

Mrs PEULICH — Does that mean commitment to a cause?

Mr SCOTT — Every employment contract has incorporated into it the requirement from the employee of loyalty and fidelity to their employer, not to breach the employer's confidential information to give away trade secrets. This is what an employment contract has incorporated into it. In an ideal world — or hopefully in the real world — if everyone complied with their obligations, then it could work. But I understand what you are saying, and obviously sometimes politics is a different game to the real world.

Mr SMITH — It sure is. Can I ask if you continue to stand by what is in your submission, or would you make some sort of change to your recommendation?

Mr SCOTT — I will have to think about it further. It is a novel — or unique — situation. Maybe that is why the exemption is there in the first place. I never went back to look at the original — —

Mrs PEULICH — Politics is a religion to some of us.

Mr SCOTT — Yes.

Mr SMITH — Would you mind sending something through to the committee at a later date? Just some further thoughts on that particular recommendation.

Mr SCOTT — Sure. I would like to go back to look at the original explanatory memorandum.

Mr SMITH — I would really appreciate it. Thank you.

The CHAIR — Ian, thank you for your effort and for your work in coming to speak to the committee.

Mr SCOTT — Thank you.

The CHAIR — It will add to our consideration on the exemption and exceptions of the Equal Opportunity Act.

Witness withdrew.